THE INDIAN DECISIONS, NEW SERIES.

ALLAHABAD, Vol. III.

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(1883—1884)

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JUDGES OF THE HIGH COURT OF ALLAHABAD DURING 1883-1884.

Chief Justices:

[H]ON'BLE SIR ROBERT STUART, KT., Q.C. (*Retired on 26th March, 1884*).

" MR. DOUGLAS STRAIGHT (*Offg. from 26th March, 1884*).

" SIR W. COMER PETHERAM, KT., Q.C. (*From 1st Nov., 1884*).

Puisne Judges:

HON'BLE MR. DOUGLAS STRAIGHT.

" " R. C. OLDFIELD.

" " M. BRODHURST.

" " W. TYRRELL.

" " W. DUTHOIT, D.C.L. (*offg.*).

" " SYED MAHMOOD (*offg.*).

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5 A. 1 (P.C.) = 9 I. A. 99 = 4 Sar. P.C.J. 382 = 5 Shome L.R. 80.

PRIVY COUNCIL.

Before Sir B. Peacock, Sir R. Collier, Sir R. Couch, and Sir A. Hobhouse.

[*On appeal from the High Court for the North-Western Provinces at Allahabad.*]

KARAN SINGH (*Appellant*) *v.* BAKAR ALI KHAN (*Respondent*).
[27th April, 1882.]

Act IX of 1871 (*Limitation Act*), *sch. ii, No.* 145—*Limitation—Collector's possession not adverse to true owner.*

Act IX of 1871, sch. ii, No. 145, enacting that suits for possession of immoveable property, or any interest therein, must be brought within twelve years from the time when the possession of the defendant, or some person through whom he claims, has become adverse to the plaintiff, differs from the rule formerly in force under Act XIV of 1859, s. 1, cl. 12. The latter was that the suit must be brought within twelve years from the time when the cause of action arose; and thus, the former rule that, where the cause of action arose upon an alleged dispossession, the burden was upon the plaintiff to show that he, or some one through whom he claimed, had actual possession within twelve years before the institution of the suit, has been superseded by the above.

Where the Government, in the Revenue Department, has taken possession of land, it is the duty of the Collector, after payment of the revenue, and the expenses of the collection, to pay over the surplus proceeds of the estate to the true owner. The Collector's possession does not become adverse to the owner, by reason of his making this payment to another claimant.

[**F.**, 28 Ind. Cas. 917; **R.**, 11 A. 438 (447); 26 B. 617 (621); 27 B. 43 (66) = 4 Bom. L.R. 721; 9 C. 802 (807); 10 C. 374 (378); 19 C. 660 (674) (P.C.); 39 M. 811 = 29 M.L.J. 645 = 18 M.L.T. 436 = (1915) M.W.N. 927 = 2 L.W. 1080 = 31 Ind. Cas. 412; 25 C.L.J. 69 (71) (P.C.); 10 Bom. L.R. 571 (573); U.B.R. (1897-1901) 461 (462); **Expl.**, 14 B. 458 (461); **D.**, 36 A. 567 = 12 A.L.J. 982 = 24 Ind. Cas. 997 (F.B.); 11 B. 222 (232); **Cons.**, 21 C.W.N. 177; 10 C. 697 (708, 709); **Disc.**, 10 A.L.J. 278 = 34 A. 640.]

APPEAL from a decree of a Full Bench (31st January, 1878), affirming a decree of a Divisional Bench (17th April, 1876), which upheld a decree of the Judge of the Aligarh District.

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This was a question of the application of the Law of Limitation Act, IX of 1871, sch. ii, No. 145.

The appellant, Rao Karan Singh, was a co-defendant with Kharag Singh and Rudar Singh in this suit, which was brought by Latif-un-nissa, who died whilst it was pending, and [2] who was represented by the respondent, Raja Bakar Ali Khan, her only son. She sued to recover money lent to Kharag Singh and Rudar Singh, during their minority, secured by two mortgage bonds, dated in January and October, 1862, which were executed by their father Baharjit Singh on behalf of the minors; also to enforce her rights over property mortgaged by the same instruments, *viz.*, the zamindari interest in mouza Khard Khera, pargana and tahsil Koel, in the Aligarh district. Rao Karan Singh, who claimed this mouza by a title distinct from that of his two co-defendants, contended that he had been in adverse possession of it for more than twelve years before the commencement of this suit, and on this question of limitation there was a difference of opinion between the two Judges of the Divisional Bench which heard the appeal. This question, appealing alone, Rao Karan Singh again raised in these proceedings.

Mauza Khard Khera was originally held with other zemindari lands by two brothers, Badam Singh and Golab Singh, grandfather of Karan Singh. Golab became insane, and in his lifetime his son, Inderjit Singh, joined in a partition of the joint estate, mauza Khard Khera falling to the lot of Badam Singh. Inderjit died before Golab (who was alive till after 1863), leaving an only son, the present appellant.

In 1856 Badam Singh died, leaving an only daughter, married to Baharjit Singh, who by her had two sons, Kharag Singh and Rudar Singh, above mentioned.

These, his daughter's sons, claimed Badam Singh's separate estate; but Rao Karan Singh, during their minority, asserted his right through Golab Singh his grandfather, alleging a customary rule of succession whereby the male line excluded daughter's sons.

In 1860, to secure payment of the revenue of mauza Khard Khera, endangered by their disputes, the Collector of the District took possession (*thurk tahsil*) of it. In 1861 a suit which Rao Karan Singh had brought against Radha Kuar, who, as widow of Rao Badam Singh, had succeeded to the possession of the mauza, was dismissed by the Sadr Diwani Adalat at Agra, the minors Kharag Singh and Rudar Singh being then on the record as defendants, Radha Kuar having died while the suit was pending.

[3] In 1863 Rao Karan Singh again sued, the question as against the minors not having been concluded in the former proceedings; and on a reference to arbitration, agreed to by Baharjit Singh, as father and guardian of the minors, an award was made in the same year in favour of Rao Karan Singh. During these disputes the mortgage of Khard Khera to Latif-un-nissa took place in order to provide funds.

The Judge of the District Court of Aligarh, Mr. G.H. Lawrence, before whom Latif-un-nissa's claim came in the first instance, decreed it in favour of the defendants; holding that the loan had been effected *bona fide*, and the mortgage made for the benefit of the minors, and that Rao Karan Singh's defence of limitation, founded on a possession alleged to have been obtained by him during the litigation, was not made out. On appeal, the Judges of a Divisional Bench of the High Court, Sir Robert Stuart, C.J., and Pearson, J., differed on the question of Rao Karan Singh's title by prescription. The Chief Justice was of opinion

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that the possession taken by the Collector in 1863 was not adverse to the minors, and although in the opinion of the Collector, Rao Karan Singh was entitled to the profits as well as to the land, this had no effect to deprive the rightful owners. It did not follow that the latter had not such a possession as justified Baharjit Singh in his capacity of guardian in charging the property with this debt. The award of 1863 dealt with the question of the rule of inheritance in the family, and on that point was in favour of Karan Singh, but gave no decision in reference to the question of actual possession.

On a further appeal to the High Court, under s. 10 of the Letters Patent, a majority of the Judges, *viz.*, Turner, Oldfield and Spankie, JJ., concurred with the Chief Justice in holding that the claim was not barred by limitation and should be decreed. The conclusion of the Judgment of Turner, J., was as follows:—

"Looking at the whole of the evidence, there seems no ground for doubt that the consideration of the bonds in suit was actually paid, and that the moneys were advanced by the respondent to the father and *de facto* guardian of the minors in the *bona fide* and well founded belief that they were required for the purposes beneficial to the [4] minors and necessary for the assertion of their rights. In this cause the appellant rests his claim solely on the award; he has not attempted to offer any proof of the alleged custom beyond that document and his own statement. By Hindu law the estate of Badam Singh devolved, on his death, on Radha Kuar, and on her death on Kharag Singh and Rudar Singh; on these points, indeed, it does not appear that any difference of opinion existed between the learned Judges of the Division Bench. The sole point on which they differed, and which presents some difficulty is the question of limitation. Seeing that the appellant at the most collected but a few of the rents in 1860, and that his action was resisted, and that the title he was then asserting was a title in his own right which was finally negatived by the decree of the Sadr Court in August 1861, that the continuity of any possession he had obtained was interrupted by the proceedings of the Collector, and that the title under which he now claims as the heir of Golab Singh was not asserted until after the decision of the Sadr Court, and at a time when neither party was in possession, limitation must be held to have commenced to run from the date when he obtained possession under the award, the claim of the respondent was in this view made within time."

On this appeal,

Mr. *C. W. Arathoon* appeared for the appellant.

Mr. *J. F. Leith*, Q. C., and Mr. *J. G. Witt*, for the respondent.

For the appellant it was argued that between October 1860, when Radha Kuar died, and April 1861, when the mauza was attached by the Collector, the title of the appellant had been asserted, and in October 1863, the award made in his favour, affirmed by a decree thereupon, rendered him the rightful owner. Therefore, when the Collector in handing over the property to him, also made over to him all the profits which had been realised from the estate during the *kham* management, that management must have been understood to have been on behalf of Rao Karan Singh as the person lawfully entitled to the possession. His title and his right to the possession was, therefore, carried back, and with it his actual possession through the Collector, to 1874; between which date and 1874, when the suit was brought, more than twelve years elapsed.

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[5] Reference was made to *Nitrasur Singh* v. *Nund Loll Singh* (1).

JUDGMENT.

Their Lordships' Judgment was delivered by

Sir B. PEACOCK.—This is a suit brought to recover a sum of Rs. 13,745 on two bonds, one dated the 7th January 1862, for Rs. 4,000, and the other dated the 6th October 1862, for Rs. 1,000. Those bonds were executed by Baharjit Singh, the father of Kharag Singh and Rudar Singh, who were infants, for money advanced by the plaintiff to enable them to defend certain suits brought by Karan Singh. It appears that Badam Singh was entitled to certain property, and that upon his death his widow took possession. Karan Singh, who is now the appellant, brought a suit to turn the widow out of possession upon the ground that Badam Singh had made him his heir-at-law. That suit was defended by the widow, who died during the pendency of it; and the grandchildren Kharag and Rudar Singh were made parties to the suit, Baharjit their father acting as their guardian. The suit was determined in favour of the defendants. After the death of the widow, Karan Singh claimed the property on behalf of his grandfather Golab Singh on the ground that the infants, who were sons of a daughter, were not, according to a custom of the family, entitled to inherit the estate. The father of the infants borrowed the moneys for the purpose of defending the suits, and it is now admitted that no question can be raised as to the validity of the bonds, the father having been justified under the circumstances in borrowing the money, and the plaintiff in lending it, for the benefit of the infants. The bonds are both in the same terms:—"I therefore covenant in writing that I shall pay the above-mentioned amount in full, with interest at one rupee per cent. per mensem, on demand, without raising any objection or pretext; that until the payment of the amount of this bond, the share in mauza Khard Khera, pargana Barauli (which is already hypothecated in satisfaction of the former loan), shall remain pledged and hypothecated in satisfaction of this loan also; and that I shall not alienate it elsewhere by means of mortgage or sale." That is what is usually called a mortgage-bond. The plaintiff claimed to enforce payment of the money due under the bonds by sale of mauza Khard Khera, the estate which was hypothecated. The only question now remain- [6] ing,—the bond having been held to be a valid bond,—is whether the plaintiff in the suit is barred by limitation.

The second suit against the infants was referred to arbitration, under which, by an award dated the 5th of August 1863, the village Khard Khera, which was sought to be sold by auction, together with other villages and properties belonging to Badam Singh, were declared rightfully to belong to Golab Singh, the defendant's grandfather, and not to Kharag Singh and Rudar Singh. The defendant Karan Singh, as guardian of Golab, sued on the said award, and obtained a decree from the Principal Sadr Amin's Court on the 31st August 1863, in execution of which he was put into possession in October of the same year.

Pending the disputes between Karan Singh and the infants, the Collector, in order to secure the Government revenue, attached and took possession of the property, and retained possession from 1861 until October 1863, when, in consequence of the decree of the Principal Sadr Amin, he delivered possession to the defendant and paid over to him the surplus profits of the estate after deducting the Government revenue and

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expenses. The present suit was brought in the year 1874; and at that time twelve years had not elapsed from the time when the defendant obtained possession from the Collector. It was contended that the plaintiff must prove that he was in possession within the period of twelve years; but when their Lordships came to consider the present law of limitation, they find that that is not correct. It would have been correct under the old law, under which the suit must have been brought within twelve years from the time of the cause of action; but under the present law it may be brought within twelve years from the time when the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff. His possession since 1863 was not twelve years' possession; but it is contended that he was justified in adding, or tacking, to his possession the possession of the Collector from 1861. Their Lordships must assume that the Collector properly took possession for the purpose of protecting the Government revenue. It was the duty of the Collector, whilst in possession under the attachment, to collect the rents from the ryots, and having paid the Government [7] revenue and the expenses of collection, to pay over the surplus to the real owner. If the defendant was the real owner the surplus belonged to him; but if, on the other hand, the infants were the right owners, then the surplus belonged to them. The plaintiff was not bound by the decision of the arbitrators, for his bonds were prior to the submission to arbitration. The Collector, by paying over the money to Karan Singh, did not give Káran Singh a title.

It appears now, as between the plaintiff and the defendant, that the infants were entitled to the property, because no evidence whatever has been given to show that the custom of the family set up by the defendant, namely, that the son of a daughter could not inherit, ever existed. According to the ordinary Hindu law the infants were entitled to inherit. Therefore, although the Collector gave up possession of the estate and paid over the surplus proceeds to Karan Singh, that did not show that he was holding for Karan Singh. The defendant does not claim through the Collector, and he cannot add to his possession from the year 1863 the possession of the Collector from 1861 to 1863.

Under these circumstances their Lordships think that the majority of the Judges of the High Court came to a correct conclusion that this suit was not barred by limitation, and consequently that the plaintiff is entitled to recover.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal, and to affirm the decision of the High Court. The appellant must pay the costs of the appeal.

Solicitor for Appellant: Mr. *T. L. Wilson*.

Solicitors for the Respondents: Messrs. *Pritchard and Sons*.

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5 A. 7 = 2 A.W.N. (1882) 145 = 7 Ind. Jur. 324.

REVISIONAL CRIMINAL.

Before Mr. Justice Straight.

EMPRESS OF INDIA *v.* RAM SARAN AND OTHERS. [7th July, 1882.]

Act XLV of 1860 (*Penal Code*), s. 174—*Non-attendance in obedience to a summons—Summons, what it should contain—Omission to state place and time of attendance.*

A summons should be clear and specific in its terms as to the title of the Court, the place at which, the day, and the time of the day when, the attendance [8] of the person summoned is required, and it should go on to say that such person is

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not to leave the Court without leave, and, if the case in which he has been summoned is adjourned, without ascertaining the date to which it is adjourned.

Where a summons did not mention the place at which, or the time of the day when, the attendance of the person summoned was required, *held*, that such person could not lawfully be punished under s. 174 of the Penal Code for non-attendance in obedience to such summons.

THIS was a case reported to the High Court for orders, under s. 296 of Act X of 1872, by Mr. R. J. Leeds, Sessions Judge of Gorakhpur. It appeared that one Ram Saran and certain other persons had been convicted by a Magistrate of the offence described in s. 174 of the Indian Penal Code, *viz.*, non-attendance in obedience to a summons from a public servant. The summons issued to these persons directed them to attend on a certain day, but it did not state at what place or time of day they were to attend. The Sessions Judge called for the record of the case, on the application of the convicted persons. He was of opinion that the offence described in s. 174 of the Indian Penal Code had not been committed by the applicants, as the summonses issued to them did not specify the place or time of attendance, and that the convictions were therefore contrary to law. He referred to 7 Mad. H.C. Rep., App. xiv.

JUDGMENT.

STRAIGHT, J.—The summons served on the persons convicted under s. 174 of the Penal Code is obviously bad, as it contains no mention of the place at which the parties summoned were to attend, nor the time of the day when their attendance would be required. Such summonses should be clear and specific in their terms as to the title of the Court, the place at which, the day, and the time of the day when, the attendance of the party summoned is required, and they should further go on to say, that such party is not to leave the Court without leave, and if the case, in which he has been summoned, is adjourned, without ascertaining the date of adjournment.

The convictions passed by the Magistrate's order of the 21st of March last are hereby set aside, and the fines, if realized, will be returned.

Convictions quashed.

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5 A. 9=2 A.W.N. (1882) 149.

[9] APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

KARAN SINGH (*Plaintiff*) *v.* MOHAN LAL (*Defendant*).*
[11th July, 1882.]

Mortgage—Foreclosure—Demand for payment of mortgage-money— Regulation XVII of 1806, *s.* 8.

Section 8 of Regulation XVII of 1806 contemplates a previous demand of payment of the mortgage-money, and non-compliance therewith as a kind of cause of action for commencing foreclosure proceedings, and such demand must therefore necessarily be made before the mortgagee has the right of applying for foreclosure, and the omission to make such demand vitiates the foreclosure proceedings altogether. *Behari Lal* v. *Beni Lal* (1), followed.

[R., 8 A. 388 (392) ; 4 A.L.J. 717=A.W.N. (1907) 266 ; 5 P.R. 1901.]

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* Second Appeal, No. 1451 of 1881, from a decree of T. R. Redfern, Esq., Judge of Mainpuri, dated the 29th August, 1881, affirming a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Mainpuri, dated the 24th June, 1881.

(1) 3 A. 408.

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THE appellant sued to have a notice of foreclosure issued under Regulation XVII of 1806 set aside, among other reasons, because it had been issued without any demand having been previously made on him for the mortgage-money as required by s. 8 of that Regulation. The principal question in the appeal was whether a notice of foreclosure issued under Regulation XVII of 1806 was invalid, where a demand for the mortgage-money had not been made previously to the issue of the notice.

Munshi *Hanuman Prasad* and Maulvi *Mehdi Hasan*, for the appellant.

Mr. *Conlan* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondent.

The Court (BRODHURST, J. and MAHMOOD, J.) made the following order of remand :—

ORDER OF REMAND.

MAHMOOD, J.—The plaintiff in this case sued the defendants, *bai-i-bilwafa* mortgagees, for a declaration that the notice of foreclosure issued by them was irregular and ineffective, *first*, by reason of no previous demand having been made as required by s. 8, Reg. XVII of 1806, and *secondly*, by reason of the notice requiring payment of a far larger sum than was actually due.

The latter point has been found by both the lower Courts against the plaintiff, and we do not see any reason to interfere upon that point, which forms the subject of the second ground of [10] appeal. But the question raised by the first ground of appeal deserves consideration. It is argued by the learned pleader for the appellant that under the provisions of s. 8, Reg. XVII of 1806, the *bai-i-bilwafa* mortgagee is absolutely bound to demand payment of the mortgage-money from the mortgagor, and the omission to make such a demand vitiates all foreclosure proceedings which the mortgagee may subsequently take. In support of this contention the learned pleader has referred us to p. 211, Macpherson on Mortgages, where the learned author states the law in the following terms:—"The first thing to be done by a mortgagee by conditional sale wishing to foreclose, that is to say, to have the sale to him declared absolute, is to demand payment of what is due on the mortgage from the borrower or his representative." The same view appears to have been taken by a Divisional Bench of this Court in *Behari Lal* v. *Beni Lal* (1), in which Straight, J., held that "the mere fact that the period limited by the bond had expired, without its being satisfied, did not absolve the mortgagee from the obligation of making a demand for its payment, and having failed to do so the foreclosure proceedings were ill-founded and should be ineffective. They will therefore have to be re-commenced *de novo*."

It is urged by the learned pleader for the respondent that this view of the law imposes unnecessary restrictions upon the mortgagee, that the nature of foreclosure has the same effect as a private demand would have had, and that foreclosure proceedings otherwise regular cannot be vitiated solely on account of no previous demand having been made.

We are of opinion that this contention is not sound. The construction which the learned pleader for the respondent desires us to place on s. 8, Reg. XVII of 1806, would render the use of the words "after demanding payment from the borrower or his representative" wholly

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superfluous in that section. We cannot adopt a construction which has the effect of rendering the express language of the statute nugatory and superfluous. It appears to us that the section contemplates a previous demand of payment, and the non-compliance therewith as a kind of cause of action for com-[11] mencing foreclosure proceedings, and that the demand must therefore necessarily be made before the mortgagee has the right of applying for foreclosure, and it follows that the omission to make such a demand would vitiate the foreclosure proceedings altogether. We are fortified in placing such a construction upon the section by the language of the preamble of the Regulation, which clearly shows that it was passed for the protection of mortgagors and for imposing restrictions upon the power formerly possessed by *bai-i-bilwafa* mortgagees in respect of foreclosure.

Under this view of the law it is necessary to ascertain whether, before initiating the foreclosure proceedings, the defendants mortgagees duly demanded payment of the mortgage-money from the plaintiff mortgagor. But this point, though distinctly alleged in the plaint, was not made the subject of an issue by the Court of first instance, and has not been noticed by the lower appellate Court.

We remand the case to the lower appellate Court under s. 566 of the Civil Procedure Code for the trial of the following issue :—Did the defendants mortgagees demand payment of the mortgage-money from the plaintiff mortgagor before applying for issue of the notice of foreclosure?

On the submission of the finding ten days will be allowed to the parties for objections under s. 567 of the Civil Procedure Code.

Issues remitted.

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APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

KHANHIA LAL AND ANOTHER (*Defendants*) *v.* MUHAMMAD HUSAIN KHAN (*Plaintiff*).* [19th July, 1882.]

Mortgage—Charge on immoveable property—Ambiguity.

A, to whom the Government had made a grant of certain villages, executed an instrument in favour of his brother charging the payment of an annual allowance to him and his heirs for ever on the "granted villages." The instrument did not name the villages which had been granted to *A*, but there was no doubt as to the particular villages which had been granted to him. *Held*, that the fact that such instrument did not specify the villages which had been granted to *A* did not constitute such an ambiguity in such instrument as to render the charge created [12] thereby invalid. *Deojit* v. *Pitambar* (1) distinguished; *Rao Manik Chund* v. *Beharee Lal* (2), followed.

[R., 12 A. 175 (177)=A.W.N. (1890) 60; 7 O.C. 108 (110); 18 O.C. 350; 19 O.C. 49.]

THE facts of this case were as follows:—In the year 1860 the Government made a grant to two persons jointly, one of whom was called Abdul Rahman, of certain shares in six villages called Samaria

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* Second Appeal, No. 1504 of 1881, from a decree of Maulvi Muhammad Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 23rd June, 1881, reversing a decree of Maulvi Muhammad Aziz-ud-din, Munsif of Pilibhit, dated the 28th March, 1881.

(1) 1 A. 275. (2) N.W.P.H.C.R. 1870, 263.

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Anup, Hasannagar, Karnapur, Partabpur, Khujnuria, and Bhudari, and of two entire villages, called Guhna and Purasi, as a reward for services rendered in the Mutiny. The grantees divided the property, and Samaria Anup, Hasannagar, Guhna, Karnapur, and Partabpur fell to the share of Abdul Rahman. On the 12th November 1862, Abdul Rahman executed an instrument in favour of his brother Ghulam Husain called an "*ikrar-nama*," or instrument of agreement, the material portion of which was as follows:—"As in lieu of loyal services rendered by me, the Government has kindly granted zamindari villages to me in perpetuity, therefore I have willingly and as a thanksgiving fixed an annual allowance of Rs. 100 in cash in perpetuity out of the profits of the said villages for my elder brother, Ghulam Husain, with his consent, and as his brotherly right . . . . After me my representatives and heirs, who may be in possession of this granted property, shall continue to pay to the said Ghulam Husain and his lawful descendants and heirs the amount above-mentioned." This instrument did not specify the villages which had been granted to the executant as a reward for his loyal services. The instrument was duly registered.

In June 1881, Muhammad Husain Khan, one of the heirs to Ghulam Husain, brought the present suit to recover his share of the arrears of the allowance from the defendants personally, and by the sale of the villages Samaria Anup, Hasannagar, Karnapur, Partabpur, and Guhna, which had been granted to Abdul Rahman. He alleged that the allowance had been regularly paid to Ghulam Husain and his heirs while Abdul Rahman was alive, but that on the latter's death his heirs had ceased to pay it. He made defendants to the suit the heirs of Abdul Rahman and certain persons in possession under private transfers of different portions of the property on which he sought to enforce a charge for the payment of the allowance, and the purchasers of the share in the village of [13] Partabpur at a sale in execution of a decree against the heirs of Abdul Rahman. The defendants generally set up as a defence to the suit that the agreement of the 12th November 1862, did not create a charge on the particular villages on which the plaintiff sought to enforce a charge. The Court of first instance allowed this defence, on the ground that the villages granted to Abdul Rahman were not specified in the agreement, and consequently no charge was created on them or any of them, and dismissed the suit. On appeal by the plaintiff the lower appellate Court held that the villages on which the plaintiff sought to enforce a charge, and which had been granted to Abdul Rahman, were charged with the payment of the allowance, and gave the plaintiff a decree.

The auction-purchasers of the share in Partabpur, defendants, appealed to the High Court, contending that the terms of the agreement were too indefinite to create a charge on that village.

Lala *Lalta Prasad*, for the appellants.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the respondent.

JUDGMENT.

The judgment of the Court (BRODHURST, J., and MAHMOOD, J.) was delivered by

MAHMOOD, J.—The only question raised by the grounds of appeal in the case relates to the construction of the *ikrar-nama* of 12th November 1862. It is contended on behalf of the appellants that the terms of that instrument are too uncertain to create a charge upon the immoveable property purchased by them. The terms of the deed

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so far as the question now before us is concerned are as follows:— "As in lieu of loyal services rendered by me, the Government has kindly granted zamindari villages to me in perpetuity, therefore I have willingly and as a thanksgiving fixed an annual allowance of Rs. 100 in cash in perpetuity out of the profits of the said villages for my elder brother Ghulam Husain Khan Sahib, with his consent and as his brotherly right . . . . After me my representatives and heirs who may be in possession of this granted property shall continue to pay to the said Ghulam Husain Khan and his lawful descendants and heirs the amount above-mentioned."

[14] The *ikrar-nama*, however, does not specify the names of the villages which had been granted to the executant by Government; and it is contended on behalf of the appellant that this circumstance alone introduces an element of uncertainty which renders the charge invalid. In support of this contention we are referred to a ruling of a Division Bench of this Court—*Deojit* v. *Pitambar* (1)—but in our opinion that case is clearly distinguishable from the present one. In that case the property was absolutely indefinite and the deed contained no specification of the property. In the present case the *ikrar-nama* describes the property to be the villages granted to the executant by Government in lieu of loyal services. It is not contended that there is any uncertainty in regard to the property actually granted by the Government, and indeed it is not disputed that the property purchased by the defendants-appellants forms part of the property which had been granted by the Government to the executant of the *ikrar-nama*. We are therefore of opinion that the present case is governed by the maxim *certum est quod certumreddi potest*, and that there is no such ambiguity in the *ikrar-nama* as renders the charge created by it invalid. Our view is supported by a ruling of this Court in the case of *Rae Manik Chund* v. *Beharee Lal* (2). The appeal is dismissed with costs.

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SHEO RATAN AND OTHERS (*Plaintiffs*) *v.* LAPPU KUAR AND OTHERS (*Defendants*).* [19th July, 1882.]

Review of judgment—Act X of 1877 (*Civil Procedure Code*), *ss.* 565, 623—*Reasons for applying for review—Error in fact or law—Second Appeal—Applicability of s.* 565.

A Division Bench of the High Court, sitting as a Court of Second Appeal, being of opinion that the Court of First Appeal had omitted to determine a certain issue of fact, determined such issue itself and decided the appeal in accordance with its determination of such issue. An application for review of judgment was made on two grounds, *viz.*, (i) that the Bench was wrong in thinking that such issue had not been determined by the Court of First Appeal, and (ii) that the Bench, sitting as a Court of Second Appeal, was not empowered to determine an issue of [15] fact which the Court of First Appeal had omitted to determine, but should have referred such issue to that Court for determination under s. 566 of the Civil Procedure Code. *Held* that, looking to the provisions of that Code relating to review of Judgment, such application ought not

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* Application for review of judgment No. 40 of 1882.

(1) 1 A. 275. (2) N.W.P.H.C.R. (1870) 263.

to be allowed on the grounds mentioned, which virtually disclosed reasons for appeal from the judgment.

Where a Court of First Appeal omits to determine a material issue of fact, the High Court, as a Court of Second Appeal, is not competent under s. 565 of the Civil Procedure Code to determine such issue itself, but should refer it for determination to the Court of First Appeal.

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[R., 9 A. 26 (30).]

THIS was an application by the respondents in S. A. No. 323 of 1881 for review of the judgment passed on that appeal on the 17th November 1881, by STRAIGHT and TYRRELL, JJ. The facts out of which that appeal arose so far as they are material for the purposes of this report were as follows:—Lappu Kuar, one of the respondents, a Hindu widow who had succeeded to the landed estate of her deceased husband Chakan Rai, made a gift of the estate to her daughter Mohni, the other respondent. Thereupon Sheo Ratan Rai and certain other persons, the appellants, sued Lappu Kuar and Mohni in the Court of the Additional Subordinate Judge of Ghazipur for a declaration that Mohni was not the daughter of Chakan Rai, and that they were the reversionary heirs to the estate of Chakan Rai. One of the issues framed for trial in this suit was—"Is Mohni the daughter of Chakan Rai." The Subordinate Judge found on this issue that Mohni was not the daughter of Chakan Rai, but was the illegitimate daughter of Lappu Kuar; and gave the appellants a decree. On appeal by the respondents, the District Judge of Ghazipur set aside this decree, and dismissed the suit of the appellants. The District Judge did not determine, in so many words, whether Mohni was the daughter of Chakan Rai or not. On appeal by the appellants to the High Court, STRAIGHT and TYRRELL, JJ., by a judgment, dated 17th November 1881, reversed the District Judge's decree and restored the decree of the Subordinate Judge. The material portion of the judgment of those learned Judges was as follows:—"This appeal prevails. The Judge of Ghazipur omitted to determine the main question before him, that of the legitimacy of Mohni in respect of the deceased husband of Lappu Kuar her mother: and the Judge reversed the decree of the first Court and dismissed the claim of the plaintiff's appellants on inadequate and irrelevant [16] considerations. Finding on the record abundant and satisfactory materials for coming to a decision on the real issues for trial, we do not remand the case for the correction of the defective procedure of the Judge, but restore the decree of the Subordinate Judge, which disposed properly of the case both in point of law and on the merits.

The principal ground on which the respondents applied for a review of this judgment was that the learned Judges had erred in holding that the District Judge had not recorded a specific finding upon the question of the legitimacy or illegitimacy of Mohni; and that, assuming he had not done so, s. 565 of the Civil Procedure Code did not empower the High Court to make a finding of fact in second appeal, but an issue should have been remitted under s. 566 of that Code.

Mr. *Hill*, for the respondents.

Mr. *Conlan*, for the appellants.

JUDGMENT.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.) was delivered by

STRAIGHT, J.—We are of opinion that this application for review of our judgment of the 17th November 1881, must be refused with costs.

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The grounds upon which it is based are, first, that we were in error in holding that the Judge had not recorded a specific finding upon the question of the legitimacy or illegitimacy of Mohni, and next, that assuming he had not done so, s. 565 of the Procedure Code did not empower us in second appeal to make a finding of fact, but an issue should have been remanded under s. 566. Looking at the provisions of the Code relating to review of judgment, we do not think we are entitled to admit the appeal to a re-hearing upon either of these grounds, which virtually disclose reasons for an appeal from our decision. If we were to accept them, as affording material upon which a review might be founded, it is difficult to see where the line could be drawn, or how anything like finality in the judgments of this Court could be secured. In this view the application must as we have already said be refused. But we think it right to add, that the view we entertained at the time of the determination of the appeal, our [17] decision of which is now impeached, of s. 565 of the Code, has, after much subsequent consideration, been altered, and we have come to the conclusion that that section does not apply in special appeal.

Application rejected.

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APPELLATE CRIMINAL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

EMPRESS OF INDIA *v.* NIAZ ALI AND OTHERS. [24th July, 1882.]

Act I of 1879 (*Stamp Act*), *s.* 51—*Application for allowance for spoiled stamps—Inquiry to be made by Collector—False evidence—Contradictory statements—Joinder of charges—Alternative charge—Act XLV of* 1860 (*Penal Code*), *ss.* 181, 193—*Act X of* 1872 (*Criminal Procedure Code*), *s.* 455.

Section 51, Chap. VI of Act I of 1879, enacts that "subject to such rules as may be made by the Governor-General in Council as to the evidence which the Collector may require, allowance shall be made by the Collector for impressed stamps spoiled in the cases hereinafter mentioned, &c." According to a rule made with reference to that section, "the Collector may require every person claiming a refund under Chap. VI of the said Act, or his duly authorised agent, to make an oral deposition on oath, &c." *Held*, therefore, that the Collector himself is the officer, and no other, to whom power is given by law to make inquiries into applications for allowances for spoiled stamps, to take evidence on oath in reference thereto, and to grant or refuse such applications, and he cannot delegate his authority in the matter.

Held, therefore, where a person had applied for a refund under Chap. VI of Act I of 1879, and the Collector made over the application for inquiry to a Deputy Collector, that the Deputy Collector was not entitled to put the witnesses produced by the applicant on their oaths, and consequently, in reference to the statements of such witnesses, no charge under s. 181 or s. 193 of the Indian Penal Code was sustainable.

In prosecutions for giving false evidence under s. 193 of the Penal Code, the case of each person accused should be separately inquired into, and, if committed for trial, separately tried. It is wholly erroneous to include them in one joint charge.

It is not of itself sufficient to warrant a conviction for giving false evidence that an accused person has made one statement on oath at one time, and a directly contradictory one at another. The charge must not only allege which of such statements is false, but the prosecutor must be prepared with confirmatory evidence independent of the other contradictory statement to establish the falsity of that which is impeached as untrue. *R.* v. *Jackson*, (1), *Reg.* v. *Wheatland* (2),

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(1) 1 Lewis C.C. 270. (2) 8 C. and P. 238.

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and *Rex* v. *Harris* (1), referred to. Section 455 of Act X of 1872 (Criminal Procedure Code) is no authority for framing against a person accused of giving false evidence, who has made one statement on oath on one occasion, and a directly contradictory one on oath on another [18] occasion, a charge in the "alternative," that word, as used in that section, meaning that where the facts which can be proved make it doubtful what particular description of offence an accused person has committed, the charges may be so varied or alternated as to guard against his escaping conviction through technical difficulties.

Held, therefore, where three persons were committed for trial jointly charged with "having on or about the 26th September 1881, or the 18th October 1881, being legally bound upon oath to state the truth, knowingly on those days, regarding the same subject, made contradictory statements upon oath," and thereby committed an offence punishable under s. 193 of the Indian Penal Code, and such persons were jointly tried on such charge, that such charge was bad for being single and joint against the three accused persons, instead of several and specific in regard to each of them; that it was further bad because it did not distinctly and in terms allege which of the statements was false; that, assuming a committal upon so faulty a charge should be allowed to stand, the Court of Session should have prepared a fresh charge against each of the accused persons, specifically setting forth the statement alleged to be false, and should then have proceeded to try each of them separately; and that, there being no evidence that either of the statements made by two of such persons was false, except that it was contradicted by the other the charge against such persons was not sustainable, there benig no sufficient evidence that either of the statement was false.

[Overruled, 7 A. 44 (F.B.).]

THIS was an appeal by the Local Government from a judgment of acquittal of Mr. C. J. Daniell, Sessions Judge of Moradabad, dated the 21st January 1882. The facts of the case are stated in the judgment of STRAIGHT, J.

The *Junior Government Pleader* (Babu *Dwarka Nath Banerji*), for the Local Government.

Mr. *Leach*, for Niaz Ali, respondent.

The Court (STUART, C. J., and STRAIGHT, J.) delivered the following judgments :—

JUDGMENTS.

STRAIGHT, J.—This is an appeal by Government against a decision of the Sessions Judge of Moradabad, passed on the 21st January last, acquitting the three respondents of having given false evidence in a judicial proceeding, contrary to the provisions of s. 193 of the Penal Code. In order to render the pleas urged in the petition of appeal intelligible, it is necessary to recapitulate the following facts. It appears that in the month of September 1881, one Mubarik Husain was contemplating a mortgage of certain property of his, and for the purpose of having a deed formally drawn up had purchased a paper with a Rs. 25 stamp on it from a person named Nawazish. It so happened, however, that after the mortgage had been written and ex-[19]ecuted, the matter fell through for reasons which it is wholly unnecessary to enter upon, and Mubarik Husain found himself with this useless document and wasted stamp upon his hands. He accordingly applied under the provisions of s. 51 of Act I of 1879 to the Collector of Moradabad for an allowance to be made him for the spoiled Rs. 25 stamp. It may be here observed, that under the preliminary paragraph of that section the Collector is the person who is authorised to make allowances in such matters, "subject to such rules as may be made by the Governor-General in

(1) 5 Barn. and Ald. 926.

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Council as to the *evidence* which the Collector may require." According to Rule 16 framed in reference to this section and contained in a Notification of the 26th February 1881, to be found at page 65 of the "*Gazette of India*" for 1881, "the Collector may require every person claiming a refund under Chapter VI of the said Act, or his duly authorised agent, to make an oral deposition, or to put in an affidavit setting forth the circumstances under which the claim has arisen. The Collector may also, if he thinks fit, call for the evidence of witnesses in support of the statement set forth in the deposition or affidavit of the claimant or his agent." Upon the receipt of Mubarik Husain's application for a refund, the Collector of Moradabad, instead of acting in the matter himself, delegated the duty of making the necessary inquiries to Mr. Shaw, Deputy Collector, and on the 26th September 1881, that gentleman examined the three respondents to the present appeal upon oath, professing to do so under the terms of the Notification already set forth at length. It is to be observed, that this examination seems to have been directed less to investigating the circumstances under which the stamp had come to be spoiled, than to fixing Nawazish as the person who had sold it to Mubarik Husain. As to the two respondents Niaz Ali and Rahimullah, they no doubt stated in substance before the Deputy Collector that the stamped paper was purchased in their presence by Mubarik Husain from Nawazish Ali, though with regard to the respondent Idu, all he said was: "Four months ago Mubarik Husain bought a Rs. 25 stamp from Nawazish." Upon this Mr. Shaw sent in a report to the Collector, who then passed an order allowing the refund, and the amount was duly paid to Mubarik Husain. Subsequently, proceedings [20] were instituted with the sanction of the Collector against Nawazish under s. 68 of the Stamp Act, 1879, for selling the Rs. 25 stamp to Mubarik Husain, he not being a properly licensed vendor. This case was heard by Mr. Shaw on the 18th October 1881, in his capacity of a Magistrate of the first class, and the three respondents were summoned and examined as witnesses for the prosecution. On this occasion they severally stated, Niaz Ali, first, that he did not himself witness the purchase but heard of it from Mubarik Husain, and then, when his former statement of the 18th October was put to him, that the stamp was purchased in his presence, and that his former statement was true: Rahim-ul-lah that the stamp paper was not purchased in his presence, and that he had only heard of it; and Idu that he had not said on the 18th of October that the stamp was purchased in his presence, but that he had heard of the purchase. In the result there being no evidence against Nawazish, he was discharged. Thereupon the respondents were, with the sanction of the Magistrate of the District, prosecuted under s. 193 of the Penal Code for giving false evidence both on the 26th September, when they made their first statements in the inquiry under the Stamp Act, and on the 18th October, when they gave their depositions in the case of Nawazish. Mr. Shaw again held these proceedings, and in the result, to use his own very extraordinary expression, "finding them guilty of the charge as laid out in the charge sheet, I direct that they be tried by the Court of Session." In ordinary course the case came before the Sessions Judge, who held "that the statements of the defendants on the 26th September were not made in a judicial proceeding, and that the oath administered to them was administered by a person not authorised to administer such an oath." He further ruled, that their statements having been reduced into writing, and such writing being inadmissible, he could not take oral evidence as to what was said by

the defendants on the 26th September, and holding these views he acquitted them. The Government now appeal from his decision under the provisions of s. 272 of the Criminal Procedure Code on three grounds: (i) that the Judge was wrong in rejecting the statements of the 26th September; (ii) that under the rules contained in the Notification of the *Gazette of India*, Mr. Shaw had authority to administer the oath on the [21] 26th September 1881; (iii) that at least the respondents are shown to have committed an offence under s. 181 of the Penal Code.

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It seems to me that the first question to be considered is whether Mr. Shaw the Deputy Collector had authority to administer an oath to the respondents or any of them on the 26th September 1881, when prosecuting his inquiries in reference to the stamp. It has already been noted, that in s. 51 of Act I of 1879 the person empowered to make allowances for spoiled stamps is the Collector, and in the Government of India's Notification of February, 1881, he it is who may require an oral deposition on oath or affirmation, or an affidavit of the applicant or his agent, or the evidence of witnesses to support the application. Hence it is obvious, that the Collector himself is the officer, and no other, to whom power is given by law to make inquiries into applications for allowances for spoiled stamps, to take evidence on oath in reference thereto, and to grant or refuse such applications. But it was urged by the Junior Government Pleader that the term "Collector" as explained in the interpretation clause to the Stamp Act, 1879, includes "any officer whom the Local Government may by Notification in the official Gazette appoint in this behalf, by name or in virtue of his office." It is sufficient to say, that Mr. Shaw never was appointed in the manner mentioned, and that this suggestion does not help the prosecution. In my opinion the Collector of Moradabad was himself alone empowered by law to hold the inquiry upon Mubarik Husain's application, and to administer the oath to those persons whose oral or written statements he required. It was illegal and incompetent for him to delegate his authority in the matter, and I therefore hold, that Mr. Shaw was not entitled to put the respondents upon their oaths, and that in reference to their statements before him on the 26th September, no charge under either s. 181 or s. 193 could be sustained. The second plea taken in the petition of appeal in my judgment accordingly fails.

It will be convenient now to examine the terms of the charge sheet prepared by Mr. Shaw upon which the respondents were committed to the Court of Session. "I, H. Shaw, Magistrate of the first class, hereby charge you Niaz Ali, Rahim-ul-lah, and Idu [22] as follows:—That you on or about the 26th of September, 1881, or the 18th day of October, 1881, at Moradabad, being legally bound upon oath to state the truth, did knowingly on those days, *regarding the same subject, make contradictory statements upon oath*, in saying on the 26th September, 1881, that you saw Nawazish Husain Khan sell a stamp of Rs. 25 value to Mubarik Husain, and on the 18th October, 1881, saying you did not see, but heard of the transaction, that you gave false evidence voluntarily, and thereby committed an offence punishable under s. 193 of the Penal Code, and within the cognizance of the Court of Session."

Now in the first place the charge was open to objection for being single and joint against the three respondents instead of several and specific in regard to each of them. In prosecutions for giving false evidence under s. 193 of the Penal Code, the case of each person accused should be separately inquired into by the Magistrate, and if committed to the

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Sessions Court, separately tried by the Judge. It was wholly erroneous to include them in one joint charge. But apart from this fatal objection, the Magistrate avowedly committed the case upon the extraordinary assumption, that because the respondents had made contradictory statements they must necessarily be guilty of the offence of giving false evidence. This is a very mistaken view of the law, and it is right it should be corrected, for it is by no means peculiar to Mr. Shaw, but on the contrary prevails to a considerable extent in these Provinces among Magisterial officers. It is not of itself sufficient to warrant a conviction either for giving false evidence or making a false oath, that an accused person has made one statement on oath at one time, and a directly contradictory one at another. The charge must not only allege which of such statements is false, but the prosecutor must be prepared with confirmatory evidence independent of the other contradictory statement to establish the falsity of that which is impeached as untrue. The remarks of HOLROYD, J., in *R.* v. *Jackson* (1) are valuable upon this point: "Although you may believe that on one or the other occasion the prisoner swore what was not true, it is not a necessary consequence that he committed perjury, for there are cases in which a person might very honestly and conscientiously believe and swear to a particular fact from the best of his [23] recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong, and swear to the reverse without meaning to swear falsely either time. Again, if a person swears one thing at one time, and another, at another, you cannot convict where it is not possible to tell which is the true and which is the false." GURNEY, B., also took a similar view in the case of *Reg.* v. *Wheatland* (2) upon which, and a decision of the Court of King's Bench in *Rex* v. *Harris* (3), Mr. Greaves in Russell on Crimes, Vol. III, pages 82 and 23, *notes*, records some valuable comments. Section 455 of the Criminal Procedure Code is no authority for the form of charge prepared by the Magistrate in the present case, and the word "alternative" as used in the sections means, that where the facts which can be proved make it doubtful what particular description of offence an accused person has committed, the charges may be so varied or alternated, as will guard against his escaping conviction through technical difficulties. I have no hesitation whatever in declaring, that the charge framed by Mr. Shaw was erroneous in point of law, as being joint against all the respondents instead of several, and for not distinctly and in terms alleging which of their statements was false. Assuming that a committal upon so faulty a charge could be allowed to stand, the Sessions Judge should have prepared a fresh charge against each of the respondents, specifically setting forth the statement alleged to be false, and should then have proceeded to try each of them separately. This however he did not do, and his procedure, were it necessary to enter into the point, would thus be open to serious objection.

From what I have said in the earlier part of this judgment it is clear, that no charge could have been properly preferred or sustained as to the statements made on the 26th of September. Indeed, as to the respondent Idu, I have already pointed out, that he did not distinctly assert, that the stamp was bought in his presence. As to the evidence given by the respondents Niaz Ali and Rahim-ul-lah in the case of Nawazish, beyond their own contradictory assertions on the 26th September, there was no other proof against them, and as standing alone, it was impossible to say

(1) 1 Lewis C. C. 270. (2) 8 C. and P. 238. (3) 5 Barn. and Ald. 926.

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which of them was true and which was false, as no legal charge could be framed or [24] sustained against them or either of them. Upon the face of the depositions there is nothing whatever to show whether they were or were not present when the stamp was bought by Mubarik Husain, nor was that person called as a witness in the case, though he could have thrown important light upon it. In my opinion no charge of giving false evidence under s. 193 of the Penal Code against any or either of the respondents was capable of being maintained for want of sufficient proof, and that while it was imperative to allege one or other of their statements as being false, it was equally necessary to establish its falsity by some confirmatory evidence other than that of their contradictory statements. If the prosecution could not succeed under s. 193, it was equally clear that it must fail under s. 181, for the falsity would in that case have to be proved with equal exactness. Looking at this appeal in its entirety and bearing in mind the several matters to which attention has been called, I am very clearly of opinion that it should be dismissed.

STUART, C. J.—This case has been very carefully examined by my learned colleague, Mr. Justice Straight, and I entirely agree with him in his conclusion that the appeal must be dismissed. I may at the same time observe that in regard to the very objectionable and inartificial manner in which the charges were drawn up against the three accused, an amendment by the Judge of the charge or charges might have removed any error on that score, or this Court might under s. 297, Criminal Procedure Code, have directed a new trial under proper charges, or we might do that now, if we thought that such a mode of proceeding would serve any useful or relevant purpose.

But the imputed false swearing or perjury alleged to have been committed before Mr. Shaw is the one material question with which we are concerned in this appeal, and that, in the circumstances, could under no form of charge be investigated by that officer, whether in virtue of his own powers or as the delegate of the Collector, and the inquiry that took place before him was not a "judicial proceeding" within the meaning of s. 193, Indian Penal Code, and could afford no grounds for his committal of the accused to take their trial before the Sessions Judge. This is also the opinion of the Sessions Judge of Moradabad, and he is clearly right.

[25] Even if the inquiry by Mr. Shaw (whose unfitness for the duty cast upon him by the Collector is painfully manifest) could be regarded as in any respect a "judicial proceeding," it is plain that the case on any merits it may be supposed to have was of the most trumpery description, and quite undeserving of the ordeal through which it has passed, and I agree with Mr. Justice Straight that the statements by the accused relied on by Mr. Shaw as showing false swearing are not, on the face of them, of that character, but if anything little more than variations, perhaps careless variations, not necessarily of a wilfully deceitful or misleading nature, or in themselves charged with the vice of perjury. This is specially the case with respect to the alleged contradictory statements of the accused Niaz Ali, who simply adheres to his first statement, explaining that his second statement, to the effect that he did not personally witness the sale, was made when he was suffering from fever and ague, complaints not certainly calculated to sharpen the memory and intelligence of the most conscientious person. Then, besides these considerations, if regard be had to the peculiarity of the native character when acting the part of a witness, and the different languages in which the depositions, supposed to contain the

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false swearing were ultimately made to appear, it is reasonable to believe that the trial might not have resulted unfavourably to the accused men. Indeed, if the supposed offence of these men had not been connected with a matter relating to the revenue, as to which all Government officers are so laudably zealous, this prosecution would in all probability never have been heard of. The appeal is dismissed.

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5 A. 25=2 A.W.N. (1882), 138.

REVISIONAL CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

DHIAN RAI (*Defendant*) *v.* THAKUR RAI (*Plaintiff*).* [3rd July, 1882.]

Landholder and tenant—Ex-proprietary tenant— Rent—Damages—Act XII of 1881 (*N.W.P. Rent Act*), ss. 14, 95 (*l*), 206.

T, who had acquired the proprietary rights of *D* in a certain mahal, sued *D* in a Civil Court for damages for the use and occupation of sir-land of which *D*, [26] on losing such rights, had become by law the ex-proprietary tenant. *Held* that, *T* being *D*'s landlord, such suit was not maintainable in the Civil Courts. *Ram Prasad* v. *Dina Kuar* (1), S.A. No. 768 of 1881 (2), and S.A No. 914 of 1879 (3) followed.

Held also that the provisions of s. 206 of the N.W.P. Rent Act were not applicable, it not being possible to treat the suit as being in any respect the claim that alone *T* was entitled to make on *D*, which was a claim for rent assessed or ascertained in the mode provided in that Act.

THIS was an application by the defendants in a suit for revision under s. 622 of the Civil Procedure Code of the decrees made therein by the Court of first instance and the appellate Court. The plaintiff in the suit had acquired the proprietary rights of the defendant in a certain mahal. On losing such rights the defendant had become by law (s. 7 of Act XII of 1881) the ex-proprietary tenant of the land held by him as sir at the time of such loss. In the suit the plaintiff claimed damages for the use and occupation by the defendant of such land in 1287 fasli, assessing such damages on the value of the produce. The suit was instituted in the Court of the Munsif of Ballia. The plaintiff admitted that the defendant was in possession of the land as an ex-proprietary tenant. He claimed damages in respect of the occupation of the land on the ground that the defendant had neither paid rent for the land nor had had rent assessed on it by the Revenue Court. The defendant set up as a defence to the suit that, as the plaintiff admitted that he (defendant) was a tenant, the claim should have been brought in the Revenue Court, and was not cognizable in the Civil Court: and that, as he had applied to the Revenue Court to have rent assessed on the land, before the plaintiff had instituted his suit, and such application was pending, he could not be charged with laches in the matter of the assessment of rent on the land. Both the lower Courts held that the defendant was liable for damages for having cultivated the land, as he had cultivated it without giving notice to the plaintiff of his intention to do so, and to pay rent.

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* Application No. 224 of 1881, for revision under s. 622 of the Civil Procedure Code of a decree of Rai Raghu Nath Sahai, Additional Subordinate Judge of Ghazipur, dated the 10th September 1881, modifying a decree of Munshi Kulwant Prasad, Munsif of Ballia, dated the 23rd May 1881.

(1) 4 A. 515. (2) Not reported. (3) Not reported.

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5 A. 26 = 2 A.W.N. (1882) 138.

The defendant sought revision of the decrees of the lower Courts on the ground that the claim was one in reality for rent, and therefore was not maintainable or cognizable in the Civil Courts.

[27] Munshi *Hanuman Prasad*, for the defendant.

Lala *Lalta Prasad*, for the plaintiff.

JUDGMENT.

The judgment of the Court (TYRRELL, J., and MAHMOOD, J.) was delivered by

TYRRELL, J.—Following the rulings of this Court in *Ram Prasad* v. *Dina Kuar* (1), S. A. No. 768 of 1881, decided the 2nd February 1882 (2), and S. A. 914 of 1879 decided 2nd July 1880 (3), we hold that the suit of the plaintiff must fail. He was admittedly the landlord of the petitioner, who was his tenant in respect of the land, the subject of the suit, in the year 1287 fasli, and therefore he cannot sustain an action for damages assessed on the value of the crop against the petitioner as a trespasser. We have been asked to apply the provisions of s. 206 of the Rent Act to the case, admitting that it was wrongly instituted in a Civil Court. But this section will not help the plaintiff, for it is impossible to treat his claim for damages assessed on the value of the produce as being in any respect the claim that alone he is entitled to make on the petitioner, which is a claim for rent assessed or ascertained in the mode provided by law in s. 7 of the North-Western Provinces Rent Act. We decree this application with costs.

Application allowed.

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5 A. 27 = 2 A.W.N. (1882), 140 = 7 Ind. Jur. 374.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

BANARSI DAS AND OTHERS (*Judgment-debtors*) v. MAHARANI KUAR AND ANOTHER (*Decree-holders*).* [4th July, 1882.]

Execution of joint decree—Application by one joint decree-holder for execution in respect of his own share—Transfer of decree to judgment-debtor—Civil Procedure Code, ss. 231, 232.

A joint decree cannot be executed by one of the several joint holders in respect only of his share of the decree. *Ram Autar* v. *Ajudhia Singh* (4); *The Collector of Shahjahanpur* v. *Surjan Singh* (5); and *Haro Sanker Sandyal* v. *Tarak Chandra Bhuttacharjee* (6), followed.

[28] When by operation of law one of several joint judgment-debtors acquires the position of decree-holder in respect of the whole judgment-debt, the effect is to extinguish the liability of the other judgment-debtors, and the decree cannot be executed against them. But when one of them so acquires only a partial interest in the decree, the effect is not to extinguish the entire judgment-debt, but so much only of it as such judgment-debtor has so acquired. *Wise* v. *Abdool Ali* (7), *Pogose* v. *Fukuroodddeen Mahomed Ahsan* (8); *Degumburee Dabee* and *Soroop Chunder Hazrah* (9); *Khoshalee* v. *Nund Lall* (10), referred to.

Held, therefore, where one of several joint decree-holders applied for execution in respect of his own share only, and the joint judgment-debtors under the

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* First Appeal No. 34 of 1882, from an order of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 24th November 1881.

(1) 4 A. 515. (2) Not reported. (3) Not reported. (4) 1 A. 231.
(5) 4 A. 72. (6) 3 B.L.R. 114. (7) 7 W.R. 136. (8) 25 W.R. 343.
(9) 9 W.R. 230. (10) N.W.P.H.C.R. (1874) 1.

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decree had inherited the right therein of one of the joint decree-holders, that the application was contrary to law; that so much of the judgment-debt as had devolved upon such persons had been extinguished; and that application should have been made for execution in respect of the entire unextinguished portion of the judgment-debt.

Brojeswari Chowdhranee v. *Tripoora Soonderee Debi* (1), and *Bibee Budhun* v. *Hafezah* (2), followed.

[Appr., 10 A. 570 (574); R., 25 M. 431 (447) (F.B.); A.W.N. (1890) 62; A.W.N. (1894) 15.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Babu *Ratan Chand*, for the appellants.

Babu *Aprokash Chandar Mukarji*, for the respondents.

JUDGMENT.

The judgment of the Court (STRAIGHT, J., and MAHMOOD, J.) was delivered by

MAHMOOD, J.—The following pedigree will show the relative position of the various persons to whom reference will be made in stating the facts of the case:—

- Baldeo Prasad.
  - Madhuri Prasad.
    - Kedar Nath.
      - Maharani Kuar (widow).
      - Shib Shankar. (adopted son, minor).
  - Sital Prasad.
  - Banarsi Das.
    - Badri Prasad.
    - Brij Kishore.
    - Moti Ram.
    - Ram Gopal.
  - Nand Kishore.
  - Chatar Bhuj.

Banarsi Dass, Nand Kishore and Chatar Bhuj brought a suit against Baldeo Prasad, Madhuri Prasad, Badri Prasad, Brij [29] Kishore, Moti Ram and Ram Gopal. The suit was dismissed on the 22nd July 1878, and the plaintiffs were ordered to pay one set of costs to the defendants. Subsequently Baldeo Prasad died, and Brij Kishore brought a suit against the rest of the members of the family for the ascertainment and separation of his individual share in the family property. Among the subjects of the suit was the money due on the decree of 22nd July 1878. The suit was partially decreed on the 18th May 1881, and among the items in respect of which the claim was dismissed was the money due on the decree of 22nd July 1878.

On the 20th July 1881, Kedar Nath, the son of Madhuri Prasad, one of the original holders of the decree of 22nd July 1878, filed the present application for execution of the decree to the extent of Rs. 611-11-9, stating that sum to be the amount of his share in the decretal money due by the judgment-debtors Banarsi Das, Nand Kishore and Chatar Bhuj. Before the execution was ordered by the Court, Kedar Nath died, and his widow Maharani and his adopted son, Shib Shankar, were substituted as applicants.

The judgment-debtors objected to the execution of the decree, and urged, *inter alia*, that the decree being a joint decree could not be executed

(1) 3 C.L.R. 513. (2) 4 C.L.R. 70.

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for a portion of the decretal money; that by virtue of inheritance from Baldeo Prasad the judgment-debtors themselves had acquired the position of joint decree-holders; that the shares of the various joint decree-holders could not be determined in the course of the execution proceedings; and that the decree was therefore no longer capable of execution. The Subordinate Judge disallowed these objections on the ground that the judgment in the suit of Brij Kishore had determined the respective shares of the various members of the family, and that the decree of 22nd July 1878, being the joint property of the family, could be separately executed in part by the members of the family in proportion to their respective shares. The Subordinate Judge accordingly ordered execution to proceed in respect of the share said to belong to the applicants.

The present appeal has been preferred by the judgment debtors, and their contention in the lower Court is repeated in the grounds of appeal before us.

[30] It is admitted by the learned pleader for the respondents that the effect of Baldeo Prasad's death was to place his sons the judgment-debtors in the position of joint judgment-creditors under the decree of 22nd July 1878, sought to be executed. The learned pleader further concedes that, if the judgment-debtors were the only representatives of the original decree-holders, the decree would have been completely extinguished on the principle of merger, that is to say, by the union in the same persons of the character of debtor and creditor. But he contends that the judgment-debtors not being the only representatives of the decree-holders, the mere circumstance of their having acquired a joint interest in the decree cannot have the effect of extinguishing it *in toto*, or of rendering it incapable of execution; that the judgment in the suit of Brij Kishore conclusively determined the shares of the various members of the family; that even if such were not the case the shares of the various joint decree-holders could be determined in the execution proceedings, since the facts whereupon such determination depends are apparent from the relationship of the various persons interested in the decree; and that the Subordinate Judge was therefore right in ordering execution to be taken out by the present applicants in respect of their own share in the decree.

Before entering into the main questions in this case we consider it necessary to express our opinion that the decree in the suit of Brij Kishore cannot benefit the respondent's case. It was passed in a suit in which Brij Kishore alone was the plaintiff and the rest of the members of the family were arrayed as co-defendants. There could therefore be no conclusive adjudication in that suit in regard to the shares of the various co-defendants *inter se*, and the decision in that case therefore has no bearing upon the present case.

The decision of this appeal however depends mainly upon the determination of the following points:—

(i) Whether a joint decree can be executed by one of the joint decree-holders in respect only of his own share in the decree?

(ii) Whether when by operation of law the judgment-debtors acquire the position of joint judgment-creditors, the decree can be executed against them by the other joint decree-holders?

[31] It has been held by this Court in the case of *Ram Autar* v. *Ajudhia Singh* (1), which was followed in the case of *The Collector of*

(1) 1 A. 231.

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Shahjahanpur v. *Surjan Singh* (1), that execution of a joint decree cannot be taken out in part, and that when all the decree-holders do not join in applying for execution, any one or more of them can take out execution in respect of the decree for the benefit of all the decree-holders, under the provisions of s. 231 of the Civil Procedure Code. The same was the rule adopted in many other cases (cited at the foot-note to page 232 of vol.I, Allahabad Series, I.L.R.) under the old Civil Procedure Code, and the reason of the rule has been well stated by Peacock, C.J., in the case of *Haro Sanker Sandyal* v. *Tarak Chandra Bhattacharjee* (2). "Suppose there was a decree for a lac of rupees, it could not be contended that the decree-holder could assign it to a lac of assignees, so as to give to each of them power to take out execution for one rupee, his portion of it. Otherwise there might be a lac of executions under the decree, a lac of seizures and a lac of sales, under each one of which there can be no doubt that the judgment-debtor would suffer loss. If this were allowed, the judgment-debtor must necessarily be ruined. This is shown to be the correct view.... by supposing a case of execution by arresting the judgment-debtor. Could each one of the assignees arrest the debtor for his own portion? It appears to me that the section which provides the period, during which a judgment-debtor is to be detained in jail in execution of a decree, shows that the Legislature contemplated one entire execution, and not several executions as to portions of the same decree." In our judgment these reasons, so far as the point under consideration is concerned, are as much applicable to ss. 231 and 232 of the present Civil Procedure Code as they were to the provisions of the corresponding ss. 207 and 208 of the old Code Act VIII of 1859, and we have no hesitation in holding that the application for execution from which this appeal has arisen was illegal. Execution of the decree could therefore have been applied for only in respect of the whole of it, that is to say, including not only the shares of the other joint judgment-creditors, but *ex hypothesi* in respect also of the share which admittedly belongs to the judgment-debtors themselves.

[32] That a decree should be executed against persons who have themselves acquired rights in it is a result the law does not contemplate, and the anomaly thus suggested brings us to the consideration of the second question in appeal. That question does not appear to have been the subject of many rulings, and we have been able to find only two cases bearing upon the point in the published reports. In the case of *Wise* v. *Abdool Ali* (3), Loch and Macpherson, JJ., held that "even if it should appear that the principal defendant has (as one of the representatives of his son) an interest as one of the decree-holders, that fact will not bar execution being issued by other decree-holders according to such rights as they may be able to prove." Again, in the case of *Pogose* v. *Fakuroodddeen Mahomed Ashan* (4) Jackson and McDonell, JJ., observed:—"We considered for a moment whether it was possible to make any distinction between the capacity in which Azim Chowdhry was the judgment-debtor and that in which he became one of the decree-holders as representing his deceased wife; but it appears to us that the consequence as regards that share in the decree is the same as it would have been if he had purchased the whole or a part. We think the effect of inheritance as to a part or as to the whole is the extinction of the decree *pro tantô*." The reports of both these cases, however, are so

(1) 4 A. 72. (2) 3 B.L.R. 114. (3) 7 W.R. 136. (4) 25 W.R. 343.

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meagre, that the facts and the exact nature of the decree do not clearly appear, and the judgments do not explain the reasons for the conclusions at which the learned Judges arrived.

In our opinion the question is not altogether free from difficulty, as it is not expressly provided for by the Code. Whilst in a matter of this kind we are bound to consider the language of the Civil Procedure Code, we do not think that the rules of adjective law should be administered regardless of the fundamental principles of substantive law and equity. Where the language of the statute itself is silent upon any special point, the Courts in applying the rules of procedure will import such considerations as will render the application of those rules consistent with equity and substantive law. We are fortified in this view by the precedent of a Full Bench of the Calcutta High Court in the case of *Degumburee Dabee* v. *Soroop Chunder Hazrah* (1) in which Peacock, C. J., with the **[33]** concurrence of his colleagues, controlled the language of the statute (s. 208, Act VIII of 1859) by the principles of equity, and held that one of several judgment-debtors, who satisfied the judgment-debt by taking an assignment thereof, could not enforce it by execution against his co-debtors, and that his only remedy was to sue them to pay him their shares of the amount for which the decree had been purchased, having regard to the proportion in which they were bound, *inter se*, to satisfy the original decree. This rule was followed by this Court in the case of *Khoshalee* v. *Nund Lall* (2) and has since been adopted by the Legislature in the last proviso to s. 232, Civil Procedure Code. The principle upon which the rule is based seems to be that when one of the persons jointly liable under a decree unites in himself the characters of creditor and joint debtor in respect of the whole decretal debt, the effect is to extinguish the liability of all the co-judgment-debtors under the decree. But in the present case the judgment-debtors have not acquired the entire rights of the decree-holder but only a share in such rights, and the question before us is whether this circumstance has the effect of rendering this decree incapable of execution.

We are of opinion that such cannot be the case. No doubt there may be joint rights as much as joint obligations, and it may be laid down that the performance of the entire obligation by any one or more of several persons jointly liable under it extinguishes the liability of all, so far as that obligation is concerned. It is an equally well recognized rule that an obligation in favour of several persons jointly, *i.e.*, a joint right, is extinguished by full performance rendered to any one of such joint holders of the right. And these principles are wide enough to include cases in which the performance of the obligation consists of delivery of money, *i.e.*, payment. The provisions of the last proviso to s. 232, Civil Procedure Code, which prohibits the execution of a money-decree purchased by one of the joint judgment-debtors, and the provisions of s. 231, Civil Procedure Code, which permits one of several joint decree-holders to take out execution in respect of the entire decretal money, seem to be based upon the principles we have thus enunciated. But it is clear that, in either case, before a liability to pay money can **[34]** be extinguished (if no other form of performance has been accepted as a substitute), full payment must have been made in discharge of the obligation, whether on the one hand such payment is made by one of the joint judgment-debtors, or, on the other hand, such payment is received by one of the joint creditors.

(1) 9 W. R. 230.

(2) N. W. P. H. C. R. (1874) 1.

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We are prepared to hold that, when on account of death a creditor becomes heir to a debtor or a debtor becomes heir to a creditor, and thus the two opposite characters of debtor and creditor become united in the same person, the obligation to pay money may be regarded as extinguished. But this rule, even though applied in its full scope to judgment-creditors and judgment-debtors, falls short of showing that when the debtor inherits the rights of only one of his joint creditors the effect is to extinguish the entire judgment-debt. The rule, no doubt, owes its origin to the *confusio* of the Roman Law. Domat has stated the rule in these terms:—"If the creditor succeeds as heir to him who was surety for his debtor, or the surety succeeds to the creditor, the obligation of the surety is annulled; but the debtor, nevertheless, remains still obliged. For the surety's obligation, which is extinguished by this change, was only necessary to the principal obligation. And if there were more debtors, or more creditors, for one and the same sum, and if one of the debtors should succeed to one of the creditors, or one of the creditors to one of the debtors, the confusion which would be made in the person of the said heir, being limited to one portion of the debt, would make no manner of change with respect to the others."—(Civ. Law, s. 2263).

Applying these principles to the present case, we are of opinion that the effect of the death of Baldeo Prasad was to extinguish only so much of the money-decree as devolved by inheritance upon his sons the judgment-debtors themselves. But so far as the remainder of the decree is concerned, they are as much liable now as they would have been if they had purchased or paid up the proportion of the decree which has devolved upon them by inheritance; and we hold that the decree, to the extent of the balance, is still capable of execution against them. We are supported in this view by two recent precedents of the Calcutta High Court, which, by analogy, are applicable to this case. In the case of *Brojeswari Chowdh-* **[35]** *ranee* v. *Tripoora Soondaree Debi* (1) in which one of two joint decree-holders, admitting that she had realized, out of Court, more than half of the decretal money, did not join in the application for execution, the Court directed execution to issue for the remaining half share of the other decree-holder. Again, in the case of *Bebee Budhun* v. *Hafezah* (2) it was held that no joint decree-holder was competent to obtain satisfaction of the whole joint decree out of Court, and that the other joint decree-holders were entitled to proceed with execution of the decree for the amount of their share, as for the whole decree, after giving credit to the judgment-debtors for a part payment amounting to the share of the joint decree-holders who had already been satisfied.

The views we have expressed on the second point are in no way inconsistent with our opinion on the first point in appeal. We have declared the application for execution to be illegal, because it relates only to the alleged share of the applicants and does not seek execution in respect of the entire unextinguished portion of the decree. There is no provision of law by which the Court, in the course of execution proceedings, can determine the shares of the various joint decree-holders *inter se*, but there can be no such difficulty in ascertaining the extent to which the decree has been extinguished owing to the death of Baldeo Prasad and inheritance from him by the judgment-debtors, who in the execution proceedings are naturally arrayed against all the other sharers in the decree. The application for execution should have been made as

(1) 3 C.L.R. 513. (2) 4 C.L.R. 70.

for the whole decree after crediting the judgment-debtors to the extent of the share in it which has devolved upon them by inheritance and which has thus become extinguished.

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For these reasons we reverse the order of the lower Court and decree the appeal with costs.

Appeal allowed.

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5 A. 36=2 A.W.N. (1882) 145.

5 A. 27=2 A.W.N. (1882) 140=7 Ind. Jur. 374.

[36] REVISIONAL CRIMINAL.

Before Mr. Justice Straight.

EMPRESS OF INDIA v. RADHA KISHAN AND ANOTHER. [5th July, 1882.]

Act XLV of 1860 (*Penal Code*), *ss.* 182, 211—*Prosecution under s.* 182—*Complaint—Rejection with reference to police-report.*

K made a report at police station accusing *R* of a certain offence. The police having reported to the Magistrate having jurisdiction in the matter that in their opinion the offence was not established, the Magistrate ordered the case to be "shelved." *K* then preferred a complaint to the Magistrate again accusing *R* of the offence. The Magistrate rejected the complaint with reference to the police-report. Subsequently *R*, with the sanction of the police authorities, instituted criminal proceedings against *K*, under s. 182 of the Penal Code, in respect of the report which he had made at the police station, and *K* was convicted under that section.

Held that, before proceeding against *K*, the Magistrate should have fully investigated and sifted his complaint for himself, and should not have abrogated the functions imposed on him by law, because the police had reported against the entertainment of the case. The views expressed in *The Government* v. *Karimdad* (1) concurred in.

Held also that *K's* conviction under s. 182 of the Penal Code was illegal as the Magistrate had no power to entertain a complaint under that section at the instance of *R*, the application of s. 182 and the institution of prosecutions under it being limited to the public servant against whom the offence had been committed or to his official superior, as mentioned in s. 467 of Act X of 1872, and it not being intended that those provisions should be enforced at the instance of private persons. Moreover, if *K's* complaint was false, his offence was against *R*, and not against the public servant to whom the complaint was made, and fell within s. 211 of the Penal Code.

Ordered that the complaint made by *K* should be investigated.

[**Overruled**, 8 A. 382 (383); **Diss.**, 13 C. 270 (271); **D.**, 5 Ind. Cas. 991 (992)=11 P. W.R. 1910 (Cr.)]

THIS was a case reported to the High Court for orders under s. 296 of Act X of 1872 by Mr. C. W. P. Watts, Sessions Judge of Agra. It appeared that one Radha Kishan complained at a police station (thanah) that one Rup Ram and one Nand Lal had stolen certain cattle belonging to him out of the shed in which they were kept. The Magistrate before whom the police report of the case came, by an order dated the 29th January 1882, directed that the case should be "shelved," because the report stated that in the opinion of the police the offence of which Radha Kishan accused Rup Ram and Nand Lal was not established. On the 4th February 1882, Radha Kishan preferred a complaint in the matter [37] which came before Pandit Kidar Nath, Magistrate of the first class. In his petition he stated as follows:—"The darogha (head constable)

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(1) 6 C. 496.

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came to the village, and went to the house of the accused: after making an inquiry he arrested them and took them to the thanah, but let them off subsequently and told the petitioner that he would take up the inquiry again. But no inquiry was made, nor were the accused "challaned" in this case: the petitioner heard that some report had been sent up to the Court; and he therefore prays that inquiry may be made in his case."

No proceedings were taken in respect of this complaint, but it was subsequently filed in the case instituted by Rup Ram against Radha Kishan which will be presently mentioned. On the 7th February 1882, Rup Ram applied to the District Superintendent of Police for sanction to prosecute Radha Kishan and one Maya Ram, a chaukidar, who it was alleged had aided and abetted him, for offences under ss. 182 and 211 of the Indian Penal Code; and such sanction was granted. On the 11th February 1882, Rup Ram preferred a complaint to Pandit Kidar Nath accusing Radha Kishan and Maya Ram of offences under ss. 182 and 211 of the Indian Penal Code. On the same day Radha Kishan preferred a second complaint to the same Magistrate in which he accused Rup Ram and Nand Lal of having stolen his cattle, and prayed for an inquiry into the charge. The Magistrate, by an order, dated the 27th February, rejected this complaint on the ground that he could not take any steps in the matter as the case had been shelved on the 29th January 1882, and Rup Ram had obtained sanction to prosecute the complainant. The Magistrate subsequently summarily tried Radha Kishan and Maya Ram for the offence under s. 182 of the Indian Penal Code of which they were accused by Rup Ram, and convicted them of that offence by an order, dated the 11th April 1882. The Sessions Judge, having called for the record of the case, on the application of Radha Kishan and Maya Ram, came to the opinion that the proceedings of the Magistrate were contrary to law for the following reasons:—

"By a ruling of the High Court—*Queen* v. *Hurree Ram* (1)—it is laid down very clearly that s. 182 is an offence against the public [38] servant, not against the person complained of..............the offence which Radha Kishan committed (if his report was false) was one under s. 211, and was against Nand Lal and Rup Ram—not under s. 182: Maya Ram the chaukidar does not seem to have committed any offence at all; for though he went to the thanah with Radha Kishan, he made no report; and it was not till the Police went to the spot that he, Maya Ram, made any statement at all in the matter: there can be no doubt that the appellants have been prejudiced by the trial being held under s. 182, and not under s. 211, for in the latter case a summary trial could not have been held, and the evidence would have had to be recorded at length: moreover, Radha Kishan was never allowed an opportunity of proving that his complaint was true, not false; he gave in a petition praying for this on the 4th February 1882, but it was ultimately "filed" in this very case against himself and Maya Ram, and no inquiry was made: there is a ruling on this very point of the Calcutta High Court (2) in which Garth, C. J., and Field, J., ruled that such opportunity should always be given, if a man claimed it, before he was put on his trial under s. 211, and that he should be allowed to establish his case (if he could) before a Magistrate, and not before the Police...........altogether, I think that the Magistrate has failed to recognize the true legal aspect of the case, and I think that his conviction is contrary to law, and to justice also."

(1) N.W.P.H.C.R. (1871) 194. (2) 6 C. 496.

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OPINION.

STRAIGHT, J.—I am very clearly of opinion that the order of the Magistrate is open to the objections mentioned in the referring letter of the Judge, and that the conviction of Radha Kishan and Maya Ram must be set aside. The Deputy Magistrate should not have shelved the petition of complaint of Radha Kishan, because the Police had not sent the matter up for want of proof, but should have inquired into it himself for the purpose of determining whether process should or should not issue against Nand Lal and Rup Ram. Had Radha Kishan, after the Police had refused to take any action on his petition of 21st January 1882, refrained from adopting any further steps, and so indicated that he had dropped the matter, a prosecution for making a false charge under s. 211 of the Penal Code might with propriety have been instituted. But when by his petition of the 4th, followed by that of the 11th Feb-[39]ruary, he showed his intention to persevere in and proceed with his charges against Nand Lal and Rup Ram, the Magistrate should have fully investigated and sifted the complaint for himself, and should not have abrogated the functions imposed upon him by law, because the Police had reported against the entertainment of the case. The duties of the Police are one thing, those of the Magistrates another, and the latter have no right to allow the former to intrude upon their proper province. I entirely concur in the views expressed by Garth, C.J., and Field, J., in the matter of *Karimdad* (1), a case very similar to the present.

But the Magistrate's procedure in the matter more immediately before me, namely, the charge against Radha Kishan and Maya Ram, is open to the obvious objection, that he had no power to entertain a complaint under s. 182 of the Penal Code at the instance of Rup Ram. The application of s. 182 and the institution of prosecutions for offences under it are in my opinion limited to the public servant against whom the offence has been committed or to his "official superior" as mentioned in s. 467 of the Criminal Procedure Code, and it was not intended that these provisions should be enforced at the instance of private persons. For if the complaint made by Radha Kishan was false, his offence was against Rup Ram and not against the public servant to whom it was made, and his crime fell within s. 211 of the Penal Code. The order of the Magistrate of the 11th April last must be set aside and the sentences passed thereby quashed. It is further ordered, that the Magistrate of Agra do investigate according to law the complaints preferred by Radha Kishan on the 4th and 11th February 1882, and do dispose of them as to him seems fit. If he comes to the conclusion that there is no sufficient ground for proceeding, he will dismiss the complaint, and if he consider it necessary sanction a prosecution of Radha Kishan, and of Maya Ram, if there is any evidence of his having made a charge against Rup Ram, under s. 211 of the Penal Code. Of course such charge must be heard before another Magistrate, who will determine whether there should be a committal to the Sessions or he should convict or acquit. When the matter has been finally closed the records will be forwarded to the Court for examination.

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(1) 6 C. 496.

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5 A. 40=
2 A.W.N.
(1882) 143.

5 A. 40=2 A.W.N. (1882) 143.

[40] REVISIONAL CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

MANOHAR DAS (*Defendant*) *v.* MANZUR ALI (*Plaintiff*).*
[6th July, 1882.]

Lease—Suit by one of several joint lessors for his share of rent—Co-sharer.

One of several joint lessors of certain land sued the lessee for his share of the rent payable under the lease to all the lessors, making the other lessors defendants. *Held* that the suit was not maintainable, and the making of the other lessors defendants did not cure the defect in the suit.

[R., 6 A. 576 (577); 17 Ind. Cas. 488; 68 P.L.R. 1901.]

THE plaintiff in this suit, which was instituted in the Court of Small Causes at Allahabad, claimed his share of the rent of certain land. The plaintiff was one of the representatives in title of one Shahamat Ali and one Imam Bakhsh, who in the year 1823 gave a Mr. Mathews a lease of the land. Mr. Mathews executed in favour of those persons jointly a kabuliyat, agreeing to pay them a certain sum annually as rent for the land. The principal defendant in the suit was Manohar Das, who was a joint owner of the land with the plaintiff, and the representative in title of Mr. Mathews the original lessee of the land. The remaining defendants in the suit, seventeen in number, were also joint owners of the land with the plaintiff and the defendant Manohar Das. The defendant Manohar Das set up as a defence to the suit that one of several joint lessors of land was not competent to sue the tenant for his share of the rent payable by the tenant to the joint lessors. The Court of first instance held that in the present case the plaintiff's suit was maintainable, because his share of the rent could be accurately determined; and proceeding to determine such share, gave the plaintiff a decree for the same.

The defendant Manohar Das applied to the High Court for revision under s. 622 of the Civil Procedure Code of this decree, again contending that the suit was not maintainable, as one of several joint lessors of land was not competent to sue the tenant for his share of the rent payable by the tenant to the joint lessors.

Mr. *Spankie*, for the defendant.

[41] The *Senior Government Pleader* (Lala *Juala Prasad*), for the plaintiff.

JUDGMENT.

The judgment of the Court (BRODHURST, J., and TYRRELL, J.) was delivered by

TYRRELL, J.—The first plea taken by the petitioner must be allowed. The plaintiff had no right to sue the lessee for a portion only of the lump rent payable by the petitioner under one single and entire obligation to all the lessors. The suit was based on the kabuliyat of 1823, under which the predecessors in title of the petitioner entered into this obligation to the predecessors of the plaintiff. It is not proved, and indeed in a suit thus founded it is hard to conceive how evidence of such a matter could

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* Application No. 117 of 1882, for revision under s. 622 of the Civil Procedure Code of a decree of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, dated the 14th January 1882.

have been admitted, that any valid and subsisting agreement was made by which an exact and ascertained amount of the plaintiff's interest in the whole rent payable by the petitioner was exigible separately by the plaintiff from the lessee. Under such circumstances it is obvious that this claim for a share arbitrarily fixed, it would seem, by the plaintiff is not rightly sustainable against the petitioner. It is true that the plaintiff has brought his co-sharers on the record as defendants: but this alone would not cure the defect in the suit as brought. These co-defendants have not appeared in the suit, and the Court was not in a position to come to a safe or satisfactory finding as to the real extent of the plaintiff's interest in the rent, that is to say, of the petitioner's exclusive liability to him, if any such may be taken to have existed. The plaintiff might have sued alone for all the rent, and possibly the petitioner would have made no objection to such a claim. The plaintiff as undoubtedly one of several joint co-lessors could have given a good acquittance to the lessee for all the rent due from him for his non-agricultural holding: but it is clear that a payment of an arbitrarily assumed fraction of the lump rent might have left the lessee still liable to other lessors for a sum greater than the difference between the sum so paid to the plaintiff and the whole rent due on the lease. We allow the first plea, and therefore cancel the decree below with costs.

This finding renders a consideration of the other pleas unnecessary. But we may say that they are none of them sustainable.

Application allowed.

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5 A. 42=2 A.W.N. (1882) 146.

[42] REVISIONAL CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BISHESHAR KUAR AND OTHERS (*Pre-emptors*) v. HARI SINGH AND OTHERS (*Auction-Purchasers*).* [6th and 18th July, 1882.]

High Court's powers of revision—Sale in execntion—Pre-emption—Civil Procedure Code, ss. 310, 311, 622—Locus standi *of pre-emptor in execution proceedings.*

A person claiming to be a co-sharer in certain undivided immoveable property, a share of which had been sold in execution of a decree, objected to the confirmation of the sale in favour of the person recorded as the auction-purchaser, and prayed that it might be confirmed in his favour, with reference to the provisions of s. 310 of the Civil Procedure Code. The Court disallowed the objection and confirmed the sale in favour of the auction-purchaser. The objector thereupon applied to the High Court for revision of the order of the lower Court under s. 622 of the Civil Procedure Code. *Held* that, having been allowed to object to the confirmation of the sale, and treated as a party to the proceeding held therein, it was competent for him to make such application, notwithstanding that he was not one of the persons mentioned in s. 311 of the Code; that there being no appeal in the case, so far as he was concerned, the High Court was competent to entertain the application under s. 622 of the Code; but that, as he was not one of the persons who was competent to avail himself of the provisions of s 311, he had no *locus standi* to justify his application to the lower Court, and the application for revision must therefore be dismissed.

[R., 23 B. 450 (451).]

THIS was was an application for revision under s. 622 of the Civil Procedure Code of an order of the Munsif of Ballia, dated the 1st March 1882,

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* Application No. 44 of 1881, for revision under s. 622 of the Civil Procedure Code of an order of Munshi Kulwant Prasad, Munsif of Ballia, dated the 1st March 1882.

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confirming a sale of immoveable property in execution of a decree. The application was made by Bisheshar Kuar and certain other persons. These persons had objected in the Munsif's Court to the confirmation of the sale on the ground that they, being co-sharers with the judgment-debtor in the property, and having bid as high as Hari Singh and certain other persons to whom the property had been knocked down, had, under s. 310 of the Civil Procedure Code, a preferential right to be declared the purchasers. The Munsif disallowed the objection and confirmed the sale.

Mr. *Conlan*, for the applicants (pre-emptors).

Mr. *Hill* and Lala *Lalta Prasad*, for the auction-purchasers.

Mr. *Hill*, for the auction-purchasers, objected to the application being entertained on the ground (i) that the applicants were not persons mentioned in s. 311 of the Civil Procedure Code who could [43] apply to have a sale set aside, and therefore had no (*locus standi*) in the proceedings in the execution department; and (ii) that, as an appeal is given by s. 588 of the Code of Civil Procedure to decree-holders, judgment-debtors, and auction-purchasers against orders passed under the first paragraph of s. 312, and under s. 313, the provisions of s. 622 were not applicable, because they had reference only to cases in which an appeal did not lie to the High Court.

The Court (STRAIGHT and TYRRELL, JJ.) made the following order in respect of the preliminary objection taken on behalf of the auction-purchasers:—

STRAIGHT, J.—The first of these contentions does not appear to us to have any force. The powers of revision given to us are very wide, and we can of our own motion call for any record under s. 622, if it appears to us desirable so to do. With the merits of the present application we are not for a moment dealing; but this is clear, that though the applicant did not fall within the category of persons mentioned in s. 311 of the Code, he was allowed to file objections to the confirmation of the sale in the execution department, and was treated as a party to the proceeding held therein. So far therefore we think it was competent for him to set this Court in motion to exercise its powers under s. 622. The second point urged by Mr. *Hill* at first sight presents difficulties, for the limitation of the operation of s. 622 to cases in which no appeal lies to the High Court is distinct enough. But in the matter before us neither the decree-holder, the judgment-debtor, nor the auction-purchaser is dissatisfied with the sale, and the only persons therefore who could appeal have not done so. It accordingly comes to this, that *quoad* the applicant the case to be revised is one in which he has no appeal to the High Court, and under these circumstances we think ourselves justified in holding that it is competent for him to apply for revision. In expressing this opinion it must be understood that we in no way determine the question of the *locus standi* of the applicant in the execution proceeding, or any of the other points to be discussed upon the hearing, which will now proceed.

At the further hearing of the application Mr. *Hill* contended that the applicants were not competent to apply, under s. 311 of [44] the Civil Procedure Code, to have the sale set aside, but their remedy, if they had any, was by a regular suit.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—The applicant in our opinion, not being either the decree-holder or a person whose immoveable property had been sold, was

not competent to avail himself of the provisions of s. 311 of the Procedure Code with a view to obtaining an order in the execution department, setting the sale aside on the ground that he, and not the persons recorded by the officer conducting the sale, was the auction-purchaser. Under these circumstances he had no *locus standi* to justify this preferring the application to the Munsif and this petition for revision must be dismissed with costs.

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Application rejected.

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5 A. 44=2 A.W.N. (1882) 154=7 Ind. Jur. 378.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Mahmood.

MAYA RAM AND OTHERS (*Defendants*), *v.* PRAG DAT AND ANOTHER (*Plaintiffs*).* [12th July, 1882.]

Specific performance of contract—Suit for execution of fresh instrument—Act 1 of 1877 (*Specific Relief Act*), ss. 12, 21, 22—*Lost instrument, suit to restore terms of.*

The plaintiffs, alleging that the defendants, having executed in their favour and delivered to them a bond, the consideration for which was money due to them for rent of land and on a former bond, had received it back for registration, and, refusing to register it, had retained it, sued the defendants to have a similar bond executed and registered.

Per MAHMOOD, J.—That it was doubtful whether the suit could be regarded as a suit for specific performance of a contract, and whether the only remedy open to the plaintiffs was not a suit for the money. It was only on the hypothesis that the mere writing of the original bond, in the absence of registration and final delivery, did not amount to a performance of the contract, that the suit was entertainable at all.

That, assuming the suit to be one for specific performance of a contract, the plaintiffs were not entitled to the specific relief which they sought, since they could obtain their full remedy by suing for the money in respect of which the [45] fresh bond was sought to be executed; and they had failed to prove the exact terms of the original bond.

Observations on the nature of the evidence required to prove a contract of which specific performance is sought.

Per STUART, C.J.—That the suit was bad in form and substance, and there was no ground for the remedy by specific performance of a contract. If the alleged bond were in existence, a suit simply and directly for the recovery of the money claimed by the plaintiffs would have sufficed, for in such a suit facts relating to the loss or concealment of the bond might have been proved, and under the circumstances secondary evidence at least of the terms of the bond might have been admissible, or the plaintiffs might have found themselves in a position to make out their claim by other evidence; but if the plaintiffs considered it material to their case to have their claim on the bond, the loss or destruction of which could not be doubted, their proper course of proceeding was by a suit to restore the terms of the lost bond, or as it was said in Courts of Equity in England, by a suit to obtain the benefit of the lost deed or instrument, and that, if the suit could be taken to be one affording such a remedy, it contained no sufficient materials to warrant it being held that the bond was of the tenor and in the terms alleged by the plaintiffs.

THE facts of this case are sufficiently stated for the purposes of this report in this judgment of Mahmood, J.

Munshi *Hanuman Prasad* and Babu *Sital Prosad*, for the appellants.

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* Second Appeal, No. 177 of 1882, from a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 10th January 1882, affirming a decree of Moulvi Abdul Bait, Munsif of Chibramau, dated the 17th September 1881.

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Pundit *Bishambhar Nath* and Babu *Jogindro Nath Chaudhri*, for the respondents.

The Court (STUART, C.J., and MAHMOOD, J.) delivered the following judgments :—

JUDGMENTS.

MAHMOOD, J.—The plaintiffs in this case are the usufructuary mortgagees in possession of the zamindari rights of the defendants, mortgagors. They further state themselves to be the obligees of an hypothecation-bond, dated the 21st October 1878, executed by Maya Ram, defendant No. 1, and Shami Sahai, defendant No. 2. Ram Bhajan, defendant No. 3, is the own brother of the first two defendants, and is alleged by the plaintiffs to be joint with his brothers and living in commensality with them. The plaintiffs came into Court on the allegation that the usufructuary mortgage held by them included the sir-lands of the defendants; that notwithstanding the mortgage the plaintiffs allowed the defendants to cultivate twenty-two fields out of such lands as tenants at a rental of Rs. 180 per annum; that in respect of the year 1288 fasli they paid [46] only Rs. 35, leaving a balance of Rs. 145 still due; that besides this item a sum of Rs. 294 was due by them on the bond of the 21st Octobter 1878; that in May, 1881, the plaintiffs demanded the payment of the bond-debt and of the balance of the rent; that thereupon the defendants promised to pay Rs. 67 in cash out of the money due on the bond, and to execute a deed in respect of Rs. 372-8-0 the balance of the total money due to the plaintiffs; that accordingly on the 19th June 1881, the defendants executed a deed for the sum of Rs. 372-8-0, whereby they hypothecated their equity of redemption in the property already held in usufructuary mortgage by the plaintiffs, promising to repay the loan at the end of a year, together with interest at fourteen annas per cent. per mensem; that having signed the bond they delivered it to the plaintiffs promising to get the deed registered, and to pay the remaining Rs. 67 to the plaintiffs at the time of registration; that on the 1st July 1881, the defendants, having taken the deed from the plaintiffs, presented it for registration, but at the instigation of some persons took it back from the registration clerk, and declining to register it, took it home with them, and never paid the Rs. 67 cash agreed to be paid by them at the registration. On these allegations the plaintiffs pray for specific relief, (i) to have an hypothecation-bond executed by the defendants, and (ii) to have the deed so executed duly registered.

Two separate defences were set up by the defendants, but it is necessary to notice only the main pleas. Maya Ram, defendant No. 1, and Shami Sahai, defendant No. 2, pleaded that the sir-lands were not included in the usufructuary mortgage held by the plaintiffs; that the defendants were still in possession; that they had never agreed to pay Rs. 180 as rent; that the proper rental of the land was only Rs. 44-7-0, which they had duly paid to the plaintiffs in respect of the year 1288 fasli; that only Rs. 225 were due on the bond of the 21st October 1878; that a bond for the sum of Rs. 400 had been executed by them in favour of the plaintiffs payable at the end of four years at twelve annas per cent. per mensem interest; that the consideration of the bond included the Rs. 225 due on the bond of the 21st October 1878, and the balance of Rs. 175 was promised to be paid in cash to the defendants by the plaintiffs, who, however, never paid the sum, and a dispute having [47] ensued in consequence, the bond was never presented for registration, and the defendants tore up the

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bond as useless. They further alleged that the bond really executed was dated the 6th July 1881, and not 19th June 1881, as stated by the plaintiffs; that it was written at a different place and in the presence of different witnesses to those stated by the plaintiffs. Ram Bhajan, defendant No. 3, pleaded that he was not bound by the usufructuary mortgage held by the plaintiffs; that no rent was ever due by him; that he was no party either to the bond of the 21st October 1878, or to the hypothecation-deed alleged by the plaintiffs to have been executed in their favour in June 1881; and that he was therefore in no way liable to the claim.

The Munsif, without going into the merits of the allegations in regard to the matters precedent to the alleged deed, found, on the oral evidence before him, that the allegations of the plaintiffs in regard to the terms of the bond, so far as such terms related to the amount, the rate of interest, the period after which the money was to be payable, the items of which the total amount of the consideration was made up, were proved. He also found that the defendant Ram Bhajan was one of the executants of the bond; that the pleas set up by the defendants were not proved; and that the defendants had failed to establish that they had destroyed the bond. There is, however, no finding in the judgment of the Munsif as to whether the hypothecation of land constituted one of the terms of the bond; but he decreed the whole claim, and his decree directs the defendants to execute an hypothecation-deed in the terms alleged by the plaintiffs. The lower appellate Court has upheld the findings of the Court of First Instance in regard to the alleged terms of the hypothecation deed, and has expressed its opinion that the suit was a fit one for granting specific relief, as it was not possible that the plaintiffs could obtain, as an alternative, adequate compensation in money; that the defendants having executed the deed "with their eyes open and full knowledge of its contents," it could not be said that they would "suffer a hardship they did not foresee." The lower appellate Court also held that Ram Bhajan was a party and a competent party to the bond; and confirmed the decree of the Court of First Instance.

[48] The present second appeal has been preferred by the defendants, and the contention of the parties in this Court raises the following main questions for determination:—

(i) Whether the present case is one in which compensation in money would not be an adequate relief?

(ii) Whether on the facts as proved by the evidence relied upon by the plaintiffs and accepted by the lower Courts, the terms of the alleged contract can be found with reasonable certainty?

There are also other pleas urged by the learned pleader for the appellants in the grounds of appeal, but it is not necessary to consider them.

It appears to me to be very doubtful, whether a suit of this nature can be regarded as a suit for specific performance at all, and whether, according to the plaintiffs' own showing, the only remedy open to them was not a suit for recovery of money. It is only on the hypothesis that the mere writing of the alleged deed, in the absence of registration and final delivery of the deed to the plaintiffs, did not amount to a performance of the contract, that this suit is entertainable to all; but even taking the most favourable view of the suit, I am of opinion that plaintiffs are not entitled, under the circumstances of this case, to the specific relief which they seek.

In considering suits for specific relief the most important rule to be borne in mind is that "the jurisdiction to decree specific performance is

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discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so." This rule has been enunciated by the Legislature in s. 22 of the Specific Relief Act (I of 1877) in the clearest terms. The section goes on to lay down that "the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles, and capable of correction by a Court of Appeal." The question before us therefore is whether the lower Courts, in decreeing specific relief in the present case, have exercised the discretion in a sound and reasonable manner, consistent with the principles of equity applicable to such cases.

On both the main points raised by this appeal, I am of opinion that the present case is one in which no specific relief should have [49] been granted. From the facts of the case as stated by the plaintiffs themselves, the case is one in which a pecuniary compensation would be an adequate relief. The learned pleader for the respondents has called our attention to the terms of the *Explanation* to s. 12 of the Specific Relief Act, which lays down that "unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money;" and he contends that the contract sought to be specifically enforced in the present case, being one of this nature, the lower Courts were right in decreeing specific relief. But in the first place the alleged contract is not satisfactorily proved to have been one for transfer of immoveable property; and in the second place it seems to me to be clear that in the present case the nature of the plaintiffs' allegations show that they could have obtained their full remedy by suing for the money in respect of which the alleged hypothecation-bond is sought to be executed. The consideration of that bond is said to consist of the sums due on the hypothecation-bond of the 21st October 1878, and the money due as rent for the lands said to be held by the defendants as tenants of the plaintiffs. The former of these items is recoverable by a suit in the Civil Court, and the latter by a suit in the Revenue Court; and if this can be done by the ordinary procedure of law, the lower Courts were wrong in holding that the plaintiffs could not obtain adequate relief without a decree for specific relief. It is true that the plaintiffs would lose such benefits as they might have derived by obtaining a fresh bond; but Courts of Equity will not allow a creditor to obtain any advantages which go beyond the repayment to him of the money which the debtor owes. Moreover, in the present case the plaintiffs already possess the security of the hypothecation-bond of the 21st October 1878, the sum due whereon according to the plaintiffs' own allegation amounts to Rs. 294. On the other hand, the question relating to the amount of the rent is one which the Civil Court cannot enter into, and which can best be disposed of by the Revenue Court.

In regard to the second point in appeal I am of opinion that the evidence produced in this case is not adequate to prove the exact terms of the deed, the execution of which is sought to be enforced [50] by this suit. In this case no draft of the alleged deed has been produced, and the only evidence of its terms consists of the oral testimony of witnesses, one of whom is said to have written out the deed and the others are marginal witnesses. There is also the evidence of the patwari and of the registration clerk. But the evidence of these witnesses falls far short of supplying information accurate enough to justify a Court of Equity in directing the defendants to execute a bond in accordance with those terms. "The specific execution of a contract in equity is a

matter, not of absolute right in the party, but of sound discretion in the Court: hence, it requires a much less strength of case on the part of the defendant to resist a bill to perform a contract, than it does on the part of the plaintiff to maintain a bill to enforce a specific performance."—Story's Eq. Jur., s. 769. Again the rule of equity in regard to evidence in cases of this kind is very stringent. Wherever the evidence in regard to the contents of a deed lost or destroyed consists only of oral testimony, and such testimony is not absolutely trustworthy, precise, and certain, Courts of Equity will decline to enforce the execution of a deed on the basis of such evidence. "There is a manifest policy in requiring all contracts of an important nature to be reduced to writing, since otherwise, from the imperfection of memory, and the honest mistake of witnesses, it must often happen, either that the specific contract is incapable of exact proof, or that it is unintentionally varied from its precise original terms: so sensible were Courts of Equity of these mischiefs that they constantly refused to decree a specific performance of parol contracts, unless confessed by the party in his answer, or they were in part performed."—Story's Eq. Jur., s. 753.

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Applying these principles to the present case, I find that one of the most important of the conditions of the alleged bond is not satisfactorily established. The plaintiff's case was that the bond which the defendants had written out and intended to deliver them after registration was not a simple bond, but a deed whereby the defendants hypothecated their equity of redemption in the zamindari rights already held by the plaintiffs under a usufructuary mortgage. In regard to this point, which is the most important in the case, the evidence is so meagre, vague, and unsatisfactory that [51] neither of the lower Courts has found that the nature of the alleged bond was hypothecation.

Under these circumstances the case in my opinion, even if the suit is regarded as one for specific performance, falls under cl. (*a*) and cl. (*c*) of s. 21 of the Specific Relief Act, and both the lower Courts have therefore erred in decreeing the claim for specific relief.

I would reverse the decrees of both the lower Courts and decree this appeal with costs.

STUART, C. J.—Both the lower Courts have misapprehended the nature of this case and the present appeal to this Court must be allowed. On the facts alleged by the plaintiffs the suit is bad in form and substance. There is no ground whatever for the remedy by specific performance of a contract. The sections of the Specific Relief Act, 1877, referred to at the hearing, such as ss. 12 and 21, all presuppose and assume the existence of a contract or deed, the terms of which are before the Court, and there would have been ground for the relief provided by the Act if the facts had shown a mere agreement or contract for the subsequent execution and delivery to the plaintiff of a bond with hypothecation of the equity of redemption as set out in the plaint. But here a bond of the kind alleged was undoubtedly executed by the defendants. That fact distinctly appears from the judgment of both the lower Courts, the plaintiffs suggesting that it was wilfully withheld by the defendants, while the defendants' statement is to the effect that the bond was for a different consideration than that alleged by the plaintiffs, and that they did not get the bond registered, but had it torn up in consequence of the plaintiffs' failure to carry out the transaction which had been agreed upon. Both the lower Courts appear to doubt the truth of, if not to disbelieve, this last allegation, and to assume that the bond is still in existence in the custody and

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under the control of the defendants and wilfully withheld by them. Now if that be so, a suit simply and directly for the recovery of the money claimed by the plaintiffs would have sufficed, for in such a suit facts relating to the loss or concealment of the bond might have been proved, and under the circumstances secondary evidence at least of the terms of the bond might have been admissible, or the plaintiffs might have found themselves [52] in a position to make out their claim by other evidence. But if the plaintiffs considered it material to their case to have their claim on the bond, the loss or destruction of which could not be doubted, their proper course of proceeding would have been by a suit to restore the terms of the lost bond, or, as it is said in Courts of Equity in England, by a suit to obtain the benefit of the lost deed or writing. The same proceeding is allowed in Scotland by what is called an action for "proving the tenor" of the lost deed or instrument; and there cannot be a doubt that such a suit might be instituted here, otherwise parties in the position of the present plaintiffs, and who are aggrieved by the loss or destruction of a document material to the assertion of their rights, would be without any adequate remedy. In the present case if the suit as brought could be taken, as I consider it could not, to be one affording such a remedy, it is perfectly clear to me that it contains within it no sufficient materials for such a purpose, that is, to warrant us in holding that the bond was of the tenor and in the terms alleged by the plaintiffs, while the inconsistency of the lower Courts in ordering the execution of a bond, which, according to their own showing, had already been executed, is not a little remarkable.

There is no reason to doubt the actual execution of the bond; and its terms, if these be material, could be ascertained in a suit simply for recovery of the debt, in which suit secondary evidence of the contents of the bond might be adduced; or by another suit, if the facts allowed of such a suit, in the form which I have explained, *viz.*, for the restoration of the terms and tenor of the bond and any consequent accounting between the parties which might be necessary.

In any case the judgments in appeal before us cannot stand, as they proceed on wholly inadequate grounds in substance, and in a suit the form of which does not apply to the facts.

These appear to me to be sufficient reasons for disposing of this case by allowing the present appeal with costs to the defendants-appellants in all the Courts.

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5 A. 53 = 2 A.W.N. (1882), 151.

[53] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

RAMPHAL RAI AND OTHERS (*Decree-holders*) *v.* RAM BARAN RAI (*Judgment-debtors*).* [17th July, 1882.]

Execution of decree—Refusal to execute decree on equitable grounds—The Court executing a decree not competent to go behind it.

The holders of a decree, made in 1866, against *K* and certain other persons jointly, applied to recover mesne profits in execution thereof. *K* paid the decree-holders the mesne profits claimed, and then sued his co-judgment-debtors for

* Second Appeal No. 21 of 1882, from an order of R. J. Leeds, Esq., Judge of Gorakhpur, dated the 9th January, 1882, affirming an order of Sayyid Munir-ud-din, Munsif of Deoria, dated the 12th August, 1881.

contribution, and in 1878 obtained a decree against them. Subsequently the holders of the decree of 1866 again applied to recover mesne profits in execution thereof, and in the proceedings which followed it was decided that mesne profits were not recoverable under the decree. After this *K's* representatives applied for execution of the decree of 1878. The lower Courts refused to execute the decree on the ground that, as under the decree of 1866, on which the decree of 1878 was based, mesne profits were not recoverable, it would not be equitable to allow a decree for contribution passed on a contrary supposition to be executed. *Held* that the lower Courts were not competent to go behind the decree of 1878, but must deal with it as it stood.

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[R., 24 C.L.J. 375 (378).]

THE facts of this appeal were as follows :—On the 14th April 1866, one Deoki Rai and certain other persons obtained a certain decree against one Kesri Rai and certain other persons jointly. The holders of this decree applied to recover certain mesne profits in execution thereof. Kesri paid them the amount which was claimed under this application. He then sued his co-judgment-debtors for contribution, and on the 11th September, 1878, obtained a decree against them for their share of the amount which he had paid to the holders of the decree of the 14th April 1866. Subsequently the holders of the decree of the 14th April 1866, again sought to recover from the judgment-debtors under that decree mesne profits in execution thereof. It was finally decided by the High Court in the execution-proceedings which followed this application that mesne profits were not payable under that decree. The representatives of Kesri Rai, who were the appellants in the present appeal, after this decision of the High Court had been passed, made an application for execution of the decree of the 11th September 1878. Both the lower Courts held that, inasmuch as mesne profits were not lawfully payable under the decree of the 14th April 1866, the appellants' decree, which was one for contribution [54] in respect of mesne profits paid under the former decree, ought not in equity to be executed, and refused to execute it. The lower appellate Court observed as follows on the point :—"I think the lower Court was fully justified in refusing to execute the appellants' decree: the legal maxim—*cessante ratione legis, cessat ipsa lex*—is clearly applicable to this case; and the High Court having détermined that the decree on which the appellants' claim is based did not allow mesne profits, they cannot in equity be permitted to execute a decree for contribution which was given on a contrary supposition."

The appellants contended that their decree of the 11th September 1878, ought to be executed as it stood, and execution of it had been improperly refused.

Lala *Lalta Prasad*, for the appellants.

Munshi *Kashi Prasad*, for the respondent.

The Court (STRAIGHT, J. and MAHMOOD, J.) delivered the following judgment :

JUDGMENT.

STRAIGHT, J.—We do not think it was competent for the Courts below to refuse execution of the decree. They had no power to go behind it for the purpose of entertaining certain equitable considerations, which appeared to render further enforcement of it unfair or improper. There was the decree declaring the decree-holder entitled to recover so much money from the judgment-debtor, and with that and that alone the Court had to deal. Whether or not the decree of 1866 covered mesne profits or the payments made by Kesri were right or wrong are not matters to be

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considered in execution, and the maxim mentioned by the Judge has no application. The course adopted by the lower Courts virtually reopened the suit of 1878, and they allowed themselves to be influenced by matters which would have been good material for a defence in that suit, but which were not urged by the defendants as an answer to the plaintiff's claim.

The appeal must be decreed with costs as against Rambaran Rai, respondent, and so far as the application the subject of this appeal is concerned, execution must proceed against him alone.

Appeal allowed.

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5 A. 55=2 A.W.N. (1882), 152.

[55] APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

SOMKALI (*Plaintiff*) *v.* BHAIRO (*Defendant*).* [17th July, 1882.]

Declaratory decree—Consequential relief—Act I of 1877 (*Specific Relief Act*), s. 42.

S sued *B* in a Court of Small Causes for arrears of ground-rent of a house. The latter denied *S*'s proprietary right to the land and his liability to pay ground-rent, and *S*'s suit was in consequence dismissed. Thereupon *S* sued *B* in the Civil Court for a declaration of proprietary right to the land and of his right to receive ground-rent.

Held, that the suit was not barred by the proviso to s. 42 of the Specific Relief Act because it did not include a claim for arrears of ground-rent; and that the suit was one in which the specific relief claimed might properly be granted.

The principle laid down in *Sadut Ali Khan* v. *Khajeh Abdool Gunnee* (1), applied.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Mahmood, J.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

Munshi *Kashi Prasad*, for the respondent.

The Court (BRODHURST, J., and MAHMOOD, J.) delivered the following judgments :—

JUDGMENTS.

MAHMOOD, J.—The plaintiff came into Court on the allegation that the land in suit was the property of Manki, who executed a will in favour of the plaintiff on the 12th June, 1879, bequeathing all her property to the plaintiff; that the testatrix placed the plaintiff in possession of all her property before her death, which occurred on the 16th June, 1879; that 1½ biswas of land formed part of the property of Manki and devolved upon the plaintiff under the above-mentioned will; that the land was occupied by the house of the defendant, whose wife Anandi had executed a kabuliyat, dated Aghan Sudi 15th, Sambat 1905, whereunder she paid Rs. 7-0-0 per annum as ground-rent to the plaintiff; that upon her death the defendant continued in possession of the house as heir to his wife, and was consequently liable to the payment of ground-rent; that on the 18th September,

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* Second Appeal No. 1502 of 1881, from a decree of G. E. Knox, Esq., Judge of Benares, dated the 16th September, 1881, affirming a decree of Baboo Mritonjoy Mukarji, Munsif of Benares, dated the 2nd August, 1881.

(1) 19 W.R. 171.

1880, the plaintiff instituted a suit in the [56] Small Cause Court for recovery of Rs. 21, ground-rent, from the defendant; that in that suit the defendant denied the proprietary right of the plaintiff in respect of the land and his liability to pay ground-rent; and that the suit was in consequence dismissed on the 24th December 1880. On these allegations the plaintiff prayed for a decree establishing her proprietary right in respect of the land, and for a declaration of her right to receive Rs. 7 per annum from the defendant as *parjote* or ground-rent in respect of the land occupied by the defendant's house. The defendant resisted the suit by a total denial of the plaintiff's right to the land, and set up various other pleas which need not be noticed. The Court of First Instance held that the real object of the suit was not to obtain a declaration of the plaintiff's proprietary right to the land, but a declaration that she was entitled to recover rent for it at the rate of Rs. 7 per annum, so that her suit for recovery of ground-rent might not in future be liable to dismissal by the Small Cause Court on the defendant's pleading the plaintiff's want of right; that the plaintiff could obtain her full remedy in the Court of Small Causes which was bound to give her a decree for rent, if it found her entitled to recover it; and that it was therefore "not in consonance with judicial and equitable principles to grant her the declaratory decree asked for in the suit." The Court further held that the proviso to s. 42 of the Specific Relief Act barred the suit, as it did not include a claim for arrears of rent due to the plaintiff from the defendant. On these grounds the Munsif dismissed the suit without going into the merits.

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The lower appellate Court has upheld the Munsif's decree, being of opinion that, because it was in the plaintiff's power to have sued for recovery of past arrears of rent along with the claim for a declaratory decree in respect of the land, and the suit did not include a claim for further relief, it was therefore barred by the proviso to s. 42 of the Specific Relief Act.

I am of opinion that both the lower Courts have taken an erroneous view of the case, and have placed a wrong construction on the proviso to s. 42 of the Specific Relief Act. In the first place, the Munsif totally misunderstood the express prayer in the plaint, which distinctly sought to obtain a declaration of proprietary right [57] in respect of the land, and was not confined to a mere declaration of the plaintiff's right to recover ground-rent at the rate of Rs. 7. The proprietary right to the land itself was therefore included in the subject-matter of the suit; and having regard to the express language of the plaint, it is difficult to conceive how the Munsif arrived at the conclusion that "the real object of the suit was not to obtain a declaration of the plaintiff's proprietary right to the land." Such being the case, both the lower Courts have erred in holding that the suit was one in which the plaintiff had omitted to sue for consequential relief in respect of the same cause of action. In a suit of this nature the only consequential relief could have been recovery of possession of the land, a relief to which the plaintiff is admittedly not entitled, as, although she claims the declaration of proprietary right to the land, her whole case is that that proprietary right does not entitle her to oust the defendant, but only to recover ground-rent from him. It was therefore not in her power to claim "further relief" in this suit beyond a mere declaration of proprietary right in respect of the land, a right which according to her case entitled her to claim Rs. 7 per annum as ground-rent from the defendant. It is true that she does not claim recovery of arrears of rent in this suit,

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but that circumstance alone is not sufficient to make her claim less complete, so far as her declaratory suit is concerned. The claim for arrears of rent, though dependent upon proprietary title, is in itself a separate claim, which may or may not be joined with a suit to obtain a declaration of title to immoveable property, and like mesne profits the arrears of rent may form the subject of a separate suit. Indeed, it is only of the express provisions of the Civil Procedure Code, s. 44, *Rule a*, *Exception* (*a*), that a plaintiff has the option of joining claims in respect of mesne profits or for arrears of rent with a suit relating to immoveable property; but his claim is none the less complete if he omits to join such claims with a suit relating to immoveable property. Moreover, in the present case there was sufficient reason for the plaintiff for not joining the claim for arrears of rent with the present suit. A claim for recovery of arrears of rent was cognizable by the Small Cause Court of Benares, and the plaintiff was at liberty to seek that relief by a suit in that Court. On the other hand, she is entitled, if so advised, to relinquish her claim for ar-[58]rears of rent altogether, and her suit for a declaration of right cannot fall by reason of such relinquishment. The suit therefore did not fall under the prohibitory proviso to s. 42, Specific Relief Act.

But the question remains to be determined whether the present case is one in which the Court would be justified in granting specific relief.

Section 42 of the Specific Relief Act lays down that "any person entitled to any legal character or to any right as to any property may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief." Now, in the present case the defendant not only denies the plaintiff's right, but his denial has actually prevented the plaintiff from obtaining her relief in the Court of Small Causes in which the suit for recovery of arrears of rent was formerly instituted. The Munsif has held that the Court of Small Causes was bound to decide the plaintiff's suit for arrears of rent on its own merits, and that that Court had erred in declining to entertain that suit because the plaintiff's right to the land was denied by the defendant. Be it as it may, the fact remains that the position taken up by the defendant has prevented the plaintiff from obtaining relief in a Court which, but for defendant's denial of the plaintiff's right, would have adjudicated upon her claim for arrears of rent. Moreover, it is quite clear that the decision of the Small Cause Court could in no case constitute a final adjudication in regard to the proprietary right to the land, so as to bind the parties, and finally settle the dispute between them. In the case of *Sadut Ali Khan* v. *Khajeh Abdool Gunnee* (1) the Lords of the Privy Council held that the Court had exercised a sound discretion in entertaining a suit for a declaratory decree where a zemindar, who in a suit for enhancement had had his zemindari right denied, came into Court to have that right ascertained and declared. In laying down this rule their Lordships observed :—"It must be assumed that there must be cases in which a merely declaratory decree may be made without granting any consequential relief, or in which the party does not actually seek for conse-[59]quential relief in the particular suit; otherwise the 15th section of the Code of Civil Procedure (Act VIII of 1859) would have no operation at all. What their Lordships understand to have been decided in India on this article of the Code, and

(1) 19 W.R. 171.

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in the Court of Chancery upon the analogous provision of the English Statute, is that the Court must see that the declaration of right may be the foundation of relief to be got somewhere. And their Lordships are of opinion that that condition is sufficiently answered in the present case, even if it be assumed that no other consequential relief was in the mind of the party, or was sought by him, than the right to try his claim to enhance in the other *forum* in which he is now compelled by statute to bring an enhancement suit. It was a necessary preliminary to such a suit that he should establish his right to a share in the zemindari title."

This principle, in my judgment, is fully applicable to the present case. A final adjudication by a Court of competent jurisdiction is the only means which can preclude the defendant from harassing the plaintiff in the Small Cause Court, by resisting her claims for arrears of rent, on the ground that she has no proprietary title to the land and no right to receive ground-rent from him. The nature of the suit was therefore a fit one for granting a declaratory decree, and the lower Courts ought to have tried the case on the merits.

I would decree this appeal, and setting aside the decrees of both the lower Courts, remand the case to the Court of first instance under s. 562, Civil Procedure Code, for trial on the merits. Costs to abide the result.

BRODHURST, J.—I concur in decreeing the appeal and in remanding the case under s. 562 for disposal on the merits.

Cause remanded.

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5 A. 60=2 A.W.N. (1882) 164.

[60] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

TULA RAM AND ANOTHER (*Plaintiffs*) *v.* HARJIWAN DAS AND OTHERS (*Defendants*).* [21st July, 1882.]

Civil Procedure Code, s. 24—Place of suing.

Section 24 of the Civil Procedure Code does not empower a High Court to transfer a suit instituted within its own jurisdiction to the jurisdiction of another High Court, but only to declare in which Court a suit shall proceed, and, if necessary, to stay all further proceedings within its own jurisdiction.

The defendants in a suit instituted at Mainpuri, who resided and carried on business at Surat, applied under s. 24 of the Civil Procedure Code that the suit might be tried at Surat, on the ground that it would be tried with greater convenience to them at that place. *Held*, that there being no balance in favour of either justice or convenience on the side of the Surat Court, the suit should proceed at Mainpuri.

[**F.**, 5 Ind. Cas. 588 (589); **Appr.**, 8 Ind. Cas. 449 (450); **R.**, 27 M.L.J. 645; 14 A.L.J. 242; 27 Ind. Cas. 455 (458).]

THE defendants in a suit instituted in the Court of the Subordinate Judge of Mainpuri applied to the Subordinate Judge, under s. 24 of the Civil Procedure Code, to have the suit tried at Surat in the Presidency of Bombay, the application being dated the 8th May 1882. The Subordinate Judge, under the provisions of the same section, submitted the application through the District Court to the High Court. The facts which led to

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* Reference No. 165 of 1881.

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the application are sufficiently stated for the purposes of this report in the order of the High Court.

Babu *Jogindro Nath Chaudhri*, for the plaintiffs.

Pandit *Ajudhia Nath*, for the defendants.

ORDER.

The order of the Court (STRAIGHT, J., and MAHMOOD, J.) was delivered by

STRAIGHT, J.—We think that the application filed in the Court of the Subordinate Judge of Mainpuri on the 8th May last, and submitted by him to us through the District Court, must be regarded as preferred under s. 24 of the Procedure Code. Indeed, the petition itself says so in terms, and the remarks of the Subordinate Judge which accompany it are not very intelligible.

The applicants, who reside and carry on their business at Surat in the Presidency of Bombay, are the defendants in a suit insti-[61]tuted by the plaintiffs, opposite parties, in the Court of the Subordinate Judge of Mainpuri on the 18th November 1881. The plaintiffs are proprietors of a firm at Etawah known as Tula Ram, Jiwa Lal, and by their plaint they allege that they remitted to the defendants at Surat goods for them to dispose of as agents for and on behalf of the plaintiffs; that accounts were rendered from time to time, and moneys remitted by the defendants, who charged a commission on the sales they effected; and that a balance of Rs. 3,079-1-6 still remains due from the defendants to the plaintiffs.

The defendants deny that the goods were sent to them direct; on the contrary, they assert that they were consigned to a servant of the plaintiffs, one Gaya Din, who resided at Surat, and by him handed to the defendants; that all payments were made to Gaya Din; and that no balance remains due. They accordingly contend that no cause of action has accrued to the plaintiffs within the jurisdiction of the Subordinate Judge of Mainpuri, and that the cause can with greater convenience to them be tried at Surat.

The language of s. 24 of the Procedure Code seems to us far from clear, and it is not very easy to see what the precise power is that it confers upon the High Courts. Sections 22 and 23 which precede it are plain enough, for they in precise and specific terms make use of the words "apply to transfer;" but it will be noted that in s. 24 the expressions are "to apply to the High Court" and "apply accordingly," and no mention is made of what the application is to be for. Under Act VIII of 1859, s. 13, provision was made for suits for immoveable property situate in districts subordinate to different Sadr Courts, and it was enacted that the Sadr Court in whose district the suit had been brought might, with the *concurrence* of the other Sadr Court, give authority to proceed with the same. But in the present Code the High Court is to "determine in which of the several Courts having jurisdiction the suit shall proceed." By the context of ss. 22 and 23 and the omission of the word "transfer," we can only construe s. 24 as intending something short of transfer, and cannot interpret it as empowering us to remove a cause from our own jurisdiction to that of another [62] High Court. Placing the most reasonable construction we can upon s. 24, we think it authorises us to declare in which Court a suit shall proceed, and if necessary to stay all further proceedings within our own jurisdiction and that of the Courts subordinate to us. We are not prepared to go the length of holding that it gives us the power to intrude orders of our Court into the

jurisdiction of the other High Courts. Such being the view we take of s. 24, we next have to see whether the defendants, applicants, have made out a case to justify us in closing the doors of the Court of the Subordinate Judge of Mainpuri, to the plaintiffs, and leaving them to seek their remedy in another jurisdiction. We do not think that they have, or that any sufficient cause has been shown for depriving the plaintiffs of the right given them by law to select in which of the Courts they will carry on their suit. We see no balance in favour either of greater justice or convenience on the side of the Surat Court, and we accordingly determine that the suit shall proceed in the Court of the Subordinate Judge of Mainpuri. We must, however, not be understood to have disposed of the plea of want of jurisdiction raised by the defendants as to the place where the cause of action accrued. The decision of the plea in this case depends upon a question of fact, and must be disposed of on its own merits by the Subordinate Judge. The costs of this application will be costs in the cause.

Order accordingly.

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5 A. 62=2 A.W.N. (1882) 165.

REVISIONAL CRIMINAL.

Before Mr. Justice Tyrrell.

EMPRESS OF INDIA *v.* JUALA PRASAD. [29th July, 1882.]

Act X of 1872 (*Criminal Procedure Code*), *s.* 471—*Preliminary inquiry.*

An order made under s. 471 of Act X of 1872 sending a case for inquiry to a Magistrate is not necessarily bad because the Court did not make a preliminary inquiry before making such order. The law requires only such preliminary inquiry "as may be necessary."

Held, therefore, where a Munsif, being of opinion that both the parties to a suit tried by him had given false evidence therein on certain points, sent the case for inquiry to the Magistrate under s. 471 of Act X of 1872, with a proceeding embodying the facts of the case, and charging the parties respectively with giving false evidence on such points, and there was nothing to show that any inquiry that the Munsif [63] could have made was necessary or would have put the Magistrate into a better position for dealing with the case than he was in, that the Munsif's proceedings were not bad because he did not hold a preliminary inquiry.

THIS was a case reported to the High Court for orders, under s. 296 of Act X of 1872, by Mr. H.F. Evans, Sessions Judge of Bareilly. The facts of the case, and the reasons of the Sessions Judge for thinking that the order made therein was contrary to law, appear from his referring letter, which was in the following terms:—

"It has been brought to the notice of this Court that Juala Prasad and Wilayat Husain, the parties in a civil suit, were directed by the Munsif of the City Munsifi to be placed on their trial before the Criminal Court. The order directing this trial is to be found in the concluding words of the judgment of the Munsif in the case of Juala Prasad against Wilayat Husain dated the 16th January 1882, which are to the following effect: 'As in the opinion of the Court both the parties have been guilty of giving or producing false evidence, I direct that they be placed on trial before the Criminal Court.' No other separate order was passed, but a copy of this extract from the Munsif's judgment was sent to the Magistrate with a proceeding embodying the facts of the case. This order

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was presumably passed under s. 471 of the Code of Criminal Procedure; but the procedure prescribed by that section was not observed. No preliminary inquiry was made. The Munsif acted on the evidence that had come before him in the course of the civil suit in which the parties are stated to have given or produced false evidence.

"Juala Prasad had in the opinion of the Munsif falsely denied that a certain receipt was written by him; while Wilayat Husain had falsely declared that another receipt was written by Juala Prasad.

"On appeal before the Judge the finding of the Munsif was upheld as regards the genuineness of the former receipt, but it was reversed as regards the fabrication of the latter receipt. The question is whether the words 'as may be necessary' would justify the Munsif in sending the case for inquiry to the Magistrate without any preliminary inquiry, and simply on the strength of [64] the opinion at which he had arrived in the course of the civil suit.

"With reference to this course of action on the part of the Munsif, the attention of the Court has been called to the order of the Calcutta High Court in *The Queen* v. *Baijoo Lall* (1).

"Although there is not in this case the defect of vagueness in the Munsif's order, which specifies the exact offence he believed the parties to have been guilty of, yet I am of opinion that he did not sufficiently consider the nature of the evidence before him. Although he may have had reason to doubt the statements of the parties, and the evidence adduced by them to support it, yet I think that, if he had made a preliminary inquiry into each case separately, he would have seen that there was little evidence to support a criminal charge against each of the two individuals, except the identification of the handwriting, and the statements of the other of these two individuals, which statements under the circumstances would be worthy of little credit.

"As regards Wilayat Husain, in the opinion of the appellate Court he had committed no offence; and though this involves the supposition that Juala Prasad was doubly guilty, yet it does not follow that the case was one which the Munsif should have sent for inquiry without any preliminary inquiry on his part.

"For these reasons I think the Munsif's proceedings were irregular, and should be reported to the High Court under s. 296 of the Criminal Procedure Code for their orders."

Mr. *Howell* appeared on behalf of Juala Prasad.

ORDER.

TYRRELL, J.—I am not prepared to hold that the Munsif's order made under s. 471 of the Criminal Procedure Code was necessarily bad, because he did not hold a preliminary inquiry before sending to the Magistrate a case for inquiry into the criminal conduct imputed by the Munsif in his judgment of the 16th January 1882, to Juala Prasad and Wilayat Husain. The law requires only such preliminary inquiry "as may be necessary," and there is nothing before me to show that any inquiry that the Munsif would have made was necessary, or would have put the Magistrate [65] into a better position for dealing with the case than he now is. The Munsif sent the Magistrate "a proceeding embodying the facts of the case," and charging Juala Prasad definitely with falsely denying in a civil suit, that a certain specified receipt had been

(1) 1 C. 450.

written by him; and imputing to Wilayat Husain the similar criminal offence of falsely declaring in the same suit, that another specified receipt had been written by the same Juala Prasad. The records will be returned and the Magistrate will proceed with the case.

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APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

FIDA ALI AND ANOTHER (*Plaintiffs*) v. MUZAFFAR ALI AND ANOTHER (*Defendants*).* [12th August, 1882.]

Muhammadan Law—Pre-emption—"Stranger"—"Sale"—Assignment by way of dower—Assignment in lieu of dower—Debt.

The heirs to a Muhammadan have no legal interest or share in his property so long as he is alive and cannot therefore be regarded as in any sense co-sharers or co-parceners in his property, so as to be entitled to claim the right of pre-emption in case of a sale by him of his property.

Held, therefore, where a husband sold his share of an undivided estate to his wife, that, although one of his heirs, she had not on that account a right of pre-emption in respect of such sale.

A husband transferred certain property to his wife in consideration of a certain sum which was due by him to her as dower. *Held*, that such transfer was a "sale", within the meaning of the Muhammadan law of pre-emption, and gave rise to the right of pre-emption. *Pearee Begum* v. *Sheikh Hushmut Ali* (1) followed.

The meaning of "stranger" and "sale," as used in the Muhammadan law of pre-emption, explained.

[F.,37 A.522=13 A.L.J. 714=29 Ind. Cas. 495; N.F., 86 P.R. 1902=4 P.L.R. 1903; R., 8 A. 179 (181); 19 A. 324 (327); 31 A. 623=6 A.L.J. 887 (F.B.)=3 Ind. Cas. 820=6 M.L.T. 352; 21 Ind. Cas. 60; 2 P.R. 1903=53 P.L.R. 1903; 23 P.R. 1906 =107 P.L.R. 1906; 90 P.L.R. 1904; D., 88 P.R. 1901=145 P.L.R. 1901.]

THE plaintiffs in this suit, Fida Ali and Ganhar Ali, sued the defendants, their brother Muzaffar Ali and his wife Kaniz Bano, to enforce their right of pre-emption in respect of the transfer of certain shares of certain undivided estates by Muzaffar Ali to his wife Kaniz Bano. The plaintiffs claimed under the Muhammadan law of pre-emption, on the ground that they were co-sharers in such estates, and Kaniz Bano was a "stranger." The transfer which gave rise to the suit took place on the 3rd March 1880, when [66] Muzaffar Ali executed a deed of sale conveying the shares in suit to his wife "in lieu of Rs. 2,000 out of Rs. 25,000 dower due to her." Both the lower Courts concurred in dismissing the suit on the ground that the vendee, being the wife of the vendor, and therefore entitled to inherit from him, could not be regarded as a stranger under the Muhammadan law, and the sale to her therefore did not involve infringement of the right of pre-emption. The Courts further held that the property in suit having been transferred to the vendee in lieu of her dower, the transfer did not constitute such a sale as would give rise to the right of pre-emption under the Muhammadan law. The Court of first instance (Subordinate Judge) observed on the first

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* Second Appeal, No. 169 of 1882, from a decree of J.H. Carter, Esq., Judge of Jaunpur, dated the 7th November 1881, modifying a decree of Mirza Abid Ali Beg, Subordinate Judge of Jaunpur, dated the 16th May 1881.

(1) N.W.P.S.D.A.R. 1864, Vol. i, p. 475.

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point as follows:—"When the object of pre-emption is that a stranger should be prevented from causing inconvenience or loss to a co-sharer, a stranger in this sense would be a person who, under the law of inheritance, would not be entitled to the possession of that property in future, the Court thinks that it could not in any way have been the intention of the founder of the Muhammadan law, that any person who could take a share in the property under the law of inheritance should be prohibited from sharing by reason of one's right of pre-emption. According to the tenets of the Shiah sect, the wife, a member of the same family, as the female defendant is in this case, can share under the law of inheritance, and therefore, in the opinion of the Court, the female defendant does not come within the definition of 'stranger' given in the rules of pre-emption." The opinion of the Subordinate Judge on the second point will be found stated in the judgment of the High Court. In second appeal the plaintiffs impugned the grounds on which the suit had been dismissed.

Babu *Aprokash Chander* and Lala *Lalta Prasad*, for the appellants.

Mr. *Conlan*, Shah *Asad Ali*, and Lala *Jokhu Lal*, for the respondents.

JUDGMENT.

The judgment of the Court (Tyrrell and Mahmood, JJ.) was delivered by

Mahmood, J. (After stating the facts of the case and the view of the Subordinate Judge on the question whether Kaniz Bano was a "stranger," continued :)—The Subordinate Judge has cited no **[67]** authority in support of this view, and we have no hesitation in holding that it is an innovation which is not warranted by any principle of the Muhammadan law, whether of the Sunni or of the Shiah school. It is true that among Shiahs, as among Sunnis, the wife is entitled to inherit a share in the property of her husband along with his other heirs. But the right of inheritance under the Muhammadan law confers no vested interest so long as the owner of the property is alive. Till the devolution of inheritance takes place by the death of the proprietor, his heirs have no legal interest or share in the property, and can in no sense be regarded as co-sharers or co-parceners in the property. The rights of a Muhammadan proprietor are absolute, and so far as his proprietorship is concerned, his heirs have no more rights than absolute strangers wholly unconnected by consanguinity or marriage. The word "*stranger*" as used in the Muhammadan law of pre-emption has no reference to any relationship arising from consanguinity or marriage. The word is a correlative term to "*pre-emptor*." A "*shafi*" or pre-emptor is a person who possesses the right of pre-emption,—all persons who do not possess such right are "*strangers*" under the Muhammadan law of pre-emption. In a case like the present the criterion is whether the vendee could have enforced the right of pre-emption if the sale had taken place in favour of a stranger. It is not contended before us that Kaniz Bano holds any such position, by virtue of her marriage with Muzaffar Ali, as would have entitled her to question a sale made by him in favour of a stranger, on the ground that she had the right of pre-emption. According to the *Sharaya-ul-Islam*, a book of as high an authority among the Shiahs as the *Hedaya* is among the Sunnis, "the *shafi* is every owner of a share in a joint and undivided property who is able to pay the price" of the share sold. It has already been shown that Kaniz Bano, as an heir to her husband, has no vested interest in his property, and that she can in no sense be regarded as a co-sharer of her

husband. It therefore follows that she had no right of pre-emption in respect of the property sold to her, and must be regarded as a stranger a sale in whose favour involves infringement of the right of pre-emption under the Muhammadan law.

[68] The Subordinate Judge's opinion upon the second point in this case is expressed in the following terms:—"There cannot be a claim for pre-emption when a house is given for dower. In the opinion of the Court the fact that the property be fixed as dower and given to the wife, or that a certain sum be fixed as her dower, and afterwards, with the mutual consent of the husband and the wife, a property be given in lieu of the dower, makes no difference. The result, in the opinion of the Court, is that, when any property is given to the wife in lieu of her dower, there can be no claim for pre-emption." This view of the law is only partially correct, and its inaccuracy lies in ignoring the great distinction which exists between assigning a property as dower and selling it in payment of the dower-debt. The rule of the Shiah law upon this point is thus expressed in the *Sharaya-ul-Islam*:—"If the share has been assigned as a dower, or given in charity, or bestowed by way of gift, or in compromise, it is not subject to the claim of pre-emption."

The *Mafatih*, another book of authority on the Shiah law, explains the rule in similar terms:—"The transfer must be by sale. So, if the transfer be made as dower, or as a gift, or in compromise, then, according to the prevalent doctrine, there is no right of pre-emption." The rule, that *sale* is an essential condition precedent to the operation of the right of pre-emption, is a well-established principle of Muhammadan law, and in this respect no serious difference exists between the doctrines of the Sunni and the Shiah schools. But the lower Courts have erroneously applied the rule to the transfer in question in the present case. Under the Muhammadan law, *sale* is defined to be "the exchange of property for property by consent of the parties," each property being regarded as the price of the other. "Price," as a term of Muhammadan law, includes not only money, but also any other kind of property capable of being valued at a definite sum of money. But when a transfer of property takes place for a consideration, not capable of being estimated at a definite money-value, such transfer is not regarded as sale at all, and does not give rise to the right of pre-emption. Since the payment of the price by the pre-emptor is an essential condition precedent to his acquiring the property by virtue of his pre-emptive right, it follows, *ex-necessitate rei*, that the [69] right of pre-emption can operate and be effectively enforced only in those cases in which the consideration for the transfer is either already fixed at a definite money-value, or is capable of being so ascertained. Now, the Muhammadan law imposes no limit upon the amount of dower which may be settled on a wife in consideration of marriage. Therefore when a man, on marrying a woman, does not fix the amount of dower at a money-value, but assigns property to her as her dower, the right of pre-emption cannot have any operation—the transfer not being a sale, and the consideration thereof being unascertained and unascertainable at a definite money-value. But no such impediment to the operation of the right of pre-emption exists in cases in which the dower was originally fixed at an ascertained amount, and property is subsequently sold in lieu of a part or the whole of such amount of dower. Dower under the Muhammadan law is regarded as a debt due by the husband to the wife.

It is an equally well-recognized rule of that law that transfer of property by the debtor to the creditor in payment of the debt constitutes

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sale, and the rule is wide enough to include transfer of property by the husband to the wife in payment of her ascertained dower. In the present case the deed of sale clearly states the amount of dower and the part thereof in payment of which the sale took place. The lower Courts were therefore wrong in holding that the transfer did not give rise to the right of pre-emption. This view of the law is supported by the ruling of the late Sadr Diwani Adalat of these Provinces in the case of *Peeree Begum* v. *Sheikh Hushmut Ali*, dated 14th May 1864, published at page 475 of the Reports for that year. The judgment in that case proceeded principally upon the authority of the *Hedaya*, and it is therefore to be inferred that the parties to that suit were Sunnis. The reason of the rule, however, is common to both the Sunni and the Shiah schools of the Muhammadan law. The learned pleader for the respondents, in attempting to draw a distinction between the Sunni and the Shiah doctrines on the subject, has pointed out a passage in the *Man-la-yahzur-hul-Faqih* —a book of *Hadis*, or traditions of recognized authority among the Shiahs—which contains a tradition related by *Hasan Ibn Mahbub* on the authority of [70] *Abu Jaafar*. The following is a literal translation of the original Arabic text of the tradition:—

"I asked him in regard to a man who married a woman in lieu of (Ar: *ala* علي) an apartment of a house whilst having co-sharers in that house. He said that it was lawful for him and for her, and none of the co-sharers had a right of pre-emption against her."

Whilst fully recognizing the authority of the tradition in the Shia law, we are of opinion that it does not support the contention of the learned pleader for the respondents. The original Arabic expression *ala baitin* (علي بيت) which occurs in the tradition, if translated absolutely literally and regardless of idiom, means "*on* an apartment," but the word *ala* علي (*on*), as it occurs in the tradition, necessarily implies by its context that the assignment of the apartment of the house as dower must have been made at the time of the marriage when dower was originally settled. Therefore the tradition only supports and does not go beyond the rule laid down in the *Sharaya-ul-Islam* and the *Mafatih* already cited. The learned pleader for the respondents, who is a Muhammadan lawyer, acquainted with the original Arabic texts, has been unable to point out any authority which would support his contention that a distinction exists between the Sunni and the Shiah doctrines upon the point under consideration.

For these reasons we are of opinion that neither the circumstance that the vendee is the wife of the vendor, nor the fact that the sale took place in lieu of a portion of the vendee's dower, can operate as an impediment to the enforcement of the right of pre-emption in this case. The Court of first instance does not appear to have excluded any evidence in the case; but neither of the lower Courts has disposed of the remaining pleas urged by the defendants on the merits. We therefore set aside the decree of the lower appellate Court, and remand the case to that Court under s. 562, Civil Procedure Code, for a proper adjudication of the case.

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MATRIMONIAL JURISDICTION.

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[71] MATRIMONIAL JURISDICTION.

Before Mr. Justice Straight, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

HOLLOWAY v. HOLLOWAY AND CAMPBELL. [17th August, 1882.]

Dissolution of marriage—Discretionary bar—Separation from wife without reasonable cause—Conduct conducing to wife's adultery—Act IV of 1869 (*Divorce Act*), *s. 14.*

A husband separated himself from his wife, who up to the time of his doing so was a virtuous woman, merely because she had run him into debt. He did not write to her, or go to see her, or make her an allowance proportionate to his income, after he had done so. *Held*, upon a petition by the husband for dissolution of his marriage on the ground of his wife's adultery, such adultery having been committed during such separation, that his conduct towards his wife disqualified him from obtaining the relief sought.

THIS was a case for confirmation of a decree for dissolution of marriage made by Mr. W. C. Turner, District Judge of Agra. The facts of the case are stated in the judgment of the High Court.

The parties did not appear.

JUDGMENT.

The judgment of the Court (STRAIGHT, BRODHURST and TYRRELL, JJ.) was delivered by

STRAIGHT, J.—This is a reference for confirmation, under the provisions of the Indian Divorce Act, of a decree passed by the Judge of Agra on the 26th October 1881, dissolving the marriage of the petitioner and respondent, on the ground of the latter's adultery.

The parties were married at Chunar in these Provinces on the 22nd June 1868, and have issue surviving, one son and two daughters. The petitioner is employed in the Government Telegraph Department, and his duties necessitated changes of residence from time to time, till early in 1879 he found himself stationed at Agra. Down to this period the respondent always accompanied him, and they continued to cohabit together as man and wife, and to live on good terms. In 1880 the petitioner was transferred to Pali in Rajputana, to which place he went leaving his wife behind him at Agra, under circumstances that will be more fully adverted to in a moment. It is here necessary to remark that there can be no doubt from the evidence taken before the Judge that the adultery of the respondent is abundantly established as also that she had been, prior to the institution of the suit, leading a life of immorality at Agra and engaging in criminal connection with various persons [72] at that place. *Prima facie*, therefore, the petitioner is entitled to the relief he asks in his petition. But there are matters in this case calling for very serious consideration at our hands, and the question arises whether they do not disclose that the petitioner either wilfully and without reasonable cause separated himself from the respondent, or that he was guilty of such wilful neglect in regard to her as conduced to her adultery. If he did so separate from her or was guilty of such neglect, then this Court under the provisions of s. 14 of the Indian Divorce Act is not bound to confirm the decree of the Judge, and in the exercise of its discretion may refuse to do so and dismiss the petition. When the case came before us for hearing, we regarded the evidence given by the petitioner as highly unsatisfactory, and in order to afford him an

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opportunity of explaining certain parts of it, that presented him to our minds in a most unfavourable light, as well as to enable us to obtain further information, we directed him to attend before us on an adjourned date, upon which day he appeared, and questions were put to him, the answers to which were duly recorded.

The following are the portions of his statement that appear to call for our very serious attention and consideration. "My wife had been living with me on good terms from the time of my marriage up to our going to Agra. My pay was Rs. 182 a month. I kept a house for her at Agra. She had the whole of my pay as I received it. In 1880 (this should be 1879) I was transferred at my own request to Pali in Rajputana. This was in consequence of a disagreement with my wife. I complained of her getting into debt without my consent. Prior to this my wife had been to the Cantonment Magistrate, and in consequence of her application I had to pay Rs. 30 per mensem for maintenance. I separated from her at her own instance. She was living with Mrs. Warner, a woman of bad reputation. She would not listen to me when I advised her against living with this person. I was at Pali for more than a year. My wife wrote to me once while I was there to say she could not live on Rs. 30 per mensem. Up to the time I went to Pali *she had not to my knowledge committed herself criminally with any one.* I heard before leaving Pali of her having committed adultery. I heard of this by wire. I tried to get leave to go to Agra, but could not succeed. I took proceedings in the Cantonment Magistrate's Court [73] at Agra and got the maintenance order cancelled on the 9th of June 1880. She incurred debts over Rs. 400. I sent the Rs. 30 to her for six months. After her adultery the allowance was stopped. My wife was living with me when she went to the Magistrate's Court. It was in consequence of a summons in a civil suit that she first went to the Cantonment Magistrate. Two weeks after this she left to live at a Mr. Forster's, a married man. *It was agreed between us* that she should go away for six months till I had cleared all her debts. I paid her money for her railway fare to take her to her godmother at Meerut. I allowed her maintenance because she thought she could compel me to give her a third of my pay. I have paid 200 or 300 rupees on her account for debts. For some years before we parted, I remonstrated with her about her conduct. After she left my house she went to that of a disreputable woman, but I went to her and asked her to come back, and she would not come. My wife left me before I went to Pali, at my own request. Subsequently to this I did not ask her to come back. My transfer was arranged by telegraph the day before I left for Pali."

Now, before proceeding to comment upon this evidence and the conclusions to be drawn from it, we are constrained to remark that the High Courts in these divorce cases are placed in a very difficult position. For, in the absence of any official like the Queen's Proctor in England, they have, where suspicion is aroused as to the conduct or good faith of the parties, to inaugurate and carry out such inquiries and investigations as may appear necessary, in order to prevent the provisions of the divorce law being abused and themselves being imposed upon. In the present matter we have felt ourselves bound to send for and examine not only the records of the maintenance proceedings in the Agra Cantonment Magistrate's Court in May 1879 and June 1880, but the files of two suits to which the petitioner had referred in the course of his evidence. It is impossible to avoid noticing that when the respondent appeared before the Magistrate in

May 1879, her allegation was that her husband had turned her out of his house and told her to go to her godmother at Meerut, who had replied that she could not take her in as she was living in barracks, and that she had then gone to live with a Mr. and Mrs. Forster. It is due [74] to the petitioner to say that he denied the assertion that he had turned his wife out, and stated that she expressed a wish to go to Meerut, and that he gave her money to do so, but she did not go, and went to live with Mr. and Mrs. Forster. On what precise grounds does not appear, but the Magistrate ordered maintenance to be paid at the rate of Rs. 30 a month. So much for the first proceeding in the Magistrate's Court, which is mainly noticeable for the absence of any complaint on the part of the petitioner against his wife, except that she had gone to Mr. and Mrs. Forster, and of any statement that, as he now alleges, they had mutually arranged that she should go to Meerut for six months while he paid off her debts. There is, by the way, to be found in this file of proceedings a very extraordinary letter apparently handed to the Magistrate by the respondent and obviously written by the petitioner, as to which, he unfortunately not having been asked for his explanation, it is sufficient to say, that from its terms it would seem that he had been guilty of some misconduct towards the petitioner prior to writing it, for which he was asking her forgiveness, and, at any rate, that at the time of her application for maintenance his behaviour towards her had not been so blameless and without reproach as he would now have us believe. With regard to the proceedings in June 1880, when the Magistrate cancelled his order, it is to be observed that throughout the somewhat lengthened investigation that then took place, the respondent stoutly denied that she had been guilty of adultery with any person, and fought the case out to the bitter end, asseverating her innocence to the last. Yet the same woman fifteen months after is authorising her pleader in writing to admit such adultery in the suit now before us. Such a complete change of front is, to say the least of it, extraordinary, and calculated to awaken grave suspicion of collusion between the parties, though in the view we take of the matter it is not necessary to arrive at any definite opinion upon that point.

Having regard to the whole of the evidence given by the petitioner both before the Judge and in this Court, and looking at all the circumstances, we can come to no other conclusion than that the petitioner did intentionally separate himself from the respondent when he left her at Agra and went to Pali, and that he had [75] no reasonable cause for doing so. He himself admits that down to this time she had been a virtuous woman, and that his only complaint against her was that she had run him into debt, and that he had had or subsequently had to pay some Rs. 300 on her account. This was no reasonable cause for his withdrawing the protection of his house and his society from her, or leaving her to incur all the risks and temptations that a young woman of twenty-eight living by herself on very inadequate means in a place like Agra would be subjected to. The law upon this point is very clearly and expressively laid down by Lord Penzance in *Jeffreys* v. *Jeffreys* (1) :— " It must not be supposed that a husband can neglect and throw aside his wife, and afterwards, if she is unfaithful to him, obtain a divorce on account of infidelity. The Legislature never intended that such a man should be entitled to a divorce." Again, in the same judgment there

(1) 33 L. J. P. M. 84.

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is the following passage:—"If chastity be the duty of the wife, protection is no less that of the husband. The wife has a right to the comfort and support of the husband's society, the security of his house and name, and the just protection of his presence so far as his position and avocation will admit. Whoever falls short in this regard, if not the author of his own misfortune, is not wholly blameless in the issue: and though he may not have justified the wife, he has so far compromised himself as to forfeit his claim for a divorce." The propriety and wisdom of the principles thus laid down cannot for a moment be questioned, and if their recognition and application is essential to the conditions of life in England, how much more indispensable are they to the state of society in this country. The power given to the Courts to dissolve the marriage bond was not granted in the interest of husbands who, having grown tired of their wives, deliberately separate from them, careless as to what becomes of them, and virtually encouraging them to go astray. The present case is a lamentable instance of the justice of the rule laid down by the Judge Ordinary to which we have adverted, and it is impossible for us not to feel that, remembering the petitioner's own admission that his wife was a virtuous woman till he left her and went to Pali, his thus separating himself from her, neither writing to her, nor going to see her, nor allowing her means proportionate to his income, was conduct on his part that [76] largely contributed to the results of which he now seeks to take advantage. He had no reasonable cause for abandoning her to her fate or depriving her of the protection of his house and presence; and by so doing he, if he is not directly responsible for her misconduct, has at least disqualified himself from obtaining the relief prayed in the petition.

We therefore are clearly of opinion that the confirmation of the Judge of Agra's decree in this case must be refused, and the petition dismissed.

Petition dismissed.

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APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Straight.

HAZARI LAL AND OTHERS (*Plaintiffs*) *v.* JADAUN SINGH (*Defendant*).*
[15th August, 1882.]

Act XV *of* 1877 (*Limitation Act*), *sch. ii, Nos.* 91, 144—*Suit to cancel instrument—Champerty.*

The plaintiffs sued for possession of certain immoveable property, "by avoidance of a spurious deed of gift" executed by one *N*, deceased, in favour of the defendant. *H*, one of the plaintiffs, joined in the suit under an agreement with the other plaintiffs that he should defray the costs of the suit from the Court of First Instance up to the Privy Council, and that he should then become Proprietor of one-half of the property in suit and be entitled to half the costs.

Per STRAIGHT, J.—That the suit was governed by No. 144, and not No. 91, sch. ii of the Limitation Act, 1877.

Per STUART, C.J.—That the suit was governed by No. 91, and not No. 144, sch. ii of that Act. *Sikher Chund* v. *Dulputty Singh*, (1) distinguished.

Held, by the Court, that *H* had no right to join in the suit.

[F., 6 A. 260 (262); Appr., 16 M.L.J. 311 (314); R., 6 A. 75 (76); 10 C. 178 (181); 23 C. 460 (469); (1890) A.W.N. 115.]

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* First Appeal No. 83 of 1881, from a decree of Maulvi Nazir Ali Khan, Subordinate Judge of Mainpuri, dated the 16th July 1881.

(1) 5 C. 363.

THE plaintiffs, with the exception of Hazari Lal, sued to obtain possession, by right of inheritance under Hindu law, of ten biswas of a village called Pilkhana, and ten biswas of a village called Katlapur, by avoidance of a deed of gift executed by one Narain Singh, deceased, and the defendant Dal Kuar, in favour of the minor defendant Jadaun Singh, on the 5th July 1876. They also sought to recover a one-third share of a village called Narwar. The plaintiff Hazari Lal, according to the plaint, "joined in the suit on this mutual contract and agreement, that he would defray [77] the costs of the suit from the Court of First Instance up to the Privy Council appeal, and that he would then become proprietor of one-half of the disputed property, and would be entitled to half the costs." The defendants set up as a defence that the suit, as to the deed of gift, was barred by the limitation of No. 91, sch. ii of Act XV of 1877; that even if not so barred, such deed was duly and properly executed by Narain Singh, who had full power to make it; that mauza Narwar was the self-acquired property of Narain Singh, and was orally given to Jadaun Singh, who held possession of it, and received the profits; that mauzas Pilkhana and Katlapur were the divided and separate property of Narain Singh, which he could dispose of as he thought proper; and that on the admissions contained in the plaint as regards Hazari Lal, the suit was champertous and illegal. The Court of First Instance (Subordinate Judge) decided the plea of limitation in favour of the defendants, and the claim of the plaintiffs as to Pilkhana and Katlapur was accordingly dismissed. But as to Narwar, it ordered that a decree "be passed in the plaintiffs' favour against the defendants for the share in mauza Narwar, declaring them to be the proprietors of the same, and authorising them to take possession after the death of the widows of Narain Singh."

The plaintiffs appealed to the High Court as regards the dismissal of their claim in respect of mauzas Pilkhana and Katlapur, contending, *inter alia*, that the suit was not barred by limitation, No. 91, sch. ii of Act XV of 1877 not being applicable to it, but No. 144. The defendant-respondent filed objections under s. 561 of the Civil Procedure Code in regard to mauza Narwar.

Mr. *Conlan*, Munshi *Hanuman Prasad*, and Pandit *Nand Lal*, for the appellants.

Mr. *Ross*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and Babu *Jogindro Nath Chaudhri*, for the respondent.

The Court (STUART, C. J., and STRAIGHT, J.) delivered the following Judgments:

JUDGMENTS.

STRAIGHT, J. (After stating the facts as set out above, continued:)—The point of limitation has first to be considered, for, if the view of the lower Court upon it is correct, the substantial portion of the plaintiffs' claim falls to the ground. In order to [78] determine it, we must look to the plaint, and there the relief sought as to mauzas Pilkhana and Katlapur is a decree for possession by "avoidance of the spurious deed of gift executed on the 5th July 1876, by Narain Singh, deceased and Dal Kuar, defendant No. 2, in favour of defendant No. 1." As to the question of limitation, the plaintiffs' pleader contended that the mention of the deed of gift in the plaint is purely incidental and wholly immaterial, and that the suit is substantially one for the recovery of immoveable property to which the limitation period of twelve years

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applies. The argument is a sound one, for if Narain Singh was incompetent in point of law to make a gift, the deed is a mere piece of waste paper, the existence of which can in no way obstruct the plaintiffs' rights by inheritance to succeed to his estate, and it is therefore unnecessary for them to seek to have that set aside which has neither force nor effect. No doubt, in the plaint the plaintiffs assail this document in terms and seemingly in two ways, as if somewhat doubtful of their positions. First, they appear to suggest that it was fraudulently and collusively brought about—how, is not stated very clearly—by one Sohan Lal, elder brother of the minor defendant, in collusion with the defendant Dal Kuar, and the wives of Narain Singh, when the latter was "in a state of insensibility," and that he was in reality unaware of its existence; and next, they assert his incompetency under the Hindu law to make such a gift at all. I may say at once, however, by way of expediting the determination of the question of limitation, that I entirely concur in the conclusion of fact arrived at by the Subordinate Judge, that Narain Singh did execute the deed of the 5th July 1876, and that he did so freely and voluntarily in a sound state of mind, and with full knowledge of what he was doing. Equally do I agree with the Subordinate Judge in his finding that mauzas Pilkhana and Katlapur were the divided estate of Narain Singh, and were enjoyed separately by him. It therefore comes to this, that Narain Singh, on the 5th July 1876 executed an instrument conveying property rightly belonging to him by way of gift, as he was fully competent to do, to the minor defendant, and conferring a title upon him under which he no doubt did obtain possession. Then the point arises, is a suit like the present, which is in substance one for the recovery of immoveable property, altered in its main nature and **[79]** character and subjected to a much shorter period of limitation, because the plaintiffs mention in their plaint the deed of gift and ask for its avoidance? In other words, is it one to cancel or set aside an instrument "not otherwise provided for" in the sense of art. 91, Act XV of 1877?

After giving the point the best consideration I can, I do not think that it is. In my opinion art. 91 is intended to apply to suits of the kind mentioned in s. 39 of the Specific Relief Act, and to cases where a plaintiff seeks to have cancelled or set aside some instrument he has been induced by misrepresentation, concealment of facts, or other means of a like kind to enter into, or where the cancelment or setting aside of an instrument is the only relief asked, as an example of which latter kind of suit I may refer to a case reported in I. L. R., 3 A. 394. I therefore consider it right to say, lest by silence I should be supposed to endorse the view expressed by the lower Court, that I hold the present suit to be in its essence and substance one for the recovery of immoveable property, so far as mauzas Pilkhana and Katlapur are concerned, and that it is not governed by art. 91, but by art. 144 of the Limitation Law.

(After deciding that mauzas Pilkhana and Katlapur were the separate estate of Narain; that he had full power to dispose of them; and that the deed of gift was duly and properly executed, without fraud or coercion of any kind; and that the suit, as regards those mauzas, must be dismissed: and further, that the oral gift of mauza Narwar to Jadaun Singh had been established, the learned Judge, as regards the joinder of Hazari Lal as a plaintiff in the suit, observed as follows) :—

It is clear that he had no right whatever to figure in the litigation, or to be joined as a party to the suit. His interest was of a purely

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speculative character, and his presence in the litigation cannot for a moment be countenanced or tolerated. The question of champerty or any special points in reference to him need not, however, be gone into, as the practical result of my judgment is that, the appeal being dismissed with costs, and the objection under s. 561 allowed with costs, the whole suit of all the plaintiffs fails.

STUART, C. J.—In this case the plaintiffs seek to set aside a deed of gift by one Narain Singh in favour of the defendant, his [80] nephew, Jadaun Singh, a minor, and they also claim property other than that given by the deed of gift, which it is contended on behalf of the minor defendant is his, by reason of an oral or parol gift of it by Narain Singh shortly before his death. The suit appears to have been promoted in the Court below by one Hazari Lal, who made a speculative bargain for himself, but to whose claims, and even to his presence in the suit, we can give no countenance whatever. It is sufficient, however, to say thus much of Hazari Lal, as the result of this appeal must be the dismissal of the whole suit.

Among the pleas as maintained before us is one which raises the question whether the suit, as far it relates to the deed of gift, is barred by limitation. This question was also considered by the Subordinate Judge, who was of opinion that it was barred by the limitation of three years provided by No. 91, sch. ii of Act XV of 1877, the deed of gift having been executed on the 5th July, and registered on the 17th July, 1876, while this suit was not filed until the 18th April, 1881, that is, four years and nine months after the execution of the deed of gift. As I am of opinion that the validity of the deed is, as I shall presently show, established by the evidence, it is scarcely necessary for me to offer any observations on this question of limitation. But as remarks were made on this subject at the hearing, in which I do not concur, and which appear to me to involve a misapprehension of the Limitation Law, it may be as well for me to explain the view I take of this matter. I am disposed to agree with the Subordinate Judge. The only other alternative is to hold that the case falls under No. 144 of the same schedule—"for possession of immoveable property or any interest therein not hereby otherwise specially provided for,"—the limitation period prescribed for which being twelve years, reckoned from the time "when the possession of the defendant becomes adverse to the plaintiff." I cannot see that the present case is one of that kind. No doubt it may be in substantial effect more or less of that character. But it is the defendant's deed of gift, and not any flaw in the plaintiffs' hereditary title, or the action of any third party under any kind of adverse contract, which stands in the plaintiffs' way; and should it be set aside, the necessary consequence would be the recovery by the [81] plaintiffs of the property comprised in the deed of gift. There is, I say, no question about any dealing with the land by parties entitled, say, by way of mortgage or conditional sale, or by any similar contract—the defendant stands on his deed, and he must, I think, under the circumstances, be taken to admit that were it not for his deed of gift the plaintiffs would undoubtedly, and as a matter of course, be entitled to recover and hold possession of the property. The sole and only question therefore, so far as relates to the plea of limitation, is simply and only whether this deed was a valid and effectual gift of the property comprised in it to the defendant Jadaun Singh, and as such the deliberate act and deed of Narain Singh, the donor, and no examination of the plaintiffs' right, or of any other right or title to the property, is in any way involved.

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And that, in my opinion, is a question or state of things provided for by No. 91 of sch. ii of Act XV of 1877, and not by No. 144 of the same schedule. Allusion has been made to s. 39 of the Specific Relief Act I of 1877, which provides that "any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it, and order it to be delivered up and cancelled." Now I think it may very reasonably be contended that No. 91 of sch. ii of the Limitation Act includes instruments so described, but in my judgment its application is not limited to such instruments, being, as I consider No. 91 to be, applicable not only to these, but to all other instruments which by reason of imperfect or invalid execution or of fraud parties may have an interest in seeking to have set aside, and of these such a suit as we have in the present case may, I think, be fairly comprehended, not only by legal construction, but also by considerations of legal policy; for it surely could not have been intended that such a simple question as the due and valid making of a deed of gift, which from its nature could be easily disproved, if tainted with fraud in any respect, might be held over the head of a donee especially such a donee as we have in the present case, for the long period of twelve years, during which, too, evidence which might have clearly proved the gift might by the death of witnesses, or by the destruction or loss of papers, become unavailable; three years, [82] on the other hand, being sufficient, and more than sufficient, for the collection and preparation of evidence against the deed, if there was any reason to believe or suspect it had been improperly obtained.

Generally the argument in favour of No. 91 of sch. ii of the Limitation Act of 1877, being regarded as supplying the limitation law in such a case as the present, may be briefly summed up thus: No. 144 of the schedule applies to suits for possession of immoveable property as against, say, a mortgagee or conditional vendee without regard to a deed of gift, or any other instrument outside the inheritance, and there is nothing said in it about cancelling or setting aside deeds or instruments held by third parties, or indeed instruments of any kind. On the other hand, No. 91 provides the limitation for a suit, the one express and special purpose of which is to cancel or set aside an instrument solely by reason of its existence, the plaintiff seeking on legal grounds to have it removed out of his way, not because it gives the defendant property to which, under an alleged superior title, plaintiff has a better right, but because, and only because, it is alleged to have been executed while the donor was not in a sound and intelligent state of mind.

A Calcutta case has been referred to in favour of the contention that the suit in the present appeal must be regarded as one for the possession of immoveable property, and not one of the kind intended by No. 91, sch. ii. That case had reference to the Limitation Act of 1871 and not to Act XV of 1877, under which the present case arises. But as I view that Calcutta case, it was a totally different one from the present. This was the case of *Sikher Chund* v. *Dulputty Singh* (1) and it was there held that on the facts the suit must be regarded as one for possession of immoveable property under No. 145 of the Act of 1871, corresponding to No. 144 of the present Act, and not merely for setting aside an instrument within the meaning of No. 92 of the former Act, corresponding with

(1) 5 C. 363.

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No. 91 of the present. A Hindu family being heavily oppressed with debts, ancestral and otherwise, the two elder brothers of the family, for themselves and as guardians of their [83] minor brother, applied, under s. 18 of Act XL of 1858, and obtained from the District Judge an order for the sale of several portions of the ancestral estate, and sold the same under registered deeds signed by the Judge. Within twelve years after the registration the adopted son of the minor brother brought several suits against the purchasers to set aside the sales and recover back his share of the property, alleging that his two elder brothers had made the sales fraudulently and illegally to satisfy personal debts of their own, and the Court (Garth, C.J., and Prinsep, J.) held that the suit was in substance one for the possession of immoveable property. I am inclined to think that the judgment of the Calcutta Court was right in that case, although, neither in the argument from the bar, nor in the judgments of the Judges, is there a full and conclusive examination of the question. It is to be observed that the suit was between parties equally entitled to the ancestral property without the intervention of a deed of gift to an outsider, or any other transaction foreign to the regular course of inheritance, and there was no question in regard to execution, or as to the manner in which the deeds of sale had been obtained from the two elder brothers. Prinsep, J., in the course of his judgment, remarked :—"The object of the suit is, in my opinion, to show that the sales which it is sought to set aside were made unlawfully, that is, not for purposes legally binding on the minor ; and that therefore possession taken under those sales was unlawful." That was the question, and the sole question, before the Court, and there was no plea or suggestion about the fact of execution, or of any fraud or incapacity on the part of the makers of the deeds, the question being whether the deeds were justifiable under the circumstances of the family. Garth, C.J., agreed with his colleague, although he said that the point of limitation was one which during the argument he had some doubt about; but "the substantial object of the plaintiff is to recover the property, and the validity or invalidity of the sales forms only one of the questions which are involved in that claim." In the case before us the validity or invalidity of the deed of gift is the sole and only question. And I observe that in the course of the argument for the respondent it was maintained, with the expressed approbation of the Court, that No. 92 of the Act of 1871, corresponding to No. 91 of the present Limitation Act, [84] "refers to a class of cases where a man has executed an instrument through fraud or duress, and which he wishes to have delivered up to be cancelled"—words which appear to me correctly to describe what is sought for by the plaintiffs-appellants in the case before us.

For all these reasons I am led to conclude that No. 91 and not No. 144 provides the limitation for such a suit as the present. (On the merits of the case the learned Chief Justice was also of opinion that the deed of gift executed by Narain Singh was valid, and the oral gift of mauza Narwar had been established, and that therefore the appeal should be dismissed, and the objection of the respondent be allowed).

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REVISIONAL CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

HUSAINI BEGAM (*Judgment-debtor*) *v.* MULO (*Auction-purchaser*).*
[22nd August, 1882.]

Certificate of sale—Registration—Effect of registration certificate—Civil Procedure Code, s. 316—*Act* III *of* 1877 (*Registration Act*), *ss.* 23, 60, 87, 89.

Semble that a certificate granted under s. 316 of the Civil Procedure Code is not an instrument the registration of which is compulsory.

Although that section says that a certificate granted thereunder shall bear "the date of the confirmation of the sale," that provision cannot alter the fact of execution or the time when execution does take place, which is the starting point from which the four months mentioned in s. 23 of the Registration Act begin to run.

Held, therefore, that a certificate granted under that section in respect of a sale which was confirmed on the 7th April 1880, which was registered within four months from the 10th May 1882, when it was executed, was registered within the time allowed by law.

The certificate showing that a document has been registered is conclusive proof that it has been registered according to law.

[R., 11 A. 319 (F.B.); Rel., 26 Ind. Cas. 52 (53)=12 A.L.J. 913.]

THIS was an application for revision under s. 622 of the Civil Procedure Code of an order by Mr. W. Young, District Judge of Bareilly, dated the 27th May 1882. On the 20th January 1880, Mulo, the respondent in this application, purchased at sale in execution of a decree held by her against the applicant, Husaini Begam, two villages called Kulasia and Allapur. On the 7th April, 1880, an order confirming the sale was made. On the 21st of that **[85]** month one Faizunnissa, who had instituted a suit in the Court of the Subordinate Judge of Bareilly to have the sale set aside, obtained a decree setting the same aside. On appeal the High Court, on the 4th April, 1882, reversed that decree, and restored the sale. Thereupon the auction-purchaser applied for a sale-certificate, and the same was granted to her on the 10th May, 1882, bearing date the 7th April, 1880. On the 12th May the sale-certificate was registered. On the following day the auction-purchaser applied under s. 318 of the Civil Procedure Code for delivery of possession of the villages purchased by her. The District Judge, on the 27th May, made an order directing that possession should be delivered to her.

The judgment-debtor applied for revision of this order, on the ground that the sale-certificate was invalid, as it had not been registered within the time allowed by law; contending that the date of the confirmation of the sale should be regarded as the date of the sale certificate, and that the sale-certificate should have been registered within four months from that date, *viz.*, the 7th April, 1880.

Babus *Jogindro Nath Chaudhri* and *Ratan Chand*, for the judgment-debtor.

Munshi *Hanuman Prasad*, for the auction-purchaser.

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* Application No. 162 of 1882, for revision under s. 622 of the Civil Procedure Code of an order by W. Young, Esq., Judge of Bareilly, dated the 27th May, 1882.

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JUDGMENT.

The judgment of the Court (STRAIGHT and BRODHURST, JJ.) was delivered by

STRAIGHT, J.—We are by no means clear that a sale-certificate granted under s. 316 is a compulsorily registrable instrument, and the addition made to s. 89 of Act III of 1877 by Act XII of 1879 rather favours the view that it is not. For if there is an obligation on the party obtaining a sale-certificate to get it registered himself, it is difficult to see why there should be a duty cast upon the Court granting it to send a copy to the registering officer within whose jurisdiction the whole or any part of the property to which it relates is situate. But apart from this, although s. 316 of the Code says that the sale-certificate shall bear "the date of the confirmation of the sale," that provision cannot alter the *fact* of execution, or the time when it actually does take place, which is the starting point from which the four months mentioned in s. 23 of the Registration Act begin to run. In the present case the sale-certificate was [86] granted on the 10th May, 1882, and registered on the 12th, or the second day after its execution. It does not therefore appear to be open to the objection, even if it were competent for us to go behind the registration certificate, which we think it is not. The instrument bears upon it the formal endorsement required by law, and it must be presumed that the officer making such endorsement saw that all the necessary legal formalities and requirements were satisfied before doing so. In our opinion there is no ground for this application, which is refused with costs.

Application rejected.

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FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

MAHADEO DUBEY (*Auction-purchaser*) v. BHOLA NATH DICHIT (*Judgment-debtor*).* [23rd August, 1882.]

Execution of decree—Decree for money—Sale of property without attachment—Invalidity of sale—Civil Procedure Code, Ch. XIX, and s. 254.

A regularly perfected attachment is an essential preliminary to sales in execution of simple decrees for money, and where there has been no such attachment any sale that may have taken place is not simply voidable but "*de facto*" void.

[**Diss**, 18 C. 188 (193); 6 Ind. Cas. 713=40 P.R. 1910=63 P.W.R. 1910; 36 Ind. Cas. 292; **F.**, 10 A. 506 (514); **Appr.**, 7 A. 703 (708)=A.W.N. (1885) 179; **R.**, 7 A. 38 (40); 9 A. 136 (138); 18 A. 469 (470)=A.W.N. (1896) 154; 21 A. 140 (142); 16 B. 91 (101); 11 C.W.N. 756 (F.B.)=5 C.L.J. 696; **D.**, 21 A. 311 (313); 10 M. 169 (177).]

THIS was an application for revision under s. 622 of the Civil Procedure Code of an order by the Munsif of Ghazipur setting aside a sale of certain immoveable property in execution of a decree. The application was made by the auction-purchaser. The Munsif set aside the sale on the application of the judgment-debtor on the ground that the

* Application No. 81 of 1851, for revision under s. 622 of the Civil Procedure Code of an order of Babu Nil Madhub Rai, Munsif of Ghazipur, dated the 12th March, 1881.

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property had not been attached according to law, the order prohibiting the judgment-debtor from transferring or charging the property in any way required by s. 274 of the Civil Procedure Code not having been issued.

The auction-purchaser applied for revision of the Munsif's order on the ground that a sale of immoveable property in execution of a decree could not legally be set aside, where there had not been any irregularity in its publication or conduct, and any such irregularity had not been alleged or established in this case. The ap- [87] plication came for hearing before Straight and Oldfield, JJ., and the following question raised thereby was referred by the learned Judges to the Full Bench, *viz.*, "Is a regularly perfected attachment an essential preliminary to a sale in execution of decrees for money ?"

Pandit *Ajudhia Nath* and Lala *Lalta Prasad*, for the Auction-purchaser.

Mr. *Conlan* and Munshi *Hanumxn Prasad*, for the judgment-debtor.

JUDGMENT.

The judgment of the Full Bench was delivered by

STRAIGHT, J.—As was explained at the hearing of this reference, the question virtually asked us is, whether a sale in execution of a simple money decree is "*de facto*" void, where there has been no attachment of the property sold prior thereto.

For the purpose of satisfactorily considering and properly determining this point, it is necessary to turn in the first instance to the provisions of Chapter XIX of the Civil Procedure Code, the heading of which is "Execution of Decrees." Upon looking into it, the following are the several matters with which it deals :—

A. The Court by which decrees may be executed.
B. Application for execution.
C. Staying execution.
D. Questions for Court executing decree.
E. The mode of executing decrees.
F. Attachment of property.
G. Of sale and delivery of property.
H. Resistance to execution.
I. Of arrest and imprisonment.

Now it is to be observed, in the first place, that the sections of Chapter XIX, containing the directions as to attachment of property, are treated as having a direct connection with the execution of decrees, that they immediately follow the provisions as to the "mode of executing decrees," and directly precede those regarding "sale and delivery of property." In fact, if their position in the Code is any guide or criterion, attachment, save in those cases where it is obviously unnecessary or inappropriate, to which re- [88] ference more particularly will presently be made, would seem to be an essential incident and preliminary to execution-sale under a simple money-decree. Moreover, as was pointed out at the hearing, it is incredible that the legislative authorities should have been at the pains to elaborate a long series of sections relating to attachment, if their application was to be left at the option of holders of simple decrees for money, who might or might not apply them according to their own particular fancy. That sale without attachment in their case was not contemplated by the framers of the Code, seems to be borne out upon reference to the forms to be found in the fourth schedule, more particularly to No. 145, entitled "Warrant of Sale of Property in execution of Decree,"

in which it is significant to notice that the direction to the bailiff is to sell the "property *attached* under a warrant of this Court, &c."

It will be convenient, however, to turn to s. 235 of the Code itself, which sets forth the particulars that an application for execution is required to contain. We may pass by the earlier clauses of it and come to (*j*), which deals with "the mode in which the assistance of the Court is required." As to this, the decree-holder is to state whether he seeks delivery of the property specifically decreed, or the arrest and imprisonment of the judgment-debtor, or the attachment of his property, or other assistance which the nature of the relief sought may require.

As to the first of these, that obviously relates to decrees directing the delivery of specific immoveable or moveable property, as mentioned in ss. 207 and 208, execution of which is in terms provided for by ss. 263, 264 and 259, and where attachment is obviously unnecessary, either before or after judgment.

With regard to the second head, namely, "arrest and imprisonment of judgment-debtors," the procedure relating thereto is regulated by Part I of Chapter XIX. It is also to be noticed in passing, that not only may a judgment-debtor, arrested in execution of a simple money-decree, apply to be declared an insolvent under Chapter XX, but by the new Code he is empowered to do so when an order of *attachment of his property* has been made in execution of such a decree. The holder of a simple decree for money, besides being entitled to ask for the arrest and imprison- [89] ment of his judgment-debtor, may enforce it by the attachment and sale of his property as well (s. 254), though the Court "may in its discretion refuse execution at the same time against person and property" (s. 230).

The third head "attachment of property" is, as already remarked, fully provided for in Part I of Chapter XIX, to which we will revert later on.

The fourth branch "other assistance which the nature of the relief sought may require" is obviously intended to cover decrees of the kind mentioned in ss. 255, 256, 259, 260, 261, and others in cases where some peculiar exceptional form of relief has been asked and granted.

It will thus be seen that in s. 235, which regulates the first stage in execution, namely, the contents of the application to execute, no mention is made of sale, but only of attachment. The reason of this would seem to be, that application to execute is one thing, ordering sale another, and that while in cases falling under heads 1, 2, and 4, attachment is not an essential preliminary, in others it is, as enabling the Court to ascertain what property the judgment-debtor has available for execution before or during sale, and without it the gravest inconvenience and confusion would arise both to the decree-holders and the judgment-debtors. It should also be noticed that the holder of a decree for money applying for attachment must be careful to follow the directions contained in ss. 236, 237 and 238, unless the property be moveables in the possession of the judgment-debtor, when attachment is to be made by actual seizure (s. 269). For by s. 245, which is the first of those in Part E of Chapter XIX relating to the "mode of executing decrees," it is provided that "the Court, on receiving an application for execution of a decree, shall ascertain whether such of the requirements of ss. 235, 236, 237 and 238 as may be applicable to the case have been complied with." If they have not, the application may be rejected, or amended then and there, or within a fixed time. If the application is admitted, the execution is to

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be ordered in the manner prayed, "provided that, in the case of a decree for money, the value of the property attached shall, as nearly as may be, correspond with the amount for which [90] the decree has been made." When we look to the provisions of Part F of Chapter XIX, we find that as in s. 254 the expression used is, "by the attachment *and* sale of his property," so s. 266 declares what property of a judgment-debtor is "liable to attachment *and* sale" in execution of decree.

Again, in s. 255, with respect to mesne profits subsequently to be ascertained, the expression is to be found, "property may be attached as in the case of an ordinary decree for money." It is unnecessary to travel at length through the several modes provided for the attachment of the various descriptions of property available to execution, or the sections making special provision for objections to attachment, and the procedure to be taken thereon; though as to these latter it may be remarked that, if attachment is unnecessary in execution of simple money-decrees, a non-attaching decree-holder may bring to sale property not belonging to this judgment-debtor, or in which his right is charged or limited, without those who are interested in it having an opportunity of being heard at the preliminary stage of attachment, and may thus escape the operations of ss. 278, 279, 280, 281 and 282. But it is further to be remarked, that the only section of the Code which in terms confers on the Courts the power to order sale is s. 284—"any Court may order that any property which has been attached, &c., shall be sold."

It was much pressed upon us in the course of the argument, that the provisions as to attachment are made in the interest of the decree-holder, who by resorting to them renders subsequent private alienations of his judgment-debtor invalid against all claims enforceable under his attachment. No doubt he does obtain this advantage, though s. 276 is rather a prohibition at the instance of the Court executing the decree to the judgment-debtor, forbidding him to do certain acts in contempt of its order and authority. Beyond this it is difficult to see what the holder of a simple money-decree gains by attachment, for while he is liable to have his proceedings in execution delayed or stopped by objections taken under s. 278, he is, when sale has taken place, in no better position, as to the distribution of the proceeds, than other holders of simple decrees for money who have not actually attached, but who have applied to [91] the Court holding the assets of such sale, prior to their realization, for execution of their decrees. Whatever may have been the superior advantages of the first attaching decree-holder under Act VIII of 1859, they have now been entirely swept away; and it comes to this, that while by the proviso to s. 245 he is only allowed to attach property of a value that, as nearly as may be, corresponds with the amount of his simple money-decree, when he has brought it to sale after so attaching it, he must share and share alike with other money decree-holders, who have made no attachment, if they have satisfied the requirements of s. 295 of the present Code by making applications for execution.

It was argued that if, under s. 311, a sale of immoveable property may only be set aside, or, in other words, is voidable only where there had been material irregularity in the publishing and conducting it, producing substantial injury to the judgment-debtor, it is taking a great leap to hold that, by reason of the absence of attachment, it becomes "*de facto*" void. We do not feel the force of this contention; on the contrary, it seems to us that if mere formal irregularities in publication or conduct of sales afford ground for setting such sales aside, "*a fortiori*"

the failure to make attachment, which goes to the very root of the power of the Court to order sale under a simple money-decree at all, is a fatal defect that of itself invalidates the sale. Looking to the plain language of s. 254, "attachment *and* sale of his property in manner hereinafter provided," and to the other provisions in Chapter XIX, to which attention has been directed, we have no hesitation in answering this reference by saying, that a regularly perfected attachment is an essential preliminary to sales in execution of simple decrees for money, and that where there has been no such attachment, any sale that may have taken place is not simply voidable but "*de facto*" void.

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[92] REVISIONAL CRIMINAL.

Before Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF FARID-UN-NISSA.
[24th August, 1882.]

"*Pardah-nashin*" *woman—Examination by commission—Personal appearance in Court—Act* X *of* 1872 (*Criminal Procedure Code*), *s.* 330.

Semble that in criminal cases "*pardah-nashin*" women are not *of right* exempted from personal attendance at Court. Also that the word "inconvenience" in s. 330 of the Criminal Procedure Code (Act X of 1872) empowers the Courts to allow examination by commission in criminal cases where a witness, according to the manners and customs of the country, ought not to appear in public.

The complainant in a case of defamation, alleging that she was a "*pardah-nashin*," applied to be examined by commission. *Held*, that the fact that she was a complainant, and not merely a witness, materially altered her position as regards the question whether she ought not to be exempted from personal appearance in Court, and that, under the circumstances, she ought not to be examined by commission, but ought to attend personally to be examined in Court.

Direction to the Magistrate to make such arrangements for the examination of the complainant in Court as should secure her privacy, consistent with the recording of her evidence, according to law, in the presence of the accused.

Witnesses in criminal cases should not be examined by commission except in extreme cases of delay, expense, or inconvenience.

[F., 12 A. 69 (72) = A.W.N. (1889) 202 ; R., 24 C. 551 ; 19 P.R. 1903 = 168 P.L.R. 1903.]

THIS was an application for revision, under s. 297 of the Criminal Procedure Code (Act X of 1872), of an order by Mr. A. McConaghey, Magistrate of the Bareilly district, dated the 28th June 1882. The applicant, who had brought a charge against a Mr. Purcell of defamation, applied to the Magistrate to be examined in support of such charge by commission, as she was a "*pardah-nashin*," that is to say, a woman who did not appear in public. The Magistrate refused the application, and directed that, if she wished to proceed with the prosecution, she should appear in Court to be examined.

Mr. *Hill* and Mir *Zahur Husain*, for the petitioner.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENT.

STRAIGHT, J.—I have listened with the very greatest interest and attention to the learned counsel, who has so ably and earnestly urged all

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that possibly can be said in support of his client's petition. I always have been and always shall be, to the fullest extent pos-[93]sible, consistently with common sense, ready and willing to make every concession I can, in the administration of justice, to the customs and prejudices of Hindus and Muhammadans alike. And in dealing with a question of the kind now before us, I bear in mind that intellectual progress and enlightenment, which does so much to dissipate primitive fancies and superstitions, has necessarily not as yet achieved the same amount of advancement in these Provinces as it has in the Presidency Towns and Lower Bengal. I admit to the full the necessity for still preserving a tenderness and sympathy for native ideas and notions, some of which to the European mind might seem absurd, and indeed it is my duty to do so. Although I am not prepared to adopt in its integrity the principle enunciated in the Calcutta ruling quoted by Mr. *Hill* (1), that in criminal cases "*pardah-nashin*" women are *of right* exempted from personal attendance at Court, I should be loth to differ with the two experienced Judges who recorded that opinion, by holding that the word "inconvenience" in s. 330 of the Criminal Procedure Code does not empower the Court to allow examination by commission in criminal cases, where a witness, according to the customs and manners of the country, ought not to be compelled to appear in public. But the matter now before me appears to be of an exceptional character, and while I agree, as Mr. *Hill* ingeniously urged, that the petitioner, though a complainant, is none the less a witness, I nevertheless think that the fact of her being a person who has set the criminal law in motion materially alters her position as regards the question under consideration. As I pointed out in the course of the argument, she had the alternative of bringing a suit, and if she had adopted that course, s. 640 of the Civil Procedure Code would have protected her. But she has thought proper to cite her alleged defamer in a Criminal Court, and it is his right and privilege to have her evidence taken in his presence in such Court. Were it otherwise, it is impossible to conceive the dangers and mischiefs that would arise, the false charges that would be preferred, the malicious prosecutions to which persons would be subjected.

The petitioner invokes the criminal law to punish, and I think that in such a case she should be required to guarantee the *bona* [94] *fides* of her prosecution, and that it has really been instituted by her of her own free will and not at the instigation of some other person, by attending at the Magistrate's Court. I most unhesitatingly say that the taking of evidence on commission in criminal cases should be most sparingly resorted to. Such a thing is unknown to English practice, and out here ought not to be adopted save in extreme cases of delay, expense, or inconvenience. The Criminal Courts of this country have difficulty enough to deal with the false charges made, and the perjured testimony given by prosecutors and witnesses, whose demeanour and truth they have personal opportunity of estimating, without having their labours complicated with the written evidence of parties not before them. I think the order of the Magistrate in the present case was substantially right, and I refuse the prayer of the petitioner. I, however, direct the Magistrate, if the complainant is found to be a "*purdah-nashin*" lady, and if she elects to attend and support her charge, to allow her to be brought into his room at the Court-house in her palki, or if this is not feasible, to make such other arrangements, as may enable her to remain

(1) 4 C. 20.

in it and strictly preserve her privacy, and subject her to the least inconvenience or annoyance, for the purpose of recording her evidence according to law, in the presence of the accused, after identification by some approved female witnesses.

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APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Straight.

ZAUKI LAL (*Plaintiff*) v. JAWAHIR SINGH AND OTHERS (*Defendants*).*
[25th August, 1882.]

Question for Court executing decree—Separate suit—Civil Procedure Code, s. 244.

Certain persons, claiming by right of inheritance to *C*, sued *B*, *N*, *A*, *K*, and others for possession of certain immoveable property, and obtained a decree dated in August 1876 for possession of the same. In the course of the litigation which ended in that decree *Z* purchased certain immoveable property from *B*, *N*, *A*, and *K*. *Z* was subsequently dispossessed of such property in execution of the decree of August 1876. He thereupon sued the holders of that decree for possession of the same, alleging that his vendors had inherited the same from *D*, that it [95] was not affected by that decree, and that he had been improperly dispossessed of it in execution of that decree.

Held by the Court, that, the plaintiff not being the representative of any of the parties to the suit in which that decree was passed, in the sense of s. 244 of of the Civil Procedure Code, but being, if his allegations were true, a purchaser from certain of the judgment-debtors of property not affected by that decree, the suit was not barred by the provisions of that section. *Partab Singh* v. *Beni Ram* (1) distinguished.

Observations by STUART, C.J., on his judgment in *The Agra Savings Bank* v. *Sri Ram Mitter* (2) and on the judgment of the Full Bench in *Partab Singh* v. *Beni Ram* (1) referring to that judgment.

[R., 15 B. 290 (292); 24 C. 62 (71); D., 18 M. 13 (18).]

THIS was a special appeal from a decision of the Subordinate Judge of Shahjahanpur, confirming an order of the Munsif of Sahaswan, dismissing the plaintiff-appellant's suit on the ground that it was barred by the provisions of s. 244 of Act X of 1877. The plaintiff-appellant came into Court claiming possession of an 8 biswansis, 17 kachwansis, 13 nanwansis, 7 tanwansis share in mouza Paroli, pargana Sikandra Rao, under the following circumstances:—One Daulat Singh, deceased, had three brothers, Khushal, Babht, and Hansraj, and six sons (i) Chandan, (ii) Bhagwant, (iii) Amar, (iv) Narain, (v) Kesri, (vi) Karan. Of these six sons, Chandan died in 1872, leaving a widow, Jasodha, who died on the 16th February, 1872. Subsequent to her death disputes arose as to the succession to the property left by Chandan, and on the 8th September, 1875, Hulas, Jawahir, and Hukum, his daughter's sons, together with one Balmakund, who had purchased one-third of the property sought to be recovered, brought a suit against (i) Bhagwant, (ii) Narain, (iii) Amar, brothers of Chandan, and (iv) Balwant, son of Kesri, (v) Mahtab Kuar, widow of Karan, and (vi) Pran Kuar, widow of Nirmal, for establishment of their right by inheritance to, and possession of, the ancestral and self-acquired properties left by Chandan.

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* Second Appeal, No. 28 of 1882, from a decree of Maulvi Zain-ul-ab-din, Subordinate Judge of Shahjahanpur, dated the 5th September, 1881, affirming a decree of Mir Jafar Husain, Munsif of Sahaswan, dated the 29th June, 1881.

(1) 2 A. 61. (2) 1 A. 388.

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On the 24th November 1875, the Subordinate Judge of Bareilly gave the plaintiffs a decree for the self-acquired estate, but dismissed their claim to the ancestral. The defendants then appealed to the High Court against so much of the decision as was favourable to the plaintiffs, who, on their side, filed cross objections under s. 348 of Act VIII of 1859. On the 18th August 1876, Turner and [96] Oldfield, JJ., as a Division Bench, dismissed the appeal of the defendants, and allowing the objections of the plaintiffs, decreed their claim "*in toto.*" While this litigation was going on and after the decision of the Subordinate Judge had been given, the plaintiff in the present case bought, on the 21st February 1876, at auction-sale a 6 biswansis, 10 kachwansis, 6 nanwansis share in mouza Paroli, belonging to Bhagwant; and subsequently on the 30th May 1876, by private purchase, a 7 biswansis, 19 kachwansis, 10 nanwansis, ¼ tanwansi share of Bhagwant, Narain, Amar, and Mahtab Kuar, widow of Karan, in the same mouza, or in all 14 biswansis, 9 kachwansis, 16 nanwansis, ¼ tanwansi. Of this property the plaintiff admitted in his plaint that 5 biswansis, 12 kachwansis, 4 nanwansis, 13¼ tanwansis pertained to the ancestral and acquired estate left by Chandan, while as to the residue of 8 biswansis, 17 kachwansis, 13 nanwansis, 7 tanwansis, he asserted that it was inherited by Bhagwant, Narain, Amar, and Karan, husband of Mahtab Kuar, from their father Daulat, and was not affected by the decree of August, 1876. This latter property was what was sought to be recovered in the present suit. The following was the cause of action alleged by the plaintiff:—"That in execution of the decree of the High Court of the 18th August 1876, the defendants in the present suit, then decree-holders, by reason of an error in a portion of the detail of property given in the plaint, illegally dispossessed the plaintiff by fraud from the paternal and ancestral property of his vendors, along with that left by Chandan Singh." It appeared that before the present suit was instituted the plaintiff lodged objections in the Court of the Subordinate Judge of Bareilly, where the decree of the High Court of the 18th August 1876, was being executed, virtually upon the same grounds as those upon which he based his suit. The Subordinate Judge, however, refused to entertain them, being of opinion that he could not recognize the plaintiff in the execution department, he not being a party to the suit in which the decree was passed or a representative of any such party. This order gave rise to the present litigation.

Both the lower Courts dismissed the suit, holding it barred by the prohibition of s. 244 of Act X of 1877, the Subordinate Judge [97] in appeal relying upon *Partab Singh* v. *Beni Ram* (1). The plaintiff appealed; and the question was, whether the view taken by the lower Courts was correct in point of law.

Mr. *Simeon*, for the appellant.

Pandit *Bishambhar Nath*, for the respondents.

The Court (STUART, C. J., and STRAIGHT, J.) delivered the following judgments:—

JUDGMENTS.

STRAIGHT, J. (After stating the facts as they have been stated above, continued):—I am very clearly of opinion that the appeal should prevail, and that the suit is not barred by s. 244 of the Civil Procedure Code. The plaintiff-appellant neither was nor is a representative of one of the parties

(1) 2 A. 61.

to the suit in which the decree of the 18th August, 1876, was passed in the sense of that provision of the law; on the contrary, he was, and is, if the allegations contained in the plaint are correct, a purchaser of the rights and interests of certain of the judgment-debtors, which he contends were *not* in any way affected by that decree, and could not be sold under it. The Subordinate Judge of Bareilly, in relegating the plaintiff to his present suit, very rightly held that he had no "*locus standi*" in the proceedings that were going on in execution of the decree of this Court of August, 1876, and properly refused to listen to his objections in the miscellaneous department. The Full Bench ruling of this Court on which the lower appellate Court relies (1) is not in the least in point, for there the question arose between decree-holder and judgment-debtor, and not as here between decree-holder and a third person, who was no party to the suit in the execution of the decree in which the land now claimed had been improperly taken in execution. There is, in my opinion, nothing in the law to prohibit the plaintiff instituting his present claim, and I would accordingly decree the appeal and remand the case, it having been disposed of on a preliminary point, for trial to the Munsif under s. 562 of the Code. Costs will abide the result.

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STUART, C.J.—My brother STRAIGHT, J., has accurately stated the case we have to consider in this appeal, and I entirely approve the order which he proposes. The plaintiff clearly is neither a [98] party, nor the representative of a party, to the suit in which the decree of 1876 was passed, and his present suit was clearly his only remedy; and the two lower Courts, in holding otherwise have misapprehended the meaning and scope of s. 244 of the Procedure Code, Act X of 1877.

I would have been satisfied with stating thus much as my opinion on the case, but as allusion was made at the hearing to a Full Bench ruling by three Puisne Judges of this Court (one of whom was the Judge whose opinion I had overruled), reported in I. L. R., 2 All., 62, which purports to "differ" from a previous decision of my own on a similar question, I desire to record my unhesitating rejection of that Full Bench ruling as in any way, or to any effect, binding on me. I was absent from the Court at the time on short sick leave and if any ruling of mine had to be considered in connection with such Full Bench procedure, the case ought to have been postponed till my return to the Court. But instead of adopting that course, the case was called on before the Full Bench and disposed of by a judgment which, it is not too much to say, misrepresents my judgment, which I am in consequence obliged here to reproduce. The case will be found in the I. L. R., 1 All., 388, and my judgment will be found to commence on page 390. I there said:—"The impression made upon me at the hearing of this appeal was that, contrary to my sense of justice, we were bound to hold that the suit was barred by s. 11 of Act XXIII of 1861; I say contrary to my sense of justice, for it seemed to be monstrous that the law should forbid a remedy in such a case as this when money had been paid in excess of a decree by mistake, and only because, by inadvertence or otherwise, the blunder had been omitted to be noticed in the execution department; yet the language of s. 11 seemed to me to exclude all recovery by separate suit, when it says 'all questions regarding the amount of any mesne profits, which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any

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mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other ques-[99] tions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be determined by order of the Court executing the decree and not by separate suit'; and the question before us appeared to be one relating to a sum which had been paid in discharge or satisfaction of the decree, or the like, and was also a question relating to the execution of a decree. But on reconsideration I have arrived at the conclusion that such is not a right application of s. 11 to the present case, and that therefore we need not do injustice in deference to a literal and arbitrary construction of that section. The provisions of s. 11 should, I think, be confined to matters within the limits of, and not outside, the decree, and money paid in excess of the amount decreed is, in my opinion, a matter outside the decree. I have looked into the record in this case, and I find that the amount due under the decree was Rs. 516-8-3, but that by mistake the amount actually recovered was Rs. 592-11-0, the difference in excess, Rs. 76-2-9, being the sum now sued for. These figures do not appear to be disputed, and they show that Rs. 76-2-9 not only never formed any portion of the decree, but could in no construction of it be items connected with it. It was simply a sum of money that was improperly, erroneously, and illegally obtained under the guise of the process of execution, and with regard to which no order could be made in the execution department. The present suit was, therefore, the necessary remedy. These views I find are supported by two Calcutta rulings, in which it is laid down that s. 11 of Act XXIII of 1861 does not enable any party to recover in execution anything except that which has been given by the decree, and that the 'question' as used in s. 11 must relate to something comprised in the decree, and that any other cannot be a question relating to its execution,—*Ekowri Singh* v. *Bijayanath Chattapadhya* (1) following *Haromohini Chowdhrain* v. *Dhanmani Chowdhrain* (2). It is true that the ruling appears to be opposed to a Full Bench decision of the Madras High Court — *Arunachella Pillai* v. *Appavu Pillai* (3)—by a majority of three Judges to two, but, for myself, I prefer the reasoning of the Chief Justice (Sir C. Scotland, C.J.) and Mr. Justice Innes, which, so far as it goes, is [100] in accordance which the principle of construction recognized by the Calcutta rulings to which I have referred."

I advisedly adhere to every word of this judgment as a correct statement of the law. In the Full Bench ruling referred to, it is briefly disposed of thus:—In "*The Agra Savings Bank* v. *Sri Ram Mitter* (4) the learned Chief Justice advanced in support of the opinion pronounced by him two cases decided by the Calcutta High Court. In *Haromohini Chowdhrain* v. *Dhanmani Chowdhrain* (2) no more was decided than this, that mesne profits which were neither decreed nor claimed in a suit for possession after the date of the institution of the suit could be claimed in a separate suit. In *Ekowri Singh* v. *Bijaynath Chattapadhya* (1) it was held that mesne profits which were not awarded by the decree could not be obtained by an order of the Court executing the decree." Now, in the

(1) 4 B. L. R. A. C. 111.
(2) 1 B. L. R. A. C. 138.
(3) 3 M. H. C. R. 188.
(4) 1 A. 388.

first place, it might have occurred to the Judge, who was putting such a gloss on the two Calcutta cases, that such a statement of their legal effect was in no small degree suggestive of the correctness of the view I took of the case I had decided. For surely mesne profits not included in the terms of a decree are in no better position in execution proceedings than a sum of money recovered by mistake in excess of the money decreed, and the principle which allowed a suit in the one case equally permitted it in the other, for they are both equally outside and not within the terms of the decree, and in no view, either of s. 11, Act XXIII of 1861, or of s. 244 of Act X of 1877, do these cases come within the powers and resources of the execution department. But in the second place I did not rest my judgment on these two Calcutta cases, nor on the Madras case to which I refer. I went entirely on legal principle, and merely cited the cases referred to because they appeared to me to support my view of the law as applicable to the case then before me, and that they do so is clear from their legal merits as reported. Let me first take the latter of the two cases, for it occurred before the other of the two cases, mentioned in the Full Bench judgment. Well, then, in *Haromohini Chowdhrain* v. *Dhanmani Chowdhrain* (1) (Phear, J., and Hobhouse, J.), the facts and proceedings which had taken place before the case reached the High Court in second appeal were these. The **[101]** special respondent had sued the special appellant to recover property with mesne profits in respect thereof, and a decree was given to the plaintiff awarding a certain sum by way of set-off against mesne profits up to the date of suit as claimed by the plaintiff, but it was silent as to mesne profits after that time. Against this decree the defendant appealed to the High Court upon several grounds, one of which was that the mesne profits claimed, and not decreed, were payable in respect of the subject-matter of the suit, and could therefore only be recovered in execution of the decree which had been given, and that a separate suit for them was, under s. 11, Act XXIII of 1861, not maintainable.

PHEAR, J., in delivering the judgment of the Court, said :—Now 'payable' can only be rightly spoken of that which is due to some one under an obligation already existing. Mesne profits, then, which are essentially of the nature of damages, can only be 'payable' when they are due under an order of Court. They do not merely, in the shape of mesne profits, spring from a liability under a contract either express or implied. They must not be confounded with rent, although they are generally measured by reference to rent. They are in themselves simply damages which do not exist as an obligation to be discharged until they have been awarded by a Court competent to do so. Hence, as it seems to us, 'mesne profits payable at the time of execution' must mean mesne profits which have been at that time directed to be paid by a decree of Court." The learned Judge then goes on to show that such mesne profits "are merely those which have been directed to be paid by the decree in the first suit." And the judgment contains numerous observations of the same character. Now, the relevancy of all this to the case before Pearson, J., and me, is clear ; in fact, that case was even a stronger one for the application of the principle of procedure laid down by Mr. Justice Phear, for there is not only a connection between mesne profits and possession of land, but the right to the former necessarily flows from the title to the latter ; and it was held that a claim for such mesne profits which had not

(1) 1 B.L.R.A.C. 138.

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been included in the terms of the decree could nevertheless be recovered by separate suit. In the case before Pearson, J., and me, however, there was no connection whatever between the sum improperly recovered in excess of the decree itself—it was entirely outside and [102] foreign to the decree in any way directly or indirectly, and the argument therefore in favour of the separate suit in that case is, on the principles laid down by Mr. Justice Phear, unanswerable.

The other Calcutta case is, if possible, still clearer in the same sense. This was the case of *Ekowri Singh* v. *Bijaynath Chuttapadhya*, before Jackson, J., and Markby, J. The suit was for land in which the plaintiff had got a decree for the land claimed, excepting twenty-two bighas. The plaint also contained a demand for mesne profits, as to which, however, the decree was wholly silent. The plaintiff accordingly after this brought a second suit for mesne profits, but the second suit was dismissed, on the ground that the plaintiff's proper course was to obtain his mesne profits in execution of his first decree. The plaintiff therefore appealed to the High Court, which reversed the judgment of the lower Courts, holding that the suit brought for mesne profits, which had not been decreed, was properly brought. Jackson, J., in the course of his judgment, said:—" Now, it appears to me that the question arising between the parties relating to something not comprised in the decree cannot be a question relating to the execution of the decree." The District Judge had observed in his judgment—"I come to the same conclusion as Mr. Bright (the Subordinate Judge) has come to in regard to the construction to be put on the order passed, which, I am of opinion, was meant to include a decree for mesne profits for the land decreed," " but," as observed by Mr. Justice Jackson, " it will not do to say that a decree was meant to include something, because the Procedure Code . . . . says that the decree, in addition to other matters, shall specify the relief granted, and I apprehend that that which is not clearly specified in the decree is not given. For these reasons I think the plaintiff cannot recover *wasilat* in execution of the decree when it is not expressly given in the decree, consequently the decision of the Court below must be set aside with costs." Markby, J., was of the same opinion. He said:—" I do not think it necessary to add anything to the observations made by Mr. Justice Jackson and by Mr. Justice Phear (in the case already referred to). I quite concur in thinking that s. 11 does not enable any party to recover in execution anything except that which has been given by the decree. So that the question comes back to this—what has been given by this decree ?" and further on, the same [103] learned Judge observed :—"I think it is a clear principle of law that parties cannot, either by special agreement or by any conduct of their own, invoke the process of the Court in execution. Process in execution must always be granted by the direct act of the Court itself. And it appears to me that precisely on the same principle that parties are prohibited from invoking the process of the Court *de novo*, either by agreement or by their conduct; they are also prohibited from extending, in like manner, the relief the Court has chosen to award." These observations appear to me to be very germane to the question under consideration. The case I had before me was a still stronger one for the application of the principle laid down, *viz.*, that nothing can be recovered beyond what is comprehended within the terms of the decree itself and that anything outside that decree, whether it be such a claim as mesne profits, or a sum of money taken in excess of the decree, much more anything that is foreign to such a decree, can only be

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recovered by a separate suit. In the Full Bench ruling which has given rise to these remarks not the least attempt is made to examine the case then before the Court in the light of the legal principles expounded in these Calcutta cases; but a gloss is put upon them wholly unwarranted by the terms of the judgment. I repeat that such a Full Bench proceeding cannot be binding on me, and it ought not to be followed, and I regret, that it was reported.

In the case now before us the plaintiff's claim could not have been made, and if made, ought not to have been entertained, in the execution department but was clearly and properly the subject of a separate suit. The present appeal is therefore allowed, and the case is remanded in terms of the order proposed by Mr. Justice Straight.

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5 A. 103=2 A.W.N. (1882) 196.

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Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

LALJI AND ANOTHER (*Defendants*) v. NURAN (*Plaintiff*)*.
[30th August, 1882.]

Landholder and tenant—Relinquishment by occupancy-tenant of his holding—Effect of relinquishment on co-sharers—Act XVIII of 1873 *(N.W.P. Rent Act), ss.* 8, 9, 95 *—Jurisdiction—Specific performance of contract.*

K, the occupancy-tenant of certain land, to whom the landholder had granted a lease thereof for a certain term, gave the latter a kabuliyat containing [104] the following clause:—"On the expiration of the term the landholder shall have the power to keep the said land under my cultivation at the former rent, or at an enhanced rent as may be agreed upon between the parties, or he may make over the land to some other cultivator at an enhanced rent fixed by himself." *K* died before the expiration of the lease, and was succeeded by his sons. On the expiration of the lease the landholder sued *K*'s sons in the Civil Court for possession of the land, claiming under the kabuliyat.

Per MAHMOOD, J.—That, inasmuch as the plaintiff did not seek the determination of the class of the defendants' tenure, and the suit could not be regarded as one for ejectment of a tenant in the manner provided by the Rent Act, but was one for specific performance of a contract, based on the kabuliyat, according to the terms of which the plaintiff was entitled, it was alleged, to oust the defendants, the suit was cognizable in the Civil Court.

Per CURIAM.—That whatever might have been the effect of the kabuliyat as regards *K*, it could not defeat the rights of his sons, who had become by inheritance co-sharers in the right of occupancy or had succeeded thereto under the provisions of the Rent Act.

Per TYRRELL, J.—That a relinquishment by an occupancy-tenant of his holding is not a "transfer" within the meaning of s. 9 of the Rent Act.

[F., 10 A. 615 (618); R., 18 A. 270 (272) (F.B.).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the Court.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the appellants.

Pandit *Bishambhar Nath*, for the respondent.

The Court (TYRRELL and MAHMOOD, JJ.) delivered the following judgments:—

JUDGMENTS.

MAHMOOD, J.—The plaintiff in this case represents the interests of her husband Muhammad Akbar, who owned certain resumed muafi lands

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* Second Appeal, No. 197 of 1882, from a decree of Moulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 17th November 1881, affirming a decree of Maulvi Kamal-ud-din, Munsif of Sambhal, dated the 16th May 1881.

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including the 1 bigha 18 biswas of land which is the subject of the present litigation. The defendants are the sons of one Khushali, who appears to have been in possession of the land in dispute as an occupancy tenant. On the 26th January 1873, Khushali executed a registered kabuliyat in favour of Muhammad Akbar, whereby he agreed to an assessment of Rs. 16 a year from 1281 fasli to 1287 fasli, and *inter alia* the document contains the following clause :—

"After the expiry of the term, the above-mentioned muafidar shall have the power to keep the said land under my cultivation at the former rent, or at an enhanced rent as may be agreed upon between the parties, or he may make over the land to some other cultivator at an enhanced rent fixed by himself."

[105] Subsequently, during the progress of the settlement, a dispute between the parties ended in an order of the Settlement Officer dated 9th December 1875, whereby Khushali was recorded as an occupancy tenant, it having been found that his cultivation began prior to the year 1269 fasli (1862).

Muhammad Akbar having died, his wife, the present plaintiff, succeeded to his rights and brought a suit in the Civil Court with the object of setting aside the Settlement Officer's order of 9th December 1875. The suit was however dismissed on the 4th February 1879, on the ground that the Civil Court had no jurisdiction to entertain the suit, which involved the determination of the class of tenure of a tenant. That decision was upheld by the Subordinate Judge of Moradabad on the 23rd July, 1879, and the litigation does not appear to have gone any further.

During the continuance of the term of the kabuliyat Khushali also died and was succeeded by his sons, the present defendants, who continued in possession of their paternal cultivatory holding.

The present suit was commenced on the 19th November 1880, having for its object the recovery of possession of the land in dispute from the defendants on the ground that under the terms of the kabuliyat of 26th January 1873, the plaintiff was entitled to oust the defendants by enforcement of the contract contained in the kabuliyat.

The defendants pleaded that the suit was barred by s. 13, Civil Procedure Code, by virtue of the decisions of the 4th February 1879, and 23rd July 1879, and that even if not so barred, the suit was not cognizable by the Civil Court, as it fell within the provisions of s. 95, Rent Act (XVIII of 1873). The defendants further resisted the claim on the ground that their father Khushali was an occupancy-tenant, having cultivated the land for more than twelve years ; that he was so recorded in the settlement on the 9th December 1875 ; that the order under which he was so recorded still stood uncancelled ; that upon the death of their father the occupancy right devolved upon them ; that the right could not be extinguished by reason of the kabuliyat of 26th January, 1873 ; and the expiry of the terms of that kabuliyat was, therefore, immaterial and could not affect their rights in the occupancy-holding.

[106] The Court of first instance, accepting the first two pleas urged by the defendants, dismissed the suit on the 22nd January 1881, holding that the suit was barred by s. 13, Civil Procedure Code, and was moreover not cognizable by the Civil Court. The lower appellate Court however, setting aside that decree, remanded the case under s. 562, Civil Procedure, by an order dated the 7th April, 1881.

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The Court of First Instance thereupon tried the suit on the merits, and held that the plaintiff was entitled to oust the defendants by virtue of the contract contained in the kabuliyat. The claim was accordingly decreed by the Court of First Instance, and the decree has been upheld by the lower appellate Court.

The present second appeal has been preferred by the defendants, and the grounds of appeal raise two main questions for determination:—(i) Whether the suit was cognizable by the Civil Court with reference to s. 95 of the Rent Act. (ii) Whether the kabuliyat of 26th January 1873, had the effect of defeating or extinguishing the occupancy-right, so as to deprive the defendants of such rights in the land in dispute as would otherwise have devolved upon them on the death of their father.

With regard to the first point, I am of opinion that the suit was cognizable by the Civil Court. The relief sought in the plaint is clearly of a civil nature, for it does not seek the determination of class of tenure, nor can the suit be regarded as one for ejectment of a tenant in the manner provided for by the Rent Act. The suit is for specific enforcement of contract, and is based on the clause in the kabuliyat of 26th January 1873, which, according to the plaintiff's contention, entitles her to oust the defendants. Indeed, the plaint proceeds on the assumption that it is only by virtue of the conditions of the kabuliyat that the defendants are liable to ouster, and the suit assumes that their *status* is higher than that of tenants-at-will. It is quite clear from the facts of the case, and indeed is not disputed, that the defendant's father Khushali, and after his death the defendants themselves, held the position of occupancy-tenants, and therefore the only question on the determination of which the decision of the case depends is whether the kabuliyat of 1873 can operate in defeasance of the occupancy-right.

[107] This brings me to the consideration of the second point in appeal, the determination of which, in my opinion, depends upon the construction to be placed on ss. 8 and 9 of the Rent Act, which along with some other sections of that Act define the nature and incidents of the occupancy-right. On a recent occasion, in giving my answer to a Full Bench reference in *Gopal Pandey* v. *Parsotam Das*, (1) I have at some length explained my conception of the nature of the rights of occupancy-tenants in these Provinces, and in interpreting the Rent Act upon this subject I have held that the Legislature intended to confer the right, not only on the tenants in actual occupation of the soil at the time, but also in the interest of the future members or descendants of the stock to which the occupancy-tenant belongs. It is not necessary to repeat the considerations which led me to the conclusion, but as mine was the dissentient judgment in that case, I may observe that the answer of the majority of the Court does not affect the question now under consideration. In the present case we are not concerned with the effect which the terms of the kabuliyat of 1873 may have had upon the rights of Khushali himself. It is admitted that, as a matter of fact, he never relinquished his holding, and the question before us is, whether any agreement on his part to relinquish his holding in the future could defeat the rights of his sons, the present defendants, in the occupancy-holding which devolved upon them under the provisions of s. 9 of the Rent Act. In my judgment the kabuliyat can have no such effect. It is true that a clause in that document distinctly gave to the zemindar the power to oust the tenant Khushali

(1) 5 A. 121 (F.B.) = 2 A.W.N. (1882) 128.

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after the expiration of the term of seven years; but such a power could not be conveyed by the occupancy-tenant so as to prejudice the rights of those who have become by inheritance co-sharers in the right of occupancy, or on whom such right has devolved upon his death. An occupancy-tenant may be at liberty to relinquish his occupancy-holding, but such relinquishment, even if actually carried out, cannot deprive those who are in possession at the time and entitled by law to continue in possession of the occupancy-holding. In the present case the defendants are entitled to the benefit of the 3rd paragraph of s. 8 of the Rent Act, which provides that "the occupation or cultivating of the father or other [108] person from whom the tenant inherits shall be deemed to be the occupation or cultivating of the tenant." Therefore, whatever the effect of the kabuliyat might have been on the rights of Khushali, his sons, the present defendants are entitled to calculate the period of their father's occupation of the land as a component element in the establishment of their occupancy-right, and to continue in possession of the holding as occupancy-tenants. They are not bound by the engagement which their father Khushali entered into in derogation of his own rights of occupancy, and the zamindar cannot in virtue of that engagement force the defendants to relinquish the occupancy-holding which has lawfully devolved upon them. There are, no doubt, provisions made in the Rent Act which, under certain circumstances, have the effect of extinguishing the occupancy-right and which entitle the zamindar to eject the occupancy-tenant. But no such circumstances are even alleged to exist in this case, and the suit is based entirely upon the clause in the kabuliyat already referred to. For these reasons I would decree this appeal, and, reversing the decrees of both the lower Courts, dismiss the suit; the costs in all the Courts to be borne by the plaintiff-respondent.

TYRRELL, J.—My judgment in this case has been delayed, as I wished to see the record of the proceedings of the Settlement Deputy Collector of the 9th December 1875, when he determined the dispute between Khushali as plaintiff and Muhammad Akbar as defendant in the matter of the determination of the *status* of the said Khushali as a tenant. It was then decided, after taking evidence and hearing both parties, that Khushali was then, and had for some time been, a tenant with rights of occupancy, having continuously cultivated the land in dispute as the duly recorded tenant thereof from 1269 fasli. The Settlement Court, in pronouncing this decision, observed that the kabuliyat for a certain fixed rent, executed in January 1873, for a period of seven years, "was concerned with the rent only, and had nothing to do with Khushali's right of occupancy or length of period of cultivation. Being at the time an occupancy-tenant, why should he make any contract about the period of his occupancy?" I do not find in the circumstances of this suit any question of the relinquishment of his right of occupancy by a maurusi tenant, or of [109] transfer of such right in the sense of s. 9 of the N. W. P. Rent Act. It is sufficient, therefore, to observe here that, in my opinion, there is nothing in the law to hinder an occupancy-tenant from relinquishing his holding; that it is a matter of common experience that such relinquishments not unfrequently take place; that the Rent Act (ss. 31 *et seq.*) provides occupancy-tenants with a machinery for effecting relinquishment without any reference to the claims or interests of their heirs; and that under s. 35 such an occupancy necessarily ceases without respect to heirs or other claimants, if a decree for arrears of rent remains unsatisfied fifteen days after the receipt of the notice of that

section. As to s. 9 of the Act, I cannot regard a relinquishment of his tenancy by an occupancy-tenant into the hands of his landlord as a "transfer" thereof to such landlord. A transfer implies investment of the recipient with the right handed over by the tenant divesting himself. But the landlord is not, and cannot, become invested with a right of occupancy as a cultivator in a part of his own land. The prohibitory provisions of s. 9 therefore have no bearing on a tenant's relinquishment of his tenure. In the case before me, Khushali, father of the defendants, being at the time an occupancy-tenant, as defined in s. 8 of the N. W. P. Rent Act, took a lease in January 1873, fixing his rent at an enhanced rate to January 1880. But he died in the currency of the lease, and was at once succeeded by his two sons, the appellants. Now, when Khushali died, he was an occupancy cultivator. Whatever might have been the efficacy or effect of the stipulation he had made in his kabuliyat of 1873, that if he and his landlord did not agree as to the rent to be paid on the expiry of the lease, the latter might engage with a stranger, it is certain that no such circumstances ever came into existence. It is indisputable that on Khushali's death he was succeeded by his sons as his heirs; and "the occupation or cultivating of their father," who was an occupancy-tenant when he died," from whom the appellants inherited, must be deemed to be the occupation or cultivating of the tenants within the meaning of s. 8." It cannot be held that, because the appellants seem to have held on under the terms of their father's kabuliyat for its last couple of years, they then and therefore were mere tenants under an unexpired lease, or that they by reason alone of the kabuliyat were the less occupancy-tenants of their *maurusi* **[110]** holding for 1878-79 and 1879-80, or subsequently in the years during which they have gone on cultivating the land in dispute down to the present time. For these reasons I am of opinion that the suit of the respondent for the ejectment of the appellants, by enforcement of one of the terms of the kabuliyat executed by their deceased father, was unsustainable under the circumstances of the case, and I concur with my brother Mahmood in decreeing the appeal with costs.

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5 A. 110=2 A.W.N. (1882), 199.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

ZAMIR HUSAIN (*Plaintiff*) *v.* DAULAT RAM AND OTHERS (*Defendants*).*
[31st August, 1882.]

Pre-emption—Custom—Hindu vendor and purchaser—Muhammadan pre-emptor—Muhammadan Law—"Talab-ishtihad"*—Invocation of witnesses.*

A Muhammadan sued to enforce a right of pre-emption in respect of a sale between Hindus, founding such right on local custom. The formality of "*ishtikad*," or express invocation of witnesses, required by the Muhammadan law of pre-emption, was not one of the incidents of such custom. *Held*, that the circumstance that the plaintiff was a Muhammadan did not preclude him from claiming to enforce such right against the defendants who were Hindus; and that the formality of "*ishtihad*" not being one of the incidents of such custom, it was not necessary that the plaintiff should have observed that formality as a condition precedent to the enforcement of such right.

* Second Appeal No. 136 of 1881, from a decree of R. M. King, Esq., Judge of Saharanpur, dated the 11th January 1882, reversing a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Saharanpur, dated the 21st September 1881.

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Fakir Rawot v. *Sheikh Emambaksh* (1); *Bhodo Mahomed* v. *Radha Churn Bolia* (2), referred to. *Sheikh Kudratulla* v. *Mohini Mohan Shaha* (3) and *Dwarka Das* v. *Husain Bakhsh* (4), distinguished. *Chowdhree Brij Lal* v. *Rajah Goor Sahai* (5), and *Jai Kuar* v. *Heera Lal* (6), followed.

[Appr., 9 A. 513 (516); R., 5 A. 180 (182); 7 A. 775 (790) (F.B.); 12 A. 234 (258) (F.B.); 4 Bom. L.R. 811 (812).]

THIS was a suit for pre-emption in respect of a house situate in mohalla Abupura, in the town of Muzaffarnagar. The plaintiff, a Muhammadan, was the owner of a house contiguous to the house in dispute. The defendants, vendors and vendees, were Hindus. The claim was based on the allegation that in the mohalla in which the property in dispute was situate, the custom of pre-emption prevailed universally among Hindus and Muhammadans alike; that it had been repeatedly recognized and enforced by Courts of Justice; that the plaintiff, being the close neighbour, was entitled to pre-emp-[111]tion, and had performed the requisite formalities for assertion and enforcement of that right. The Court of First Instance found that the custom of pre-emption prevailed in the locality, and that the plaintiff had duly demanded pre-emption on receiving intimation of the sale. The Court, moreover, disallowed the various pleas urged by the defendants, and decreed the claim. On appeal by the defendants-purchasers, the Judge, after entering into a discussion as to the policy and merits of the right of pre-emption, expressed his opinion that it was not advisable for the Courts to enforce the right of pre-emption as between Hindus and Muhammadans, and on this ground declined to attach weight to the several cases adduced by the plaintiff to prove that the custom of pre-emption had been recognized by the Courts as prevalent in the locality where the house in dispute was situate. The Judge further expressed his opinion that the majority of the cases adduced by the plaintiff, being cases in which the question as to pre-emption had arisen between the Hindus of the locality, the rest of the judgments produced in evidence were not numerically sufficient to prove the custom to be enforceable by Muhammadans against Hindus. Besides this finding, the Judge, relying on the ruling of the Calcutta High Court in *Prokas Singh* v. *Jogeshur Singh* (7) held that, even if the plaintiff had the right of pre-emption under the alleged custom, it was necessary for him to observe the formality of *ishtihad* required by the Muhammadan Law—*i.e.*, an express invocation of witnesses at the time of asserting the right of pre-emption upon being apprised of the sale of the property in respect of which pre-emption is sought. The Judge found that such express invocation of witnesses by the plaintiff had not been proved, and he therefore dismissed the suit, reversing the decree of the Court of First Instance.

The pleas urged by the plaintiff in this second appeal raised two main questions for determination:—(i) Whether in places where the custom of pre-emption exists, Muhammadans can claim the benefit of the custom as against Hindus. (ii) Whether the observance of the formality of *talab-i-ishtihad*, or invocation of witnesses, is an essential condition precedent to the enforcement of customary pre-emption.

[112] Shaikh *Maula Bakhsh*, for the appellant.

Pandits *Ajudhia Nath* and *Bishambar Nath*, for the respondents.

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(1) B.L.R. Sup. Vol. 35.
(2) 13 W.R. 332.
(3) 4 B.L.R. (F.B.) 134=13 W.R. (F.B.), 21.
(4) 1 A. 564.
(5) F. B. Rul., June—Dec. 1867, p. 128.
(6) N.W.P.H.C.R. (1875) 1.
(7) 2 B.L.R. A.C. 12.

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JUDGMENTS.

MAHMOOD, J. (After stating the facts as stated above continued) :—I am of opinion that the lower appellate Court has gone beyond the province of a judicial tribunal in entering into a discussion as to the merits and demerits of the law of pre-emption, and it has acted wrongly in allowing considerations of that nature to affect the adjudication of this case. So long as the law of pre-emption is recognized as a rule binding upon parties, it is the duty of the Courts of Justice to administer that law according to its well-recognized principles. In the present case, the defendants themselves did not deny the existence of the custom of pre-emption in the locality, and the plea taken by them in the first paragraph of their written statement only amounted to an allegation that the custom did not confer the right of pre-emption on Muhammadans as against Hindus. The plea therefore aimed at nothing more than establishing a qualification of, or a limitation on, the general custom prevalent in the mohalla in which the house in dispute is situate. The learned pleader for the defendants-respondents conceded, at the hearing of this appeal, that the defendants' case did not involve the denial of the existence of the custom of pre-emption *in toto* ; and although the Judge has not specifically dealt with the evidence as to the custom, I understand his judgment to proceed upon the assumption that the custom of pre-emption does exist in the locality, but that it is enforceable by the pre-emptors only against their co-religionists.

The ruling of the Full Bench of the Calcutta High Court in the case of *Fakir Rawot* v. *Sheikh Emambaksh* (1) has an important bearing upon the points raised in this case. The judgment of the Court in that case was delivered by Peacock, C. J., who exhaustively dealt with the question as to the extent to which the rules of the Muhammadan law of pre-emption are applicable to the right of pre-emption founded on local custom. After reviewing numerous cases, the learned Judges expressed their conclusions in the following terms :—" We therefore think that the established [113] law upon this subject is clear enough ; that a right or custom of pre-emption is recognized as prevailing among Hindus in Behar, and some other provinces of Western India ; that in districts where its existence has not been judicially noticed, the custom will be matter to be proved ; that such custom, when it exists, must be presumed to be founded on, and co-extensive with, the Muhammadan law upon that subject, unless the contrary be shown ; that the Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Muhammadan law of pre-emption, but that the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in the Muhammadan law, which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record."

I entirely concur in these conclusions, which appear to me to be in perfect accord with the rule of justice, equity, and good conscience upon which Courts of Justice in India are bound to act in such cases. It is clear that it does not lie within the province of equity to create rules of substantive law, and the maxim *æquitas sequitur legem* necessarily implies the existence of rules of law which equity has to follow. With

(1) B.L.R. Sup. Vol. 35.

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the exception of certain provisions of the local Acts applicable to certain provinces of India, like the Punjab and Oudh, the Legislature, whilst recognizing the existence of the right of pre-emption in India, has hardly provided any rules in regard to that right; and even where the Statute Book notices the right, the rules laid down therein relate more to matters belonging to the remedy, *ad litis ordinotionem*, rather than to subjects appertaining to the merits, *ad litis decisionem*. The Muhammadan law is the only system prevalent in India which provides substantive rules relating to the right of pre-emption in a systematic form. At least in Upper India the origin of the right of pre-emption is not traceable to any source other than Muhammadan jurisprudence which the Musalmans brought with them to this country. It may therefore be safely laid down that in all cases in which the right of pre-emption is claimed, the Courts in adminis-[114]tering equity will, by analogy, follow the rules of the Muhammadan law of pre-emption, even in cases where the right is not claimed under that law, but under local usage or custom. The rules of customary pre-emption no doubt depend upon the custom itself, but where such custom is silent upon any particular point, the rule of the Muhammadan law of pre-emption upon that point must, by analogy, be taken to be the rule of decision.

Applying these principles to the present case, I am of opinion that it rested upon the defendants to show that the custom of pre-emption, prevailing in the locality where the house in dispute is situate, was not co-extensive with the rule of Muhammadan law, but restricted the benefit of the custom to persons of the same creed or race as the vendor and the vendee. The judgments produced in evidence of the custom in this case go to show that no such limitation of the right of pre-emption exists as an element of the custom prevalent in the locality. On the contrary, some of those judgments go to show that the right of customary pre-emption has been judicially recognised and enforced in the locality irrespective of the race or religion of the parties. There can be no question that, under the Muhammadan law, the right of pre-emption may be enforced by a *zimmee*, or non-Muhammadan, against a Muhammadan, and *vice versa*. The rule is thus stated in the Hedaya:—"A Musalman and a *zimmee* being equally affected by the principle on which *shafa* or right of pre-emption is established, and equally concerned in its operations, are therefore on an equal footing in all cases regarding the privilege of *shafa*."—(Hamilton's Hedaya, Vol. iii, p. 592). The same rule has been recognized in the *Fatawa-i-Alam-giri*, (Bail. Dig. Muh. Law. part i, p. 473). The Calcutta High Court, in the case of *Bhodo Mahomed* v. *Radha Churn Bolia* (1) appears to have applied this rule of the Muhammadan law of pre-emption by analogy to pre-emption based upon local custom. The learned Judges in that case observed:—"If the custom of pre-emption did not exist among Hindus in the part of Rungpore from which this case comes, the plaintiff, who is a Musalman, could have no right of pre-emption in transactions between Hindus. The Hindus would not be bound by the Musalman law of pre-emption. But in this case the plaintiff appears to have alleged that the [115] custom of pre-emption did prevail even between Hindus. If, then, they have adopted the Musalman law as among themselves, there seems no objection to a Musalman also enforcing that right as against them." In the same case the learned Judges have pointed out the

(1) 13 W.R. 332.

distinction between cases, like the present, in which pre-emption is claimed on the ground of local custom, and cases based solely upon pre-emption provided by the Muhammadan law. The ruling of a Full Bench of the Calcutta High Court in *Sheikh Kudratulla* v. *Mohini Mohan Shaha* (1) in which it was held that a Muhammadan could not enforce pre-emption against a Hindu purchaser even though the vendor be a Muhammadan, and the ruling of the Full Bench of this Court in *Dwarka Das* v. *Husain Bakhsh* (2) in which it was held that a Muhammadan could not enforce pre-emption in respect of a sale made by a Hindu even though the purchaser be a Muhammadan, are applicable to the latter class of cases only, and have no reference to cases in which pre-emption is claimed on the basis of a local custom prevalent among Hindus and Muhammadans alike. I am therefore of opinion that the lower appellate Court was wrong in holding that the circumstance that the plaintiff in this case is a Muhammadan precluded him from claiming customary pre-emption against the defendants who are Hindus.

The determination of the second point in this case would not have been altogether free from difficulty if the custom proved in this case were found to be co-extensive with the Muhammadan law upon all points connected with the observance of the preliminary formalities of pre-emption. For I seriously doubt whether, even on the general principles of the Muhammadan law of pre-emption, the express invocation of witnesses is an essential part of the formality of the second demand known as *ishhad*. There are some cases in the published reports which lay down the proposition in the affirmative, and the Calcutta High Court has in some cases extended the application of the rule even to cases in which pre-emption was claimed, not under the Muhammadan law, but on local custom. It is, however, not necessary to discuss the question for the purposes of this appeal, as the pre-emption claimed [116] in this case is based on local custom. A Full Bench ruling of this Court in the case of *Chowdhree Brij Lal* v. *Rajah Goor Sahai* (3) has explained the rule of law upon the point in the following terms:—"In cases in which pre-emption is claimed as based on the general usage or custom of the neighbourhood, it may be (as was found to be the case in the instances which came before the High Court at Calcutta), that the incidents of Muhammadan pre-emption attach to the exercise of the right, and attach to it as part of the custom, but also it is conceivable that there may be districts in which the right of pre-emption obtains by general usage, unfettered by any, or accompanied by only some, of the restrictions of the Muhammadan law. If the existence of such a custom so unfettered were proved, it would be the duty of the Court to give effect to it, without adding to it incidents which are not proved to form part of the custom." This rule was followed in the case of *Jai Kuar* v. *Heera Lal*, (4) in which it was held that where the custom of pre-emption prevailed among Hindus, it does not necessarily follow that the person claiming pre-emption must fulfil all the conditions of the Muhammadan law regarding pre-emption, and that in such cases it should be determined whether, under the custom, it is incumbent upon the pre-emptor to fulfil those conditions. That case has an especial application to the present one, as the custom in question in both the cases relates to the same mohalla in the town of Muzaffarnagar. It appears from the published report of that case that the lower appellate Court had found that it was not necessary, according to the custom of the

(1) 4 B.L.R. (F.B.) 134 = 13 W.R. (F.B.) 21.
(2) 1 A. 564.
(3) F.B. Rul., June—Dec. 1867, p. 128.
(4) N.W.P.H.C.R. (1875), 1.

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mohalla, that the pre-emptor should fulfil all the conditions of the Muhammadan law of pre-emption, but that it was only necessary for him, according to such custom, after ascertaining the existence of the right, to demand its satisfaction from the vendor and vendee before witnesses. This Court, accepting that finding, decided the case in favour of the plaintiff pre-emptor. Nor is there anything in this case which proves that the formality of *ishhad*, or the express invocation of witnesses, is an essential part or incident of the custom of pre-emption prevalent in the locality in question. The Court of First Instance found that "the plaintiff, on receiving intimation of sale, was prepared to purchase the house, and instantly went to the [117] house sold and expressed his wish to purchase it to the contracting parties." The lower appellate Court, without dissenting from this finding, has dismissed the suit on the ground, "that the claimant did not appeal to any witnesses of his intention to buy." But, for the reasons already stated, no such invocation of witnesses was necessary, and the facts proved in this case must be regarded as sufficient conformity with the local custom, respecting preliminary formalities, to establish the plaintiff's right to sue for pre-emption.

The decree of the lower appellate Court cannot therefore stand; but since the judgment of that Court proceeds only on the two preliminary points, on both of which it has been found to be erroneous, I would decree this appeal, and, setting aside the decree of the lower appellate Court, remand the case to that Court under s. 562, Civil Procedure Code, for disposal of the pleas on the merits raised by the parties. The costs of this appeal to abide the result.

BRODHURST, J.—The custom of pre-emption by vicinity has, in previous judgments of the District Civil Courts, been found to exist in mohalla Abupurah in the town of Muzaffarnagar, and the judgments in two of those cases were affirmed by a Bench of this Court on the 5th September 1874. It is true that both parties in the two cases last referred to were Hindus, but none of the Courts appear to have found that the custom did not prevail amongst all the residents of the mohalla, Hindu and Muhammadan alike, but was confined exclusively to the Hindus. Pre-emption is a Muhammadan institution, and if the right to it in the case of houses sold in a mohalla of a town is desirable amongst Hindus, much more must such a right be desirable when the vendee and would-be pre-emptor are of different persuasions—*e.g.*, the one a Hindu and the other a Muhammadan; and the Court of First Instance, in fact, found it proved that the right of pre-emption obtains in the said mohalla, not only between Hindus, but also between Muhammadans and Hindus; and moreover, that the plaintiff (appellant) performed the preliminary condition of pre-emption at the proper time according to the Muhammadan law. It is also deserving of notice that in one of the cases above refer-[118]red to—*Jai Kuar* v. *Heera Lal* (1) the Judges of this Court accepted the finding of the lower appellate Court on remand, *viz.*, "that it was not necessary, according to the custom of the mohalla, that a person claiming pre-emption should fulfil all the conditions of the Muhammadan law of pre-emption, but that it was only necessary for him, according to such custom, after ascertaining the existence of the right, to demand its satisfaction from the vendor and vendee before witnesses."

I think, then, that the Judge ought not, on the grounds stated by him, to have reversed the judgment of the Subordinate Judge, and I concur

(1) N.W.P.H.C.R. (1875) 1.

with my learned colleague in decreeing the appeal and in remanding the case under s. 562, Civil Procedure Code, to the lower appellate Court, to dispose of the remaining pleas, and costs of this appeal will be costs in the cause.

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5 A. 118 = 1 A.W.N. (1881), 139 = 7 Ind. Jur. 431.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

RATAN RAI (*Plaintiff*) v. HANUMAN DAS (*Defendant*).*
[1st August, 1882.]

Res judicata—*Civil Procedure Code*, s. 13.

Certain immoveable property was mortgaged to *R* and then sold to *N*. It was then brought to sale in execution of a decree against *N* and was purchased by *H*. The balance of the sale-proceeds after satisfaction of that decree was paid to *N*. Under the terms of the mortgage to *R* interest on the principal amount was payable annually, and its payment was charged on the property as well as the payment of the principal amount. The mortgagors having failed to pay the interest annually, *R* in 1875 sued them and *N* and *H* to recover the interest due. It was decided in that suit that *N* was primarily and personally liable for the interest then due on the mortgage, as he had received the sale-proceeds of the property, and that the property was only liable in case he failed to satisfy the claim. *N* subsequently paid into Court the sale-proceeds he had received and *R* was paid the same. In 1878 *R* again sued the same persons for interest and again *N* was declared primarily and personally liable, on the ground that he had not at once made over the sale-proceeds to *R*; in 1880 *R* sued the same persons to recover the principal amount and interest due on the mortgage, by the sale of the mortgaged property.

Held, that, whatever might have been the rights and relations of the parties so long as any portion of the sale-proceeds remained with *N*, their position towards him assumed an entirely different character when once he had discharged himself of those moneys, and with this change in the situation the "*ratio decidendi*" [119] of the suits of 1875 and 1878 no longer existed and therefore the decisions in those suits did not preclude *R* from bringing a suit to recover the principal and interest due on his mortgage from the mortgaged property.

THE plaintiff in this suit, Ratan Rai, claimed Rs. 918-0-6, principal and interest, on a bond bearing date the 7th February 1868, in which certain immoveable property was mortgaged for the payment of the bond, principal and interest. It appeared that the bond had been executed by the defendants Nos. 1 and 2, Rashi-ud-din and Fakur-ud-din, in favour of the plaintiff, and that they agreed therein to pay the interest payable on its principal amount annually. The defendants Nos. 1 and 2 subsequently sold the mortgaged property to defendant No. 3, Nur Muhammad. After its transfer to the latter it was brought to sale in execution of a decree against him, held by one Sukhdeo, and was purchased by defendant No. 4, Hanuman Das. The balance of the proceeds of this execution-sale, amounting to Rs. 2,364, was received by Nur Muhammad. In 1875, Ratan Rai sued defendants Nos. 1 and 2, and Nur Muhammad and Hanuman Das for the annual interest due to him on the bond. It was held in that suit that Nur Muhammad was primarily liable to satisfy the claim, because he had appropriated the surplus proceeds of the execution-sale, and that the mortgaged property in the hands of Hanuman Das was only

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* Second Appeal No. 125 of 1881, from a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 29th November 1880, reversing a decree of Babu Nil Madhab Rai, Munsif of Ghazipur, dated the 18th August 1880.

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liable in case Nur Muhammad failed to satisfy the claim. After paying several instalments of interest, Nur Muhammad, in July 1876, paid Rs. 1,418-10 6, the balance of the Rs. 2,364, into Court, and such balance was at once drawn out by Ratan Rai. In June 1877, Ratan Rai again sued Nur Muhammad and Hanuman Das for the annual interest due to him on his bond. The decision in the first suit was followed in the second, Nur Muhammad being again held primarily liable, because he had not at once made over the whole of the proceeds of the execution-sale of the property to Ratan Rai. In June, 1880, the present suit was brought by Ratan Rai to recover the principal amount of his bond and interest, by the sale of the mortgaged property. The Court of First Instance gave the plaintiff a decree for the amount of his claim, directing that such amount should be realized from the defendant Nur Muhammad, and that, if he failed to pay the same, such amount should be realized by the sale of the mortgaged property. On appeal by the defendant [120] Hanuman Das, the lower appellate Court held that the defendant Nur Muhammad was primarily liable for the claim, and that the mortgaged property in the hands of the defendant Hanuman Das should be exempted, as he had purchased in good faith.

The plaintiff appealed to the High Court, contending that the mortgaged property was liable to satisfy the claim.

Lala *Lalta Prasad*, for the appellant.

The *Junior Government Pleader* (*Dwarka Nath Banarji*) and Munshi *Sukh Ram*, for the respondent (Hanuman Das).

The Court (STUART, C. J., and STRAIGHT, J.) delivered the following

JUDGMENT.

This appeal must prevail. That part of the property mortgaged by Rashi-ud-din and Fakhr-ud-din on the 7th of February, 1868, to the plaintiff-appellant, which has not been redeemed is admittedly in the possession of the defendant-respondent, and is therefore *prima facie* liable to the lien the plaintiff-appellant seeks by this suit to enforce against it. But the defendant-respondent's pleader urges that the rights of the plaintiff-appellant as against him and the property have already been determined by two suits in the year 1875 and 1878 respectively, and that the question now raised between them is *res judicata* and cannot be re-opened. We do not concur in this contention. At the time of the litigation referred to, Nur Muhammad Khan had on the 20th of April, 1874, taken out of Court the Rs. 2,364 balance left of the proceeds of the sale in execution of Sukhdeo's decree, after satisfaction of the two decrees of Sukhdeo and the present appellant; and whether rightly or wrongly it is not for us now to say, Nur Muhammad Khan was, by reason of his having done so, held primarily and personally liable for the interest then due under the bond of 1868 to the plaintiff-appellant. Subsequently, Nur Muhammad, probably being tired of litigation, after he had paid one or two instalments, having a balance of Rs. 1,418-10-6 out of the Rs. 2,364 in his hands, took that amount and paid it into Court on the 11th of July, 1876, and on the following day it was promptly drawn out by the present plaintiff-appellant, in part satisfaction of the principal and interest then due to him. It will thus be seen that whatever may have [121] been the rights and relations of the parties so long as this Rs. 2,364 or any portion of it remained with Nur Muhammad Khan, their position towards him assumed an entirely different character when once he had discharged himself of

those moneys, and with this change in the situation the "*ratio decidendi*" of the suits of 1875 and 1878 no longer existed. We cannot hold that the decisions in those cases under an entirely different state of facts, preclude the plaintiff bringing his present suit to recover the balance of principal and interest due upon his bond from the property mortgaged to him after crediting the Rs. 1,418-10-6 taken out of Court by him on the 11th July, 1876.

1882 AUG. 1. — APPELLATE CIVIL. — 5 A. 118 = 1 A.W.N. (1881) 139 = 7 Ind. Jur. 431.

We think therefore that the Judge, who most carelessly seems to have overlooked the fact that the whole of the Rs. 2,364 was refunded by Nur Muhammad Khan, was altogether wrong in his order, and this appeal will therefore be allowed with costs, and the plaintiff-appellant's claim will be decreed against the property pledged now in the hands of the defendant-respondent.

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5 A. 121 (F.B.) = 2 A.W.N. (1882), 128.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

GOPAL PANDEY (*Defendant*) *v.* PARSOTAM DAS (*Plaintiff*).*
BADRI NATH AND ANOTHER (*Plaintiffs*) *v.* PARBAT AND ANOTHER (*Defendants*).† [13th June, 1882.]

Landholder and tenant—Right of occupancy—Mortgage—Act XVIII of 1873 (*N.-W.P. Rent Act*), *s.* 9—*Meaning of "transfer."*

Held, by the Full Bench (MAHMOOD, J., *dissenting*) that an hypothecation by an occupancy tenant of his right of occupancy was not a "transfer" within the meaning of s. 9 of the N.-W.P. Rent Act, 1873.

[**R.**, 5 A. 495 (496) (**F.B.**) ; 7 A. 258 (270) (**F.B.**); 7 A. 511 (514); 7 A. 553 (559) (**F.B.**); 7 A. 691 (692); 10 A. 130 (131) ; 11 B. 114 ; 14 B. 377 (380) ; 7 A.L.J. 370 (376) ; 10 C.P.L.R. 53 (54) ; 12 C.P.L.R. 26 (29) ; **Cons.**, 13 A. 28 (49, 50) ; **Expl.**, 5 A. 103 (107) ; **Not Appl.**, 13 K.L.R. 37.]

THESE were two second appeals in which the question arose whether an hypothecation by an occupancy-tenant of his interest was a "transfer" within the meaning of s. 9 of Act XVIII of **[122]** 1873 (N.-W. P. Rent Act). This question was in each case referred to the Full Bench by the Divisional Bench before which the case came. In S. A. No. 509 of 1881 the following Order of Reference was made by the learned Chief Justice:—

STUART, C. J.—This is a case in which the plaintiffs, zamindars, sued to set aside a deed of mortgage by an occupancy-tenant with hypothecation of the land held by him, and the question at once arises whether such a mortgage is a transfer, and as such invalid, under s. 9 of the Rent Act XVIII of 1873. It has frequently been held in pre-emption cases, and in the construction of administration-papers, that a mortgage is a transfer to which a pre-emptor has a right to object, and it might, I think, be fairly argued that a mortgage by an occupancy tenant to a third

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* Second Appeal No. 1152 of 1881, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 12th August, 1881, affirming a decree of Babu Mritonjoy Mukarji, Munsif of Benares, dated the 4th March, 1881.

† Second Appeal No. 509 of 1881, from a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 4th February, 1881, affirming a decree of Maulvi Wajid Ali, Munsif of Kaimganj, dated the 19th November, 1880.

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party, a stranger, is one of those transfers the prohibition, and therefore the illegality, of which is intended by the Act. It has been ruled by a Full Bench of this Court in *Ablakh Rai* v. *Udit Narain Rai* (1), that the right of an occupancy-tenant is transferable by sale in execution of a decree held by a person who has become by inheritance a co-sharer in the same right. I concurred in that ruling, so far as it goes, but I at the same time was of opinion, and held, that such right is transferable by sale in execution of a decree without any restriction; remarking that, "in my opinion, the right to enforce legal process against property cannot under any circumstances be taken away excepting by express words to that effect." The next case in which the question came to be considered was that of *Umrao Begam* v. *The Land Mortgage Bank of India* (2), in which it was decided that the Rent Act does not prevent a landowner from bringing to sale in execution of his own decree the occupancy-right of his own judgment-debtor: Pearson, J., who delivered the judgment of the Court remarking—"In the present case the decree-holder is himself the zamindar. The section appears to have been enacted in the interest of landholders who may, presumably, waive the privilege it confers on them. It would be unreasonable to hold that a landholder should not be free to cause the sale in execution of his own decree of the occupancy-rights of his own judgment-debtor in land belonging to himself." An applica-[123] tion for the review of that judgment was subsequently made to the Division Bench, the Judges of which referred to the Full Bench the question whether the view taken in their judgment, that s. 9 of Act XVIII of 1873 was enacted in the interests of the landholder and was not intended to bar a sale made with the landlord's consent was correct. And the Full Bench ruled that it was: Pearson, J., observing—"Although the terms of s. 9 are not qualified by any reference to the consent of the landowner, we are yet bound to construe them in such a reasonable manner as to avoid absurd conclusions. I therefore adhere to the view expressed in the judgment of the 2nd January, 1878 (3)"—that is, to the judgment to which I have already referred. These rulings clearly show that s. 9 does not prevent a landowner from attaching and selling in execution of his *own decree* the rights of an occupancy-tenant, *i.e.*, the operative effect of a zamindar's executed decree against his own occupancy-tenant is to transfer the latter's holding to the zamindar within the meaning of the word "transfer" as intended by s. 9, Act XVIII of 1873, and that being so, an occupancy-tenant may, of course, by deed or other contract, transfer his holding to the zamindar direct.

It is a very different question, however whether, within the meaning of s. 9 an occupancy-tenant can effectually hypothecate and to that extent transfer his holding to a third party, a stranger. I incline to the opinion that he cannot, even with the zamindar's consent, and clearly not without such consent. In the present case, the zamindar is the plaintiff seeking to set aside the occupancy-tenant's mortgage. It was admitted at the hearing before Brodhurst, J., and myself, that a usufructuary mortgage by an occupancy-tenant to a stranger mortgagee is a transfer and therefore bad under s. 9; but here we have the case of a simple mortgage with hypothecation without possession, a condition of things which is not affected by the fact, also admitted at the hearing, that the mortgagee with permission of the occupancy-tenant cultivates the land of the holding for three years.

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(1) 1 A. 353. (2) 1 A. 547. (3) 2 A. 451.

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5 A. 121 (F.B.) = 2 A.W.N. (1882) 128.

The question whether the mortgage in this case is a transfer, and as such is invalid under s. 9, I would refer to the Full Bench [124] of the Court. Another case before another Division Bench, in which the same question occurs, has also been referred to the Full Bench. In considering this question, it appears to me that regard should be had not only to s. 9 of the Rent Act, but also to s. 171 of the same Act; to the authorities I have referred to; and to the course that has been adopted by this Court in regard to the same question in pre-emption cases.

BRODHURST, J.—I concur with the learned Chief Justice in referring for the decision of the Full Bench the following question, *viz.*, whether the hypothecation of his holding by an occupancy-tenant to a stranger, and with or without consent of the zamindar, is a transfer within the meaning of s. 9, Act XVIII of 1873.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

Mr. *Conlan*, for the respondent, in S. A. No. 1152.

Munshi *Kashi Prasad*, for the appellant.

Pandit *Bishambhar Nath*, for the respondent, in S. A. No. 509.

The following judgments were delivered by the Full Bench :—

JUDGMENTS.

STUART, C. J.—These are references to the Full Bench of the Court in two second appeals, No. 1152 of 1881, before Straight, J., and Oldfield, J., and No. 509 of 1881, before Brodhurst, J., and myself, and in both of which the question referred to the Full Bench, and which we have now to consider, is the same, *viz.*, whether a simple mortgage or an hypothecation by an occupancy-tenant is a transfer within the meaning of s. 9 of the Rent Act XVIII of 1873, that is, in other words, whether it is such a transfer as is favoured and legalised by that section ?

In my remarks proposing the reference in the latter of these two cases, I indicated an opinion that such a right or contract had not the effect of transferring the holding of the occupancy-tenant within the true intent and meaning of s. 9, and having since fully considered the question they raise, I remain of the same opinion.

Besides the authorities mentioned in my referring order there is one case also a reference to the Full Bench by Straight, J., and myself, in which although the question was not the same as that submitted by the present reference, I pointed out certain legal [125] considerations to which I may be permitted to refer. That was the case of *Bhawani Gir* v. *Dalmandan Gir* (1), in which the material question was whether the mortgagee of a co-sharer was himself a co-sharer within the meaning of s. 93 (*g*) of the Rent Act XVIII of 1873. And in the course of my answer to the reference I expressed the opinion that such a mortgagee was not in the position of a co-sharer, and for reasons which appear to me to have a material bearing on the question now before us. I there said :—" I am clear that under the revenue law as applicable to this case, that is the revenue law in operation prior to the passing of the amending Act VIII of 1879, a mortgagee is not in the position of a co-sharer. A co-sharer is a landowner, or landholder, or proprietor, whereas the interest of a mortgagee, even of a mortgagee in possession, is of a more limited nature. A mortgagee may, by foreclosure or other determinate procedure, as by decree, become possessed of the mortgaged property, but he can never by the direct and unaided effect of his mortgage right become

(1) 3 A. 144.

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absolute owner, and unquestionably he has no proprietary right to begin with. Sections 11 and 12 of Act VIII of 1879 (amending the Revenue Act, 1873) were referred to at the hearing as showing that the intention of the Legislature was that the terms 'owner' and 'proprietor' included a mortgagee. But if these words were intended to be applied in their full and complete sense, no argument could be deduced from such a provision of the law in favour of the present appellant, for that Act is not retrospective, or simply declaratory in any retrospective sense; and it would be much more reasonable to argue that ss. 11 and 12 of Act VIII of 1879 rather showed that, in the mind and intention of the Legislature, the revenue law previously enacted did not recognize any synonymous right in landlord or proprietor and mortgagee, but that to make these different rights mean the same thing, an express law had for that purpose to be passed. The sections in question, however, only provide that a mortgagee shall be deemed to be an owner or proprietor in a very partial sense. Thus s. 11 provides that a mortgagee shall only be deemed as owner as that term is used in s. 141 of Act XIX of 1873, that is, as being 'bound to maintain and keep in repair at their own cost the boundary marks lawfully erected in mahals, villages, or fields;' [126] and under s. 12 a mortgagee in possession or a farmer is only to be understood as a proprietor within the meaning and application of s. 146 of Act XIX of 1873. In all other respects, as regards those two sections of Act VIII of 1879, a mortgagee remains such without any further rights." Now these remarks (to which I may say I adhere very clearly) have a direct bearing on the question we have to consider in the present references, for they show that, while a co-sharer is himself a landowner or proprietor, the interest or right taken by the mortgagee of a co-sharer is of a different nature, inasmuch as no complete conveyance or transfer of the property mortgaged, or any rights or interests therein, had by force of the mortgage contract itself been made. It will have been observed that I said "a mortgagee may by foreclosure become possessed of the mortgaged property," by which I meant that the holder of a mortgage in terms which allowed of such a remedy may thereby ultimately become possessed of the mortgaged property; adding, however, "but he can never by the direct and unaided effect of his mortgage right become absolute owner, and unquestionably he has no proprietary right to begin with." It will be seen that these remarks are strictly relevant to the question before us, showing, as they do, that a mortgage is not in itself a complete transfer in any sense, and therefore *a fortiori* not a transfer within the meaning of s. 9, Act XVIII of 1873. I may here observe that in these remarks I used the words "foreclosure" advisedly and notwithstanding some observations in the well-known work on Mortgages in India by Mr. A. G. Macpherson, formerly a Judge of the High Court of Calcutta, and a lawyer of acknowledged ability and learning. On p. 163 of that work it is asserted that:—"It is only in mortgages by *bye-bil-wafa*, *kut-kubala*, or conditional sale, that foreclosure can occur." But this is a statement of the law which, if taken literally, is calculated to mislead. In the Tagore Lectures for 1875-6 on the Law of Mortgage in India it is pointed out that Mr. Justice Macpherson's view of the mortgage character of a conditional sale is taken from a judgment of the old Calcutta Sader-Diwani Adalat, but which, if argued to support the *dictum* I have referred to, affords, in my opinion, no sound basis for such a view of the law. All such securities are conditional sales of the property hypothecated or charged, and in all cases foreclosures

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may take place [127] if the terms of the contract admit of that remedy, and it matters not whether the security may have the name of a simple mortgage, of usufructuary mortgage, or a conditional sale. Nor does the right of foreclosure exclude any other remedy under the contract. In England a mortgagee can foreclose although a power of sale is given him in his mortgage deed; and in this country, notwithstanding foreclosure being available to the mortgagee, he may, if he so elect, sue on his contract for possession of the mortgaged property.

It thus appears that whether the remedy to the mortgagee or conditional vendee be by foreclosure or suit, no complete transfer by force of the security itself has taken place, but something outside the security-deed has yet to be done, whether by foreclosure or suit, in order to effectuate any transfer, much more a transfer under s. 9 of Act XVIII of 1873. A mortgage or conditional sale may be a limited alienation, but in no sense can such a contract be termed a transfer, and it is to my mind beyond all doubt that such an hypothecation as is stated in these references is not a transfer within the meaning of s. 9, Act XVIII of 1853. My answer then to both references is in the negative.

STRAIGHT, J., BRODHURST, J., and TYRRELL, J., *concurring*:—In answer to this reference we would say that a simple mortgage by an occupancy-tenant of his occupancy-right is not a transfer within the meaning of s. 9, Act XVIII of 1873. Such a transaction does not involve an absolute conveyance of the tenant's interest, but it merely amounts to a temporary charge on, or alienation of, the cultivatory area of the holding as a collateral security to the personal obligation of the borrower for the money advanced. What s. 9 aimed at was to prevent occupancy-tenants from wholly divesting themselves of their rights of occupancy by out-and-out transfer to strangers to the exclusion of co-sharers interested by inheritance in such right. It was argued for the zamindar that before determining whether a simple mortgage is a transfer, regard must be had to the consequences that may result from it, namely, judgment and decree for enforcement of hypothecation with subsequent sale. This does not in the least degree affect the case. If the mortgagee takes an inadequate or unenforceable security, [128] that is his look-out. For neither the mortgage itself nor the decree involve any transfer, and such sale as follows can only take place to one or more of those persons who are specially exempted from the restriction of s. 9, namely, "co-sharers by inheritance" in the right sold. For these reasons we would answer this and the kindred reference in S. A. 509 of 1881 as indicated at the outset of these remarks.

MAHMOOD, J.—These two cases have been referred to the Full Bench for determination of the question:—"Is an hypothecation by an occupancy-tenant of his interest a transfer within the meaning of s. 9 of Act XVIII of 1873?"

As I am in the unfortunate position of not being able to agree with my learned and hon'ble colleagues in the answer proposed, I feel it incumbent upon me to explain the reasons for my opinion more fully than I should otherwise have considered necessary.

In order to deal with the question raised in this reference, it appears to me necessary first of all to consider the nature of the right possessed by an occupancy-tenant in these Provinces, and in the next place to consider the nature and incidents of the form of alienation known as hypothecation or simple mortgage in India.

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Whatever the rights of tenants may originally have been in these Provinces, Act X of 1859 was the first legislative enactment which recognized or conferred the right of occupancy upon cultivators who had occupied their holdings for twelve years and upwards. Section 6 of that Act virtually declared the right to be heritable, but left the question of transferability of the tenure unprovided for. Numerous rulings, more or less conflicting, are to be found in the reports. It was held by a Full Bench of the Calcutta High Court that the right was not transferable that it was a right to be enjoyed by the person who held or cultivated and paid the rent, and had done so for a period of twelve years, that the right was only to be in the person who had occupied for twelve years, and was not intended to give any right of property which could be transferred—*Narendra Narayan Roy Chowdhry* v. *Ishan Chandra Sen* (1).

The same view had been previously taken by *Phear*, J., in the case of *Bibee Sohodwa* (2). That learned Judge, in examining the nature [129] of the right of occupancy, compared it to the relation which obtains between the right of ownership of land in England and the servitude or easement which is termed *profit a prendre*. He further observed that the ryot's was the dominant and the zamindar's the servient right; that whatever the ryot had, the zamindar had all the rest which was necessary to complete ownership of the land; that the latter must, therefore, have such a right as would enable him to keep the possession of the soil in those persons who are entitled to it, and to prevent it from being invaded by those who are not entitled to it.

Whilst such was the nature of the right to which occupancy-tenants were held to be entitled merely by force of the statute, it had been held, both by this Court and by the High Court of Calcutta, that local custom would entitle the occupancy-tenant to transfer his holding; in other words, the question of transferability was to be determined with reference to the original nature of the tenure, irrespective of the statutory provisions which were not understood to deprive tenants of such customary or other rights as they possessed before the passing of Act X of 1859. The *status* of occupancy-tenants was therefore variable and indefinite, and being thus involved in uncertainty was liable to create the mischief which arises from imposing upon the Courts, charged with deciding such suits, the duty of ascertaining local custom in every case in which the tenant chose to plead it —customs which in India are far from being fixed or easily ascertainable.

Such was the state of things found by the Legislature in 1873 when the Rent Act of that year was passed. The preamble to that Act shows that its objects were of a wider scope than those with which Act X of 1859 was enacted. The object of the Act of 1873 was not only to consolidate, but to *amend*, the law relating to the recovery of rent in these Provinces. It is therefore with reference to the provisions of that Act, which are more specific and clear, that the nature of the right of occupancy should be determined, and it is to be observed that the question of transferability no longer left unprovided for by the Legislature.

The manner in which the right of occupancy comes into existence is described in s. 8 of the Act. The right is acquired by the [130] tenant merely in virtue of occupying or cultivating land continually for twelve years; in computing the period the occupation or cultivation by "the father or other person from whom the tenant inherits" is also taken into calculation; and the whole rule is subject to certain provisos, which need

(1) 13 B.L.R. 288. (2) 12 B.L.R. 82.

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not be considered for the purposes of the present case. The right which thus comes into existence confers definite benefits on the tenant. He ceases to be a tenant-at-will; the rent payable by him cannot be enhanced by the mere wish of the landlord (s. 12) without special grounds (s. 13); he can apply for abatement of rent on showing adequate grounds (s. 15); the entire question of the amount of rent no longer remains a matter of discretion with the landlord, but is regulated by definite rules (ss. 16 and 17), though the landlord and tenant can by mutual agreement fix such amount (s. 22) for such term as may be agreed upon. Further, the tenant can claim a lease from the landlord at the rates paid by him (s. 26); he cannot be ejected except on the ground of the non-payment of arrears of rent and other definite grounds specified in the Act. In short, while the landlord still continues to be the owner of the land, the tenant acquires a right to occupy and cultivate the soil wholly irrespective of the assent or permission of the landlord, so long as the provisions of the Act are conformed to.

Now, these statutory provisions which, on the face of them, appear to relate only to the province of procedure or adjective law on the subject of recovery of rent have, in reality, the effect of creating a substantive right in favour of the tenant. It has been said that the nature of that right is only a personal one because, as is contended, it belongs to the tenant personally, and dies with him. This contention is no doubt in a measure supported by the view expressed by Couch, C. J., in the Full Bench ruling in the case of *Narendra Narayan Roy Chowdhry* (1). But that ruling was passed under Act X of 1859 and Bengal Act VIII of 1869 the provisions of which were vastly different to those of Act XVIII of 1873. I confess I can take no such view of the right of occupancy under the provisions of the last-mentioned Act. The idea of a personal right has been variously defined by jurists to whom it is known by the term *jus in personam*, but in all those definitions the essential prin- [131]ciple is recognized that such right avails exclusively against persons specifically determinate. In the case of an occupancy-tenant the right created in his favour by the statute is not a right which binds the landlord alone; in other words, it is not a right which has for its correlative the obligation of only the landlord of the soil. On the contrary, it is a right in land, a right which avails against all persons universally. It is therefore not a *jus in personam*, and it is clear that it cannot be called a *jus ad rem*, for that class of right is only a species of personal right, and implies the right of compelling a determinate person or persons to do any specific act, the commission of which would confer a real right known in the language of jurisprudence as *jus in rem*, or a permanent right in and over a thing which forms the subject of the right. In the case of an occupancy tenant the right which the Legislature has conferred upon him under Act XVIII of 1873 is such as, subject to the limitations provided by the statute, prevails against all the world. The subject of the right is the land held by the tenant, and whatever changes the ownership of that land may undergo, the occupancy right subsists in and goes with the land. The right no doubt falls far short of absolute ownership or *dominion* defined by Austin to be a "right over a determinate thing indefinite in point of *user*, unrestricted in point of *disposition*, and unlimited in point of *duration*." But "one or more of the subordinate elements of ownership, such as a right of possession or user, may be granted out while the residuary right of

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(1) 13 B.L.R. 287.

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ownership—called by the Romans *nuda proprietas*—remains unimpaired. The elements of the right which may thus be disposed of without interference with the right itself—in other words, which may be granted to one person over an object of which another continues to be the owner—are known as *jura in re aliena*."—(Holland on Jur., p. 144). Thus *jura in re aliena* are such of the rights *in rem*, availing against the world at large, as are acquired over and in the absolute ownership or *dominion* of another person in whom the ownership still continues. Among such rights was a right known to Roman jurisprudence as *emphyteusis*, which has been defined to be "the right of a person who was not the owner of a piece of land, to use it as his own in perpetuity, subject to forfeiture on non-payment of a fixed rent, and on certain other contingencies."

[132] It appears to me that the right of an occupancy-tenant in these provinces resembles the *emphyteusis* of the Roman Law. It is a right carved out of the proprietary estate of the zamindar by the operation of the statute, as indeed it might have been by grants from the landlord himself. That such was the nature of the right of occupancy intended to be conferred by the Legislature upon tenants of twelve years' standing seems to me to be clearly shown, not only by the general provisions of the Rent Act, but by the express language of a clause in s. 9. That clause lays down that "when any person entitled to such last-mentioned right dies, the right shall devolve as if it were *land*." Moreover, as shown by s. 8, the tenant acquires the right of occupancy not only by virtue of his own cultivation, but also by virtue of the continuous cultivation or occupation of the land by the person from whom he inherits. Under s. 9 the right is capable of devolution by inheritance and also of transfer by act of parties, but both these capabilities are subject to the limitations provided by that section. It provides that the right of occupancy shall not "be transferable by grant, will, or otherwise, except as between persons who have become by inheritance co-sharers in such right." These limitations, however, do not alter the nature of the right so as to take it from one class of rights recognised by jurisprudence into another class. Therefore, according to my view, the holding of an occupancy tenant must, for the purposes of the present question, be regarded as land or any other real and substantive interest in immoveable property. If any light can be thrown upon this question by the provisions of laws other than the Rent Act itself, I should say that the rules of procedure in regard to the territorial jurisdiction and limitation, applicable to a suit by an occupancy-tenant for recovery of possession of his holding from a trespasser, proceed upon the principle that the tenant's right is immoveable property and must be treated as such for purposes of procedure.

The question then before us resolves itself into the simpler question, whether the word "transferable," as used in s. 9 of the Rent Act, includes the alienation known in this country as hypothecation or simple mortgage. Under the view which I have taken of the nature of the occupancy-right, the answer to the question must, in my opinion, be the same as it would have been if the right of occu-[133] pancy were a right of ownership of land qualified by the limitations which s. 9 of the Rent Act has imposed upon the occupancy-right.

It has been said that the interpretation of the word "*transferable*" is simply a matter of ascertaining the meaning of a word of the English language; that in its ordinary import it conveys the idea of only an

absolute transfer amounting to a divestiture by the transferor of his rights out-and-out in favour of the transferee followed by possession of the latter as a necessary consequence; that hypothecation being a mere collateral security does not amount to such divestiture; that it is merely a temporary alienation, and does not therefore fall under the prohibitions against transfer provided by s. 9 of the Rent Act. It is further argued that the object of the Rent Act was to better the condition of the tenant and not to ruin his credit, and that to hold that he is prohibited from hypothecating his right would be to ruin his credit. To give force to this contention the learned pleader, who appeared to support this view, has cited the ruling of the Full Bench of this Court in the case of *Ablakh Rai* v. *Udit Narain Rai* (1) in which it was held that the right of an occupancy-tenant was transferable by sale in execution of decree, but only as between persons who had become by inheritance co-sharers in such right. In the same case it was held by Stuart, C. J., that such right was transferable by sale in execution of decree without any restriction. Again, the case of *Umrao Begam* v. *The Land Mortgage Bank of India* (2) has been cited, in which it was held by a Division Bench of this Court that s. 9, Act XVIII of 1873, did not prevent a landholder from causing the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself. This ruling was subsequently upheld by the majority of the Full Bench of this Court (3). The learned pleader has also cited more recent rulings of this Court. In S. A. No. 847 of 1880, decided on the 27th January 1882 (4) it was held that s. 9, Act XVIII of 1873, did not bar a sub-letting of his occupancy by an occupancy-tenant, as by doing so he did not part with his occupancy-right within the meaning of that section. The same view was taken by the North-Western Provinces Sadr Board [134] of Revenue in the case of *Goki* v. *Kewal Ram* (5). A stronger case than any of these is S. A. No. 899 of 1881, decided on the 15th April 1882 (6), in which it has been held by a Division Bench of this Court that even a perpetual lease by an occupancy-tenant does not amount to a transfer such as is prohibited by s. 9 of the Rent Act. These rulings, however, do not deal with the exact question before us, and whatever effect they may have upon the interpretation of the section, they do not go to the extent of showing that hypothecation is not a transfer prohibited by s. 9 of the Rent Act. The exact question before us has, therefore, never been decided by this Court. The learned pleader has, however, cited the case of *Gholam Mohammed* v. *Tika Ram* (7) which not only goes to the full extent of his contention, but indeed goes beyond it. For that was a case of usufructuary mortgage, and a Bench of the North-Western Provinces Sadr Board of Revenue, consisting of Messrs. Carmichael and Plowden held that "the middle paragraph in s. 9 simply refers to the absolute transfer of an occupancy-right, not to a conditional and temporary transfer, whatever shape such temporary transfer may take, *i. e.*, whether it is made by a mortgage for a term of years, or by a sub-lease for a term of years, that an occupancy-tenant in no way infringes the law or endangers his occupancy-rights in a holding which he assigns over to a third person temporarily; and that the term for which such an assignment may run is concurrent with, and only limited by, the occupancy-tenant's life."

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(1) 1 A. 353. (2) 1 A. 547. (3) 2 A. 451. (4) Not reported.
(5) 1 Legal Remembrancer (N. W. P.) R. & R. S. 202. (6) Not reported
(7) 1 Legal Remembrancer (N. W. P.) R. & R. S. 203.

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I confess I am unable to take any such view. It seems to me to be based upon what I cannot help feeling is a misconception of the nature of the occupancy-right. I have already endeavoured to show, by introducing a comparison between the occupancy-right of an Indian cultivator and the *emphyteusis* of the Romans, that the right as now defined by the statute is—subject to its own limitations—as much a real and subsisting right as any other kind of estate carved out of the full ownership of land. The duration of the tenant's life plays no part in determining the right. Like any other estate it devolves upon heirs, and is also transferable by act of [135] the parties, the devolution and the transfer being both subject to the limitations provided by s. 9. It cannot be taken to be in the nature of an estate for life; nor can the position of the tenant's heirs be compared to that of reversioners. That this is so appears to me to be clear from the fact that the right can be fully transferred by the tenant in favour of any one of the "persons who have become by inheritance co-sharers in such right," even though such transfer may be against the will and to the prejudice of all other persons of the same class, or those on whom the right would otherwise devolve upon the death of the tenant. So far as the duration of the right is concerned, it lasts so long as not only the original tenant himself, but also as such persons as are described in s. 9 continue to live and occupy the land. Like *emphyteusis*, it is a right which falls short of ownership, for it has reversion expectant upon it, the reversion being not in favour of the tenant's heirs, but in favour of the zamindar to whom the right reverts on default of such persons as could succeed to it under the rules of s. 9.

In considering the arguments addressed to us as to the policy of the Rent Act, I think we are bound, as much as Courts of Justice in England, to recognise the rule of construction which prohibits Judges from taking into consideration the history of an individual clause in an Act, or the policy of Government with reference to any particular legislation. Nor can we, in interpreting the Act, seek any help from the statements of objects and reasons which accompanied the Bill, nor from the debates in the Legislative Council, or any other proceeding which preceded the passing of the Act. It is for the Legislature to consider and determine whether the words which they employ in framing the Acts will give effect to the object and policy which the State has in view. We are no doubt at liberty to consider the general state of the law which prevailed *in pari materia* prior to the enactment of any statute under consideration. In the present case all we can refer to for the purpose of comparison to ascertain the policy of the Legislature consists of the law which preceded Act X of 1859, the provisions of that Act itself, and, lastly, the various authoritative judgments passed under that Act, in regard to the right of occupancy. By the light of these rules of construction it [136] seems to me that Act XVIII of 1873, going somewhat in advance of the Rent Act which preceded it, intended to confer settled and durable rights of occupancy on such ryots as had held the soil for the prescriptive period of twelve years, and had by unremitting labour improved the land. The creation or recognition of such a right by the express language of the statute is no doubt calculated to advance agriculture and promote peace in a country like this, the vast majority of whose population consists of agriculturists. The creation of the right was an act of grace on the part of the State, dictated by a sense of

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natural justice in favour of those who may be said by the length and continuity of their cultivatory possession to have earned a right in the soil which had been the object of their care and affection. But the right was not intended to favour only the tenant in actual occupation at the time, but also those who, belonging to the same stock, had taken part in the cultivation, and thus helped him in earning the right. On the other hand, as seems to me to be clear from s. 6, Act X of 1859, and ss. 8 and 9 of Act XVIII of 1873, the State did not disregard the rights of ownership which it had previously conferred upon the zamindar by express stipulations and legislative enactments. Whilst it seemed advisable to secure for those already in long standing occupation of cultivatory holdings some fixity of tenure and some guarantee of fair rents, it was equally necessary, both in the interests of the stock to which the tenant belonged, and of the zamindar who owned the land, to subject the right so created to such restrictions as would prevent the constant change of tenants and the acquisition of the right by those who formerly had no connection with the soil. Hence the prohibitions against transfer which s. 9 provides. Those prohibitions must be so interpreted as to give effect to the policy of the law.

The interpretation of the word "*transferable*" depends upon the meaning to be attached to the word "*transfer*." Whatever the meaning of that word as used by the English people in ordinary parlance may be, I cannot hold that the question before us can be decided on any such ground. I fully admit that words used in statutes are, as a general rule, to receive their natural and ordinary signification and the Courts in construing legislative enactments [137] will adopt the popular meaning of words and phrases. But this rule of construction is qualified by a distinct limitation, explained by Parke, B. in *Burton* v. *Reevell* (1) that "when the Legislature uses technical language in its statutes, it is supposed to attach to it its technical meaning, unless the contrary manifestly appears," and the reason of the rule is that "such language is employed for the purpose of escaping the difficulties caused by the use of merely popular expressions in regard to matters precise and technical in their nature, such as the title to land or the vesting of estates of other legal subjects."—Wilberforce on Statute Law, p. 124.

Now the word "*transfer*" has long been recognised to be a technical term of law in all countries where English is the language of the Legislature and of the Courts of Justice. It is often used as a convertible term with "*alienation*", "*conveyance*" and "*assignment*." Whether any distinction exists between the technical meaning of these expressions—and, if so, what that distinction is—it is not necessary exactly to determine. But it may be safely taken that the word "transfer" is used in law in the most generic signification, comprehending all the species of contract which pass real rights in property from one person to another.

In considering the question immediately before us, it seems to me necessary to bear in mind that we are not at present concerned with transfers which take place by judicial process, but with such transfers only as take place between living parties by virtue of their own act. In this signification the term cannot be defined better than by saying that it means an act by which a living person conveys the whole or part of the right of

(1) 16 M. & W. 309.

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ownership of property, in present or future, to one or more other living persons. This being my view, the next question to consider is the exact nature of Indian mortgages in general. Mortgage as understood in this country cannot be defined better than by the definition adopted by the Legislature in s. 58 of the Transfer of Property Act (IV of 1882). That definition has not in any way altered the law, but, on the contrary, has only formulated in clear language the notions of mortgage as understood by all the writers of text-books of Indian mortgages. Every word of the definition is borne out by the decisions of the [138] Indian Courts of Justice as fully explained in Macpherson's celebrated work on Indian Mortgages. I adopt that definition simply for the sake of convenience, and I must not be understood to rely upon it, as if I held that anything in Act IV of 1882 gave legislative authority to the interpretation of Act XVIII of 1873. A mortgage, then, is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee. Now, hypothecation is only a species of mortgage. It has in India been used in the sense of a pledge, and the proper term for it is simple mortgage. What, then, is the nature of a simple mortgage? I again borrow the definition from the Transfer of Property Act, solely for the sake of convenience, and wholly irrespective of its legislative authority. Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage. Now, it is quite clear to my mind that the most essential of the elements which constitute the simple mortgage is *the right to cause the property to be sold*—a right without which the transaction, whatever else it may be, certainly cannot be called hypothecation, pledge, or simple mortgage. This right does not come into existence when the actual sale takes place by virtue thereof, but it comes into existence at the time when the mortgage is made: it subsists in the property ever afterwards so long as the mortgage-money remains unpaid: it limits the interests of the mortgagor as they were at the time of the mortgage. Jurisprudence recognises it as one of the various species of *jura in re aliena*, or estates carved out of the full ownership of property. It may happen that the right, though not apparently, but in reality, is tantamount to absolute transfer, in its virtual effect. For instance, when land of the value of Rs. 100 is pledged by hypothecation in lieu of a debt amounting [139] to Rs. 101, the mortgagor is simply a nominal owner, and his *nuda proprietas* is worth less than zero. I am, therefore, of opinion that the rights created by hypothecation in this country amount to nothing more or less than a transfer of an estate amounting to a transfer of immoveable property, though of course not an absolute transfer. The feature which distinguishes hypothecation from other forms of mortgage consists in the fact that it does not entitle the mortgagee to enjoy the physical qualities of the subject of the mortgage. That this distinction does not alter the nature of the transaction so as to take it out of the category of *transfer* is clear to me from the manner in which the right is treated by jurisprudence.

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The reason of the juristic view is well described by a modern writer on jurisprudence. "The *right of sale* is one of the component rights of ownership, and may be parted with *separately*, in order thus to add security to a personal obligation. When so parted with, it is a right of pledge, which may be defined as a right *in rem* realizable by sale, given to a creditor by way of accessory security to a right *in personam*. The objects aimed at by a pledge are, on the one hand, to give the creditor, a security on the value of which he can rely, which he can readily turn into money, and which he can follow even in the hands of third parties; on the other hand, to leave the enjoyment of the thing in the meantime to its owner, and to give him every facility for disencumbering it when the debt for which it is security shall have been paid."

Such being the very nature and essence of the rights created by hypothecation, it follows that if hypothecation is valid and legal, the incidents which flow from it must necessarily be held to be valid and legal too—on the principle that when the law permits a thing, it also permits that which is essential to its accomplishment. The most essential incident of hypothecation is the *eventual sale* by order of Court—a sale which in the ordinary course of law must be held by public auction, at which *ex necessiterei* any person may bid, and which must be concluded in favour of the highest bidder. If hypothecation does not carry with it this *right of sale* at the instance of the mortgagee, and without any restrictions as to the class of bidders or purchasers, it cannot be called hypothecation at all. For if any such restrictions are attached to **[140]** the right of sale, they are essentially repugnant to the very nature of the right conveyed, and must end in defeating the entire object of the pledge. Therefore, so long as I hold that under the terms of s. 9 the occupancy-tenant has no *right of sale*, I must as a logical consequence also hold that he cannot convey that right to another, on the maxim that no man can give to another what he himself does not possess,—*non dat qui non habet*.

But it has been said that the terms of s. 9 have not the effect of prohibiting hypothecation, but only go to reduce the value of the security. For it is contended that the occupancy may be lawfully sold in enforcement of hypothecation so long as the bidders in auction belong to the class of persons in whose favour transfer could have been legally made under that section. It seems to me to be clear that no decree of Court could, in enforcing the lien created by the hypothecation-bond, deal with the occupancy-right more freely than the tenant himself could have done. And it follows that if the tenant could not transfer his rights to total strangers, the decree of Court could not do so either. If such were not the rule the prohibitions of law could be easily circumvented by the occupancy-tenant and the holder of the hypothecation bond. All that is now contended is, that a decree enforcing the hypothecation lien could be executed subject to the restriction that the sale in auction must be held in such a manner that the only persons allowed to bid for the property should be "persons who have become by inheritance co-sharers" in the right of occupancy. I am not aware of any process recognised by the rules of procedure which can impose any such restriction on a public auction-sale to be held in execution of decree. The sale, in fact, can no longer be called a *public auction* sale, and indeed cannot achieve the very objects for which auction-sales are provided by the law. Supposing a case in which the decree (passed on a hypothecation-bond executed by an occupancy-tenant) is put into

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execution and no "co-sharer" of the occupancy-tenant exists, or such co-sharers as do exist decline to bid in auction, the question arises, what happens to the decree which orders sale? It seems to me the decree must necessarily remain wholly infructuous and entirely incapable of execution so far as it directs the sale of the occupancy-right. Again, supposing [141] the hypothecation-bond was executed by the occupancy-tenant jointly with *all* his co-sharers, the same difficulty arises in a more aggravated form. *Ex hypothesi* the property would be put up to auction-sale, and the only persons who could bid in the auction would be the judgment-debtors themselves—an anomaly which no system of procedure with which I am acquainted can permit. If I could hold that hypothecation of the occupancy-right is allowed by the law, that the lien created thereby can be enforced by decree of Court, I should be driven to the logical conclusion that a well-advised tenant, in borrowing money on the security of his tenure, could effectually defeat the very essence of the pledge by getting all his co-sharers to join in the bond. For, *ex hypothesi*, whilst a decree could enforce the lien, if the hypothecation-bond was executed by only one of the co-sharers in the occupancy-tenure, the lien would be entirely unenforceable when all the co-sharers had joined the bond. And we have to face the anomaly that only one co-sharer in an occupancy-right could confer by hypothecation of the tenure rights greater than *all* the co-sharers collectively could have conveyed. In other words, what all the owners of an occupancy-tenure could not do, only one of them can do.

And it follows as a logical consequence that the larger the number of obligors, the smaller the value of the security obtained by the obligee; and if all the co-sharers are obligors, the value of the security is equal to zero. On the other hand, if, subsequent to the execution of the hypothecation-bond, the number of co-sharers in the occupancy-tenure increases, the number of possible bidders in auction also increases, thus enhancing the chances of an auction-sale being held, and augmenting the value of the security. And again, on the other hand, if, subsequent to the bond, the number of the obligor's co-sharers diminishes by death or otherwise, the value of the security would diminish as each death among the co-sharers took place. The right of hypothecation, as I understand the term, can be subject to no such sliding scale of increasing and diminishing value. It is, as I conceive it, a right which, once validly created, subsists in the property, and depends for its value only on the value of the subject-matter of the hypothecated property. Nor can I hold that a valid hypothecation, which I have [142] endeavoured to show means the transfer of *the right of sale*, can be subjected to the uncertainty of being enforceable or non-enforceable according to the will or existence of persons wholly unconnected with the transaction. And if I am right in holding that there is no process of procedure known to our law by which a public auction-sale can be limited to a determinate class of intending purchasers, it must necessarily follow that no decree passed in enforcement of hypothecation of an occupancy-tenure can be executed. It also follows that if such a qualified public auction-sale could be ordered and held, its only effect would be to take from those interested in saving the tenure money which they need never have paid to secure the occupancy right from sale. For it is not questioned that the refusal of the co-sharers to take part in the auction-sale would have the effect of rendering the security ineffective and the decree passed thereon incapable of execution, so far as the right of occupancy is concerned. I am unable to

hold that the law contemplates any such anomalies and results. And for these reasons I hold that hypothecation by an occupancy-tenant of his interest is a transfer within the meaning of s. 9 of Act XVIII of 1873; and this is my answer to the reference in these two cases.

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PRIVY COUNCIL.

Before Sir B. Peacock, Sir R. P. Collier, Sir R. Couch, and Sir A. Hobhouse.

[*On appeal from the High Court for the North-Western Provinces.*]

BALKRISHNA (*Plaintiff*) v. MASUMA BIBI AND OTHERS (*Defendants*). [6th July, 1882.]

Regulation LII of 1803—*Court of Wards—Incompetency of disqualified proprietor to contract.*

Under s. 7 of Regulation LII of 1803, *lakharaj* lands belonging to a disqualified proprietor may be committed by the Government (on its appearing that this will be for its interests and those of such proprietor), to the charge of the Court of Wards; and, thereupon, the whole estate and effects, real and personal, of such proprietor, become vested in that Court.

An estate consisting of *lakharaj* lands was duly placed under the management of the Court of Wards, the proprietress, a Muhammadan, being disqualified under the Regulation. This ward having then become a party to a mortgage of such lands to secure re-payment of money advanced to her, it was *held*, that she neither bound herself nor charged the estate.

[143] This case distinguished from *Mohummud Zahoor Ali Khan* v. *Thakooranee Rutta Koer* (1), where the proprietress, no intention to treat her as disqualified having been shown, was adjudged capable of contracting, though the Court of Wards was in possession of her estate.

On the facts of this case it was also *held*: that, although the Court had given to this ward an authority, under certain limitations of which the plaintiff had notice, to borrow money for a special purpose, there had not been such a holding out to the world of her competency as would have induced any reasonable person to suppose that she had power to make the contract on which this suit was brought.

[R., 18 A. 469 (471) = A.W.N. (1896) 154; 14 C.P.L.R. 5 (7); 13 Ind. Cas. 542; 1 M.L.J. 30; D., 28 A. 570 (581) = 3 A.L.J. 495 = 8 Bom. L.R. 491 = 4 C.L.J. 1 = 10 C.W.N. 849 = 33 I.A. 118 = 16 M.L.J. 292 = 1 M.L.T. 205 = 9 O.C. 118; 14 C.W.N. 560 (567) = 5 Ind. Cas. 390 (394).]

CONSOLIDATED appeal from two decrees of the High Court (26th May 1879), affirming decrees of the District Judge of Benares (21st and 25th September 1878).

The suits out of which this consolidated appeal arose, numbered 121 and 122 of 1878 on the High Court file, were two of a series of five in the Court of first instance relating to charges on the same estate; and were brought to recover Rs. 97,417 and Rs. 52,373, respectively, for money lent and interest; and to enforce mortgage liens upon Taluqa Sunwani, a muafi mahal of about sixteen villages in pargana Balia in the Ghazipur district. These suits were brought by Narain Das, deceased, a banker in Benares, and father of the appellant, each upon a mortgage, the one dated 1st November 1872, and the other 7th March 1874. Three of the respondents, *viz.*, Masuma Bibi, her daughter Said-un-nissa Begum, and

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(1) 11 M. I.A. 468.

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Nawab Muhammad Husain Khan, husband of the latter, were made defendants on account of their having executed the mortgages; and the fourth respondent, the Collector of Ghazipur, was made a defendant as representing the Court of Wards, under which Sunwani, the mortgaged estate, had been placed.

In suit No. 121 one of the defences was that Narain Das, suing not as the mortgagee, but as purchaser of the mortgage, having purchased at an auction sale, in execution of a decree against the mortgagee, one Babu Bisheshar Prasad, was in consequence of irregularities such sale disentitled to sue, not having obtained a title to the mortgage. The sale, it was alleged, had been of immoveables, and the requirements of s. 249 of Act VIII of 1859 had not been complied with; execution having been issued in a district (Benares) other than that in which the immoveables were situate; and thirty days' notice not having been given.

[144] To both the suits, 121 and 122, there was a common defence made by the Collector of Ghazipur, *viz.*, that Taluqa Sunwani, before the mortgages were made, had been placed under the management of the Court of Wards; and that the contract had been entered into without the authority of that Court; consequently, neither Masuma Bibi nor the estate were bound.

Both the above defences were held good at the hearing of the two suits by the Judge of the Benares District (Mr. M. Brodhurst), who was of opinion as to suit 121, that the sale in execution to the appellant of the interest of the original mortgagee was bad for irregularity under s. 249 of Act VIII of 1859. As to the other defence, made in both suits, he referred to his judgment in the first of the series of claims on the estate, stating the law as to the position of the Court of Wards, comprised in Regulation LII of 1803, at the time when the Sunwani taluqa was taken under the superintendence of the Court, *viz.*, in 1869, and also at the date of the execution of the mortgage in suit.

Regulation LII of 1803 established a Court of Wards in the Provinces ceded by the Nawab Vazir to the Honorable the East India Company, following the provisions of X of 1793 for the Lower Provinces of Bengal, to which the rules adopted by the Governor-General in Council in July 1791, had previously been applicable. Regulation LII of 1803 having been, by s. 29 of Regulation VIII of 1809, extended to the Conquered Provinces and to the Territory ceded by the Peshwa, was extended to Benares by s. 2 of Regulation VI of 1822 with the addition contained in s. 29 of Regulation VIII of 1805. Part of s. 9 of Regulation LII of 1803 was repealed by Act XXXV of 1858 (relating to lunatics). The rest of the Regulation, so far as it was applicable to the North-Western Provinces, was repealed by s. 2 of Act XIX of 1873, "the North-Western Provinces Land Revenue Act;" being also superseded by Chapter VI, ss. 193, 206, of the last mentioned Act. The District Judge held, that persons who had been pronounced by the Government disqualified to manage their estates, and whose estates had been, in consequence, placed under the superintendence of the Court of Wards, were incompetent, during the time of their disqualification, to alienate or incumber their estates.

[145] He also gave the history of the Sunwani taluqa, which had been granted as a muafi altamgha taluqa to Munshi Shariat-ulla Khan in 1785, on account of his services to the Government as Mir Munshi to WARREN HASTINGS. Inherited by Gholam Muhammad, the son, and Husaini Bibi, the daughter, of the Munshi, it had descended to the

present proprietress, Masuma Bibi, daughter of Husaini Bibi. The sole taluqdar was Masuma Bibi, although her daughter, Said-un-nissa Begam, and her daughter's husband, the Nawab Muhammad Husain Khan, had executed the deed of mortgage, and were therein styled the jagirdars of Sunwani.

In 1869, on the petition of Masuma Bibi, and on the recommendation of the Collector of the District, of the Commissioner of the Division and of the Board of Revenue, sanction was given by the Lieutenant-Governor to the placing of this taluqa under the superintendence of the Court of Wards. Masuma Bibi was, in the opinion of the District Judge, rendered a disqualified proprietress within the meaning of the Regulation LII of 1803; and she was, at the time of her attempting to mortgage, legally incompetent to incumber the taluqa. For these reasons the District Judge dismissed the suits, and his judgment was affirmed on appeal to the High Court (F. B. Pearson and R. Spankie, JJ.).

On this appeal, Mr. *J. F. Leith*, Q. C., and Mr. *R. V. Doyne*, appeared for the appellant.

Mr. *T. H. Cowie*, Q. C., and Mr. *J. T. Woodroffe*, for the respondent, the Collector of Ghazipur, on behalf of the Court of Wards.

For the appellant it was argued that the fact of the Court of Wards taking possession of the property did not of itself render the proprietor "disqualified" within the meaning of Regulation LII of 1803, and that in this case disqualification had not been occasioned. In order to render Masuma Bibi a disqualified proprietress the provisions of that Regulation should have been strictly followed. The strictness required was shown by the judgment in *Mohummad Zahoor Ali Khan* v. *Thakooranee Rutta Koer* (1). Here, however, the preliminaries necessary to the Court's taking charge of Sunwani had not been regularly conducted. These were not mere forms; for without them even an alienation of property in **[146]** the possession of, but not duly committed to the charge of, the Court of Wards, was not invalid, as had been decided by the Sadr Diwani Adalat of the Lower Provinces in December, 1832, in *Jan Khatun* v. *Khwaja Ali Mullah* (2). Reference having been made to the distinction between the power of the Court of Wards exercised under s. 7 of Regulation LII of 1803 in regard to *lakharaj* lands as distinguished from revenue-paying, it was argued that the Court of Wards had not effectively, nor properly, brought the taluqa Sunwani under their superintendence. The Court had not appointed a manager of their own, but had left the management to Masuma Bibi and her daughter and son-in-law. Having allowed the proprietress to do certain acts, as if "sui juris," the Court of Wards had thus permitted creditors to act in the belief of her having authority to charge the estate. The Court of Wards, for the purpose of promoting the payment of certain debts, incurred by the family before 1869, when the estate came under the superintendence of the Court, authorized the raising of money on mortgage. Thus the Court of Wards, having held out the ward as competent, was not in a position to allege her incompetency.

In regard to the defence peculiar to suit 121, the grounds of it were untenable. None but the judgment-debtor in the execution proceedings, or those who claimed through him, could question the regularity of the execution-sale. The Court of Wards could not question the validity of the transfer under that sale, or insist that the title of the purchaser

(1) 11 M.I.A. 468.

(2) 5 S.D.A. Select Rep. (Bengal) 240.

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was bad for want of compliance with s. 249 of the Code, on the part of the decree-holder. No issues had been fixed as to the matters relating to the sale to which objection had been taken; but for the above reason the question of the plaintiff's title could not be raised. Moreover, the sale of a mortgage-debt, with a future and contingent right of enforcing payment by proceeding against the land, was not the sale of a right or interest in land. On this point were cited *Sham Sunder Das* v. *Raheem Buksh* (1) and *Bhawani Kuar* v. *Gulab Rai* (2), the latter case being distinguished as referring to a decree for land.

[147] SIR R. P. COLLIER said that their Lordships considered that the points on which argument should be heard were: whether the Court of Wards had properly and effectively assumed the superintendence of the estate of Masuma Bibi as its ward; or had acted irregularly in such a manner as to have left the Sunwani taluqa chargeable in the manner alleged by the appellant.

For the respondent, the Court of Wards, it was contended that there had been sufficient evidence on which the Indian Courts had concurred in finding that the Court of Wards had properly taken charge of the Sunwani taluqa. This had been done on account of the incompetence of Masuma Bibi to manage her own affairs, and had been done at her own request; the result being that she had been rightly found by the Courts below to have been disqualified, as a person of the class of female proprietors, within the contemplation of Regulation LII of 1803. The appellant had express notice of her disqualification. The limited authority given by the Court to its ward to raise money to pay debts, incurred antecedently to the Court's taking charge, was under conditions stated in the bonds, one of which the appellant had taken, receiving thereby express notice of the conditions placed upon her. In *Mohummud Zahoor Ali Khan* v. *Thakooranee Ratta Koer* (3) the disqualified proprietress, on whose behalf the Court of Wards had originally taken possession of the estate, had died during the pendency of the matters which were in question; and, after her death, the Court continued to hold the estate on behalf of the heiress, who was not disqualified. To the latter, but for the mutiny, the estate would have been handed over. Masuma Bibi, on the other hand, having been distinctly disqualified, there was no resemblance between the cases. The judgment of the High Court was correct.

Mr. *J. F. Leith*, Q. C., replied.

JUDGMENT.

Their Lordships' Judgment was delivered by

SIR R. P. COLLIER.—Two suits have been here consolidated, brought by Rai Balkrishna against Musammat Masuma Bibi, her daughter, her daughter's husband, and the Collector of Ghazipur on behalf of the Court of Wards.

[148] The plaint in the first suit states that the claim is under a deed of mortgage executed on the 1st November, 1872, by the defendants 1, 2 and 3; that Rs. 67,000 were borrowed of one Bisheshar Prasad; and that as security for that amount the defendants mortgaged a two annas share out of 16 annas of Taluqa Sunwani. It then states that the debt due to Bisheshar was purchased under a sale in execution of a decree by the plaintiff, who obtained a sale-certificate, and thereby stood in the place of Bisheshar, and " that inasmuch as the Sunwani estate

(1) 6 N.W.P.H.C.R. (1874) 252. (2) 1 A. 348. (3) 11 M.I.A. 468.

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belonging to the defendants is under the superintendence of the Court of Wards, and as the Collector of Ghazipur is the manager thereof on behalf of the Court of Wards, the Collector has also been made a defendant." The plaintiff prays judgment for the amount claimed.

The plaint in the second suit is very similar. It is upon a mortgage-bond for Rs. 39,900, executed on the 7th March 1874, by the same persons, to Rai Narain Das himself. This plaint also contains a statement that the Sunwani estate is under the control of the Court of Wards; and that therefore the Collector, who was in the management of it, is made defendant.

A written statement was put in on behalf of the Court of Wards in the first suit, which stated, "That Taluqa Sunwani is the sole and exclusive property of Masuma Bibi," which is now admitted; and that she was a ward of the Court, and had no power to convey any portion of her estate by way of mortgage; that the property against which the plaintiff seeks to enforce his lien belongs to No. 1 only,—that is Masuma Bibi,—not to the other defendants; and that the debt sued for was not borrowed with the consent or knowledge of the Court of Wards.

The material issues framed are, "Who is the proprietor of Taluqa Sunwani, and have Nawab Muhammad Husain Khan and Said-un-nissa Begam any interest in this taluqa or the properties in dispute?" It is found they had not. "Was the proprietor of or were the persons who may be found to possess an interest in the property in dispute, legally competent to convey that property by mortgage or sale while the estate was under the superintendence and management of the Court of Wards?" "Is the plaintiff, as auction-purchaser of the deed of mortgage, com-[149]petent to sue? Was the deed executed with the knowledge and consent of the Court of Wards? If the deed is not valid are Masuma Bibi, Said-un-nissa Begam, and Nawab Muhammad Husain Khan, or any of them, liable for the amount claimed, or for any other amount?"

The first suit was decided on what may be called a technical point. On issue 4 it was held that the plaintiff was not the auction-purchaser of the deed of mortgage, and therefore could not sue; and the decision was therefore against him. The Judge appears also to have found the other issues very much as they were found in the other case.

With respect to the second suit the issues are very much the same, and the findings are in favour of the defendants upon all the material issues. They are in their favour upon the issue that the defendants, who may be reduced to one,—*viz.*, Masuma Bibi,—were not competent to convey an interest in the property in dispute, and that the deeds sued upon were not known to the Court of Wards. Under these circumstances, in the second case, the Judge of the first instance dismissed the suit as against the Collector of the Court of Wards and as against Masuma Bibi, but granted the relief claimed against the daughter and the son-in-law, who were not under the Court of Wards. These two judgments have been confirmed in every respect by the Court above, and the appeals are from the judgments of that Court.

It has been contended on the part of the plaintiffs, in the first place, that the estate in question, which seems to have been a large estate, was not properly put under the jurisdiction of the Court of Wards, so as to destroy the power which Masuma Bibi would have had of charging it; secondly, that even assuming that it was, still that the conduct of the Court of Wards has been such in allowing her and her son-in-law to

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manage the estate as to hold them out to the public and to creditors as capable of charging it.

It now becomes necessary to refer to some of the provisions of Regulation LII of 1803, by which the Court of Wards was established. By s. 2, "The Board of Revenue is hereby constituted a Court of Wards for the superintendence of the persons and estates of zamindars and other actual proprietors of land paying [150] revenue to Government who are or may be disqualified for the management of their own lands, in consequence of their coming under any of the descriptions of disqualified landholders specified in s. 3 of this Regulation." Those disqualified landholders are in the first place females, who are treated as disqualified if so reported by the Board of Revenue, unless the Governor-General in Council declares them competent; and there is another class of disqualified landholders consisting of minors, idiots, lunatics, and persons of bad character. This Regulation provides, in the first place, only for the case of proprietors of lands paying revenue to the Government, but the seventh section goes further, and provides "that it shall be competent to the Governor-General in Council to commit to the charge of the Court of Wards any estate paying revenue to Government, being the sole property of any disqualified person or of any two or more persons, both or all of whom may be disqualified, although the same shall not have descended to such person or persons in the regular course of inheritance;" and then it goes on to say—"and also any lakharaj lands belonging to such proprietor or proprietors, whenever the same shall appear to him for the interests of Government and the proprietor or proprietors," and so on. There are further provisions with respect to reports to be made to the Government, the appointment of a manager and a number of details as to the duties of that manager, and the staff of assistants which he shall have, and so forth. Then by s. 19 it is stated that the manager shall have "the exclusive charge of all lands, malguzari or lakharaj, as well as of all houses, tenements, goods, money, and moveables of whatever nature belonging to the proprietor whose estate may be committed to his charge, excepting only the house wherein such proprietor may reside, the moveables wanted for his or her use, and the money allowed for the support of the proprietor," etc. So that, according to the provisions of this section, if the Governor-General in Council, or the Lieutenant-Governor who now exercises his power, is of opinion that it would be for the benefit of the public or the estate to include any lakharaj lands under the management of the Court of Wards, he may do so; and then the whole estate and effects, real and personal, of the proprietor are vested in the Court of Wards.

[151] Undoubtedly the evidence in this case is somewhat meagre and unsatisfactory as to the proceedings of the Court of Wards both as to the circumstances under which they took possession of the estate and their dealings with it afterwards. What evidence there is consists mainly of what will be now referred to. It appears that on the 8th of October 1868, the Collector of Ghazipur wrote a letter to the Commissioner of Benares, with a view, no doubt, of its being transmitted to the Board of Revenue, to this effect:—"I have the honour to request that you will obtain the sanction of the Board of Revenue to my placing the estates of Masuma Begam, and Mussumat Said-un-nissa Begam (that is, the mother and the daughter), under the Court of Wards. These estates are held rent-free; they were granted rent-free to Munshi Shariatullah Khan in A.D. 1784, for good services rendered by him, and have been in his family ever since. Lately, owing to the estates being in the hands of women, they have fallen into

great disorder; large debts have accrued; and unless some steps are taken this fine property will, I fear, soon be split up and come into the possession of outsiders." He recommends accordingly, with a view to the preservation of the property, that it shall be taken into the custody of the Court of Wards. The next document is one of the 24th February 1869, in which the lady herself and her daughter pray that the estate may be put under the Court of Wards; and they make a proposal for the payment of some revenue to the Government with a view of authorising the Government to take that step. The next document is a letter, No. 1107 of the 18th May 1869, from Mr. Simson, Secretary to the Government of the North-Western Provinces, to the Secretary of the Board of Revenue, in which he says that he forwards an opinion of the Government Advocate on the proposal of the Board that the Sunwani taluqa in pargana Balia, Zila Ghazipur, be placed under the management of the Court of Wards. Then he says:—"I am to observe that to receive a small payment as land revenue simply for the purpose of bringing the property within Regulation LII of 1803, is a proceeding to which the Lieutenant-Governor would have been unwilling to resort. But on a reference to the agents of the family who are now at Allahabad, it has been alleged by them that the family are in possession of a small assessed property. If this be the case, the Board are authorised to [152] assume the property, *khalisa* and *jagir* under their control as the Court of Wards." The Government, therefore, put the construction upon the seventh section, which has been before read, that if any part of the property pays Government revenue, then there is a power to include all the lakharaj property; and this letter includes an opinion from the Government Advocate very much to the same effect.

We are informed incidentally of what was done by a letter of the 22nd July 1875, from the Secretary to the Government of the North-Western Provinces to the Secretary to the Board of Revenue of the North-Western Provinces:—"In reply to your letter dated the 24th of June last, I am directed to say that the Board have correctly interpreted the grounds on which the Government in G. O., No. 1107, dated the 18th May 1869,"—which is the last letter referred to—"authorised the Board to assume charge of the Sunwani estate in the Ghazipur district as the Court of Wards, *viz.*, on account of the incompetency of the proprietors to manage it." We have here, therefore, a statement that this estate was assumed on the ground of the incompetency of Masuma Bibi. Then the letter goes on to say—"The orders as contained in Government Order No. 1107, dated the 18th May 1869, were made subject to the condition that some portion of the estate was assessed to revenue. The same condition was subsequently referred to in Government Order, No. 1110,"—which we have not,—"dated the 20th May 1869. The Board, in their docket No. 894,"—which is not in the record,—"dated the 18th August 1869, reported that the condition required to make the orders of 20th May 1869, absolute was satisfied." Then it goes on to say:—"The proprietors are still deemed by the Government incompetent to manage their estate. The Board may therefore carry out their proposal to sell a portion of the taluqa to discharge the debts contracted." We have from this letter information that the Government made some inquiries, and in the result were satisfied that Masuma Bibi had some rent-paying land, and, if so, the condition under which they directed her estate to be put under the management of the Court of Wards was complied with; and further, it is here stated that the estate was put under the management of the Court

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of [153] Wards because she was incompetent, and that she was so considered up to that time, namely, 1875. Their Lordships understand that the whole of Masuma Bibi's property, including a house in Benares, was taken under the management of the Court of Wards.

That being so, this case is distinguishable from a case which has been quoted from the 11th volume of Moore's Indian Appeals, page 468, in which under certain circumstances it was held that, although an estate was actually in possession of the Court of Wards, still the lady to whom it belonged, Rutta Koer, might be capable of contracting debts. The ground on which this case was decided appears from what is said in the judgment delivered by Sir James Colvile at page 483 of the volume referred to: "The evidence in this case not only fails to show that the necessary reports of the Collector and of the Board of Revenue were made; it also, though not uniformly consistent, goes far to negative any intention on the part of the revenue authorities to treat Rutta Koer as a disqualified proprietor or a person incompetent to manage her affairs. It shows that when her title was attacked in 1855 they declined to act as a Court of Wards in its defence, but left her to sue or be sued as a person *sui juris*, on her own responsibility and at her own cost. It further shows that in 1856, and in the very month in which she is alleged to have executed the bond, they had taken all the necessary steps towards putting her into the full possession and enjoyment of the taluk, as a proprietor competent to its management, on her entering into proper engagements for the payment of the Government revenue." In that case the estate had been put under the Court of Wards in the lifetime of the sister, who was incompetent. It had come by inheritance to Rutta Koer, who, according to that part of the judgment which has been quoted, was not incompetent, and to whom the Board intended to transfer the estate, and would have done so but for the mutiny. That case is altogether distinguishable from the present, where the Court of Wards did hold the lady to be incompetent; where, so far from leaving her to sue and to be sued, they now take her part and protect her; and further, where they have assumed the management and retain it to the present day, holding her to be incompetent.

[154] It now remains to deal with what may be called the substantial case on the part of the appellants. They say that, assuming that the estate was properly taken possession of by the Court of Wards under a proper power, still that the conduct of the Court of Wards when they had taken possession was such as to hold out Masuma Bibi to the world as capable of contracting, and that the plaintiffs have been induced thereby to contract with her. It is said that the Court of Wards have not assumed possession of the property in the sense of taking the rents and profits at all, and that they have appointed no manager. Undoubtedly, as before observed, the evidence on these subjects is meagre, but their Lordships by no means infer that the lady, or her son-in-law, and daughter, have remained in possession of the rents and profits all along; and with respect to a manager, whether or not a regular manager was not appointed does not very clearly appear, but in the statement of the plaint the estate is said to be under the management of the Court of Wards, and appears undoubtedly in fact to have been so.

The argument last adverted to appears to their Lordships not to have been set up in either of the Courts below. There is no issue addressed to it; the judgment of the Court below is not addressed to it; and even in the petition of appeal the point is not taken. There is indeed, in the second ground of appeal, this statement: "The manner, the object for

which, and the state of things under which the estate was brought under the management of the Court of Wards did not prevent the owner or owners of the estate from raising debt by the hypothecation of the estate." That refers to the object and the state of things under which the estate was brought under the management of the Court of Wards; but it does not set up the case that the Court of Wards, after it was brought under their management, so conducted themselves as to render this lady competent. She having been incompetent when they took possession of the estate, could any conduct of theirs, in the first place, render her competent? In the second place, has their conduct been such that they are estopped, as it were, from disputing that she was competent? Those seem to be the questions. Assuming, however, that those questions, though not distinctly raised in the [155] issues or in the judgments of the Court, or in the grounds of appeal, could now be gone into, their Lordships are of opinion, that, as a matter of fact, no such case is made out on the part of the appellants. It does indeed appear that the Court of Wards allowed this lady and her daughter and son-in-law more freedom of action than probably they ought to have had or than was consistent with the Regulation which has been quoted. The circumstances under which they were permitted that liberty of action appear upon the record. In a petition of the 4th January 1872, by the son-in-law, who is called the Nawab of Sunwani, there is this statement: "The rent-free jagir of taluqua Sunwani has been, at our request, placed under the management of the Court of Wards. Mr. Nickels holds a conditional deed of sale of the said property, the term of which has expired on the 4th September 1871. As it is impossible to liquidate the debt without raising a fresh loan, which we have arranged for with certain bankers of Benares, who have already paid into the Bank of Bengal a sum more than covering the debt in question, we are therefore placed under the necessity of asking your written permission"—this is, of the Court of Wards—"for contracting the mortgage loan, so that we may be enabled to complete the requisite transaction with the bankers, and the property be thereby saved from the liability of the deed of conditional sale. Petitioners pray for the issue of early orders, as they will be put to great expense for payment of interest pending receipt of permission." That petition is considered, and this order is made: "Forward a copy of this letter to Masuma Begam, and request her to arrange that the money required for liquidation of the debt as claimed by Mr. Smythe, attorney for Nickels, may be at once deposited in the Bank of Bengal." It appears then that for the purpose of liquidating a debt of large amount to Mr. Nickels,—incurred antecedently to the assumption of the estate by the Court of Wards,—the power was given to borrow considerable sums of money, a power which probably ought not to have been given; but at the same time it is clear from the petition that the petitioner recognised the estate as being under the Court of Wards, and was fully sensible that without express written permission from them no transaction of the kind could be effected. Probably the Court in granting this permission acted under s. [156] 23 of Regulation LII of 1803, in which, among other things, it is said: "The circumstances of all such debts,"—that is, antecedent debts,—"however, shall be immediately reported to the Collector, and by him without delay to the Court of Wards, with his sentiments on the best mode of satisfying the same, for their instructions, previous to any payment being made by the manager in discharge of them." It would seem that the Court thought that the best mode of dealing with this debt, incurred antecedently

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to their jurisdiction over the estate, was to allow the lady herself and her daughter and son-in-law to contract fresh loans. Upon this permission they did contract them, and it appears that they entered into four bonds, one of them in favour of the present plaintiff, Rai Narain Das, dated the 25th January 1872, for 17,000 rupees, and three others to other persons whose names are not material. The terms of these bonds are set out, and it appears that in the bond given to this plaintiff, there is this statement: "That as the taluqua Sunwani was held by the Court of Wards, they were forbidden by law to borrow debt without the sanction of the Court; they had obtained a written permission of the Commissioner, and executed the deed of simple mortgage." Thereupon the present plaintiff advances this money, and receives a bond, for the purpose of paying off an antecedent debt, which debt is paid off, and the plaintiff is paid also; and on the face of this bond he has express notice that there is no power on the part of the lady to contract without the written permission of the Court of Wards, which has been given. That being so, when we come to the mortgage on which he sues,—and we are here dealing with the mortgage given to himself,—this previous mortgage to him is recited, which contains a statement of the want of power in the lady to contract. He had, therefore, express notice when he entered into the mortgage of the 4th March 1874, that she was acting without authority, and when he took it he certainly took the chance which every man must do who deals with a person who he knows has no authority to contract.

It appears, then, to their Lordships that the giving on the part of the Court of Wards, whether prudently or not, of this limited authority to raise loans for the purpose of paying antecedent debts, was not such a holding out to the world of the competency of Masuma Bibi, and her daughter and son-in-law as would induce [157] any reasonable person to suppose that they had the power to contract debts; and that even if it were so, the plaintiff at all events knew the true state of the case.

The case against Rai Narain Das on the second bond on which he sues is perhaps somewhat stronger than that on the first, because the first was given to Bisheshar; and the question would be what knowledge Bisheshar had. But when their Lordships consider the necessary notoriety of a large estate being put under the management of the Court of Wards, when they consider further that express notice was given to all creditors of the estate being under the management of the Court of Wards as early as December 1869, that part of the estate was in Benares, and that the family resided in Benares, and that Bisheshar was a banker of Benares, they cannot doubt that he must have been perfectly well aware, as Rai Narain Das himself must also have been, that this lady had not the power to contract.

Under these circumstances their Lordships are of opinion that the judgment in the second case, that of the bond of the 4th March 1874, is right.

With respect to the first case, their Lordships think the judgment dismissing the suit on the ground that the plaintiff was not the purchaser of Bisheshar's mortgage, on the ground of the sale being irregular, and of the Court not having jurisdiction to execute the decree, was wrong. The irregularities referred to, if they existed, were cured by the certificate of sale; and though the Court may not have had jurisdiction to attach lands out of its district, it had jurisdiction to sell in execution the right

to enforce the bond. But for the reasons which they have given with respect to the second case, they are of opinion that the judgment ought to have been the same as in that case, that is, a judgment dismissing the suit against the lady and against the Court of Wards, but giving it effect against the daughter and her husband. The judgment in the first case must be so far modified.

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In the result, their Lordships will therefore humbly advise Her Majesty that, in Appeal No. 121 of 1878, the decree of the High Court of the 26th May 1879, ought to be affirmed so far as it relates to Masuma Bibi and the Collector of Ghazipur, [158] on behalf of the Court of Wards, and to the property alleged to have been mortgaged, and to be reversed as to the other defendants; and that it be declared that Said-un-nissa and Nawab Muhammad Husain Khan are liable to pay the amount of principal and interest due on the bond in Original Suit No. 4 of 1878, such interest to be computed at the rate of nine annas per cent. per mensem from the date of the bond to the date of the Order of Her Majesty on this report, and at the rate of six per cent. from the date of the Order to that of payment; that the case be remitted to the High Court with directions to cause the principal and interest to be computed in accordance with the above directions: and that in Appeal No. 122 of 1878, the decree of the High Court ought to be affirmed.

The appellant must pay to the Collector of Ghazipur, on behalf of the Court of Wards, his costs of these appeals to Her Majesty in Council, after deducting therefrom the costs of the appellant caused by the opposition to the motion to consolidate the appeals.

Solicitor for the appellant: Mr. *T. L. Wilson.*

Solicitor for the respondent (the Collector of Ghazipur): Mr. *H. Treasure.*

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Before Lord Fitzgerald, Sir B. Peacock, Sir R. P. Collier, Sir R. Couch and Sir A. Hobhouse.

[*On appeal from the High Court for the North Western Provinces.*]

LACHCHO (*Plaintiff*) v. MAYA RAM AND OTHERS (*Defendants*).
[15th November, 1882.]

Pre-emption of village lands—Construction of wajib-ul-arz.

The *wajib-ul-arz* of a village, divided into three thoks and comprising also undivided land, contained a clause giving the right of pre-emption to such brothers and nephews of the vendor as were sharers, "and in case of their refusal to the other owners of the thok:" *held*, that under this clause, an owner of one of the three thoks having sold all his interest in the village, no right of pre-emption attached to the ownership of another of the thoks.

APPEAL from a decree of the High Court (12th January 1880) reversing a decree of the Subordinate Judge of Aligarh (11th December 1878).

The question was whether, under the terms of the *wajib-ul-arz* of mauza Tholai, a village in the Aligarh district, the appellant was [159] entitled, in virtue of her being owner of one of the three thoks into which the village was divided, to the right of pre-emption, on the sale by the

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owner of another of the thoks of all his right, title and interest in the village lands.

Of the three thoks, one belonged to one of the defendants, Muhammad Ibrahim Khan, a second to the appellant, and the third to a person not interested in this suit. Besides the land in the thoks, there were the undivided lands of the mauza, held in common by the sharers of the different thoks, proportionately to their shares in the mauza. The record-of-rights showed the divided land, comprising each thok, and the common land as outside the thoks.

The *wajib-ul-arz* dated 3rd December 1873, was in regard to pre-emption, in the terms stated in their Lordships' judgment.

In 1878, Lachcho being in treaty with Muhammad Ibrahim Khan for the purchase of his share in the village, and two other persons, Chait Ram and Maya Ram, offering a larger price, the latter obtained a deed of sale, whereby in consideration of Rs. 23,000, Muhammad Ibrahim sold all his interest in the divided as well as in the undivided lands of village Tholai. Lachcho then brought the present suit against the vendor and purchasers, claiming to pre-empt.

The Subordinate Judge, who tried the suit, was of opinion that the plaintiff had established her claim on the strength of her ownership of one of the thoks, and directing payment of the purchase-money within one month, decreed the claim.

This decree was, on appeal, reversed by a Divisional Bench of the High Court, (R. Spankie and R. C. Oldfield, JJ.) for the reason thus stated. "The plaintiff is not a sharer in the vendor's thok, that is, in the divided lands held by him separately; but she is, in common with all the sharers of the different thoks, a sharer of the common lands left undivided; and it is contended that on this ground she has a right of pre-emption. But this contention fails; the thok as already stated is not comprised of the common lands, but of those divided, and a sharer in the former will not from that circumstance become a sharer in a thok"(1).

On this appeal,

[160] Mr. *R. V. Doyne* appeared for the appellant.

The respondents did not appear.

For the appellant it was contended that on the proper construction of the words—"other owners of the thok," the owner or owners of another thok were included among those who had a right of pre-emption.

JUDGMENT.

Their Lordships' judgment was delivered by

Sir B. PEACOCK.—Their Lordships are of opinion that the judgment of the Hight Court was correct.

The question is, whether, upon the construction of the *wajib-ul-arz*, the plaintiff was entitled to a right of pre-emption in the defendant's thok. The words are:—"Each sharer is by all means at liberty to transfer his right and share, but first of all the transfer should be effected by him in favour of his own brothers and nephews, who may be sharers, and, in case of their refusal, in favour of the other owners of the thok." The lower Court seems to have treated the case as though the *wajib-ul-arz* had said, "in favour of the other owners or share-holders of the village;" but it is "the other owners of the thok." Now whether the thok comprised the divided lands which were recorded as belonging to Ibrahim

(1) The judgment of the High Court is reported at 2 A. 631.

alone, or included the undivided lands which were appurtenant to those divided lands, the plaintiff was no co-owner with Ibrahim. She was not a joint tenant, nor a tenant in common with him as to the divided portion of the lands; if she were a tenant in common of the undivided lands, that did not make her an owner of Ibrahim's share in those lands. A tenant-in-common is the owner of his own share; but he is not an owner of the other tenant-in-common's share. It appears, therefore, to their Lordships that the plaintiff was not an owner of the thok which was sold. The right of pre-emption is in favour of the tenant's own brothers and nephews. If they and the owner of the share were a joint undivided family, the brothers or nephews would be co-owners and sharers; there might also be other owners of the share with them. In such case, if the sharer wished to sell his share, his own brothers or nephews in the first instance, and in case of their refusal the other co-owners, would be entitled to the right of pre-emption. In this case the [161] plaintiff was not an owner or share-holder in the share sold, nor had she any interest in it; consequently the High Court was right in deciding that she was not entitled to the right of pre-emption.

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Under these circumstances, their Lordships will humbly advise Her Majesty that the decree of the High Court be affirmed, and the appeal dismissed.

Solicitors for the appellant: Messrs. *Oehme* and *Summerhays*.

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REVISIONAL CRIMINAL.

Before Mr. Justice Mahmood.

IN THE MATTER OF THE PETITION OF LACHMAN *v.* JUALA AND OTHERS. [15th September, 1882.]

Improper discharge—Powers of Magistrate making inquiry in Sessions case—Act X of 1872 (Criminal Procedure Code), ss. 195, 196, 297—High Court's powers of revision.

A Magistrate inquiring into a case exclusively triable by the Court of Session is not bound to commit the accused person for trial, where the evidence for the prosecution, is believed, would end in a conviction; but is competent, if he discredits such evidence, to discharge the accused.

The High Court can only interfere under s. 297 of Act X of 1872 (Criminal Procedure Code) in such a case, if it comes to the conclusion that the Magistrate has illegally and improperly under-rated the value of such evidence.

The meaning of the words "sufficient grounds" in s. 195 of that Act explained.

[**Appr.**, 12 Bom. L.R. 923=8 Ind. Cas. 631; **R.**, Rat. Unr. Cr. Cas. 746; **Diss.**, 4 K. L.R. 126.]

ONE Juala and certain other persons were accused of murder. Among the witnesses examined at the inquiry into this charge, there were some who stated themselves to be eye-witnesses to the offence. The Magistrate making the inquiry, after examining the witnesses for the prosecution, was of opinion that the direct evidence in the case had been fabricated and was false, and that putting aside such evidence there was no case against the accused. He accordingly discharged them.

The persons prosecuting applied to the High Court to revise the Magistrate's order, and to direct that the accused persons should be committed for trial.

Mr. *Spankie* and Munshi *Kashi Prasad*, for the applicants.

Mr. *Leach*, for the accused persons.

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JUDGMENT.

[162] MAHMOOD, J.—The learned counsel who has appeared in support of the application contends that the action of the Joint Magistrate in discharging the accused was illegal and improper, inasmuch as the discretion given to him by s. 195 of the Criminal Procedure Code did not extend to weighing evidence; that the expression "sufficient grounds" as used in that section did not include the power of discrediting eye-witnesses; that in a case of this nature and in consideration of the kind of evidence produced before him, the Magistrate was bound to commit the accused to the Court of Session, whose duty it would be to weigh the evidence produced by the prosecution and to arrive at its own conclusions. In support of this contention the learned counsel has referred to the change of language in s. 215, where, instead of the expression "sufficient grounds," the phrase "if he finds that no offence has been *proved*" has been used; and similarly in s. 216 the phrase "if the Magistrate finds that an offence has been apparently *proved*" has been used, instead of another phraseology in s. 196, Criminal Procedure Code. The argument in support of the application is, that this circumstance necessarily indicates that the powers of Magistrates in cases triable by himself, and in which he is empowered to convict or acquit the accused, were intended by the Legislature to be greater than in those triable exclusively by the Court of Session; and that in the latter class of cases he is bound to commit the accused if the evidence produced by the prosecution is such that, if it were believed, it would end in a conviction.

I am of opinion that this contention, though plausible, is not sound. The object of the law in providing that the inquiry shall be held by the Magistrate before the accused has to undergo a trial in the Court of Session, seems to be to prevent the commitment of cases in which there is no reasonable ground for conviction. This provision of the law is calculated, on the one hand, to save the subjects from prolonged anxiety of undergoing trials for offences not brought home to them; and, on the other hand, to save the time of the Court of Session from being wasted over cases in which the charge is obviously not supported by such evidence as would justify a conviction. Taking this view of the law, I am of opinion that the power given to a Magistrate under s. 195 extends to weighing [163] of evidence, and the expression "sufficient grounds" must be understood in a wide sense. I must not, however, be understood to lay down that this discretionary power should be exercised by the Magistrate without due caution, or that he should take upon himself to discharge the accused in Sessions cases in the face of evidence which might justify a conviction. But when the evidence against the accused is such that, in the opinion of the Magistrate, it cannot possibly justify a conviction, I hold that there is nothing in the law which prohibits the discharge of the accused, even though the evidence against him consists of witnesses who state themselves to be eye-witnesses, but whom the Magistrate entirely discredits. This being so, I could interfere in revision only, if, on considering the evidence produced on behalf of the prosecution, I came to the conclusion that the Magistrate had made a "material error" in discharging the accused, or had illegally and improperly under-rated the value of the evidence. But having examined the record, I can arrive at no such conclusion. I therefore decline to interfere, and reject this application.

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Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

NARSINGH DAS (*Plaintiff*) v. MANGAL DUBEY AND OTHERS (*Defendants*). * [26th August, 1882.]

Misjoinder of cause of action—"Multifarious" suit—Act X of 1877 (*Civil Procedure Code*) *ss.* 28, 45.

Defendant No. 1, the tenant of certain land at fixed rates, on the 12th November 1877 sold his interest in the land to the plaintiff. At the time of the sale the land was in the actual possession of defendant No. 2, defendant No. 1's sub-tenant, against whom however defendant No. 1 had obtained an order for ejectment on the 25th June preceding. On the 25th March 1878 defendant No. 1 applied a second time for the ejectment of defendant No. 2, and while this matter was pending the plaintiff endeavoured to obtain possession of the land, but was resisted by defendant No. 2. He thereupon instituted a charge of criminal trespass against the latter. This criminal proceeding was pending when, on the 14th September 1878, defendant No. 1 obtained a second order for defendant No. 2's ejectment. Under this order he obtained possessoin of the land, and also of the crop [164] planted by defendant No. 2, which he sold to defendant No. 3 on the 22nd September 1878. On the 25th of the same month the plaintiff's charge of criminal trespass against defendant No. 2 was dismissed, on the ground that defendant No. 1 was in possession, and the plaintiff had never obtained possession under his purchase. Defendant No. 1 subsequently let the land to defendant No. 4. The plaintiff, alleging that three causes of action had accrued to him—*viz.*, (i) on the 12th November 1877 the date of the sale to him—(ii) on the 30th March 1878, when defendant No. 1 applied a second time for the ejectment of defendant No. 2—and (iii) on the 22nd September 1878, when defendant No. 1 took possession of the land—sued defendants Nos. 1, 2, 3 and 4 claiming (i) possession of the land as against them all; (ii) mesne profits by way of damages for the year 1285 Fasli (September 1877—September 1878) as against defendants Nos. 1 and 2; (iii) mesne profits by way of damages for 1286 Fasli (September 1878—September 1879) against defendants Nos. 1 and 3; and (iv) mesne profits by way of damages for 1287 Fasli (September 1879—September 1880) against defendants Nos. 1 and 4.

Held by the Full Bench (MAHMOOD, J., *dissenting*) that the Court of First Instance had properly rejected the plaint, the suit being open to the objection that different causes of action against different defendants separately had been joined. for which procedure no sanction was to be found in the Code of Civil Procedure.

[F. A.W.N. (1883) 230; 4 L.B.R. 183; R., 6 A. 106 (108); 16 A. 279 (282); 34 B. 358; 13 C. 147 (152); 37 C. 399=11 C.L.J. 285; 11 Bom. L.R. 499; 14 C.W.N. 836 (838)=6 Ind. Cas. 120; 9 C.P.L.R. 125 (128); 13 C.P.L.R. 9 (13); 3 L.B.R. 191; 29 P.R. 1894; 3 K.L.R. 161; Expl. 11 A 33 (34).]

THIS was an appeal from an appellate order affirming an order rejecting a plaint under s. 53 (*f*) of the Civil Procedure Code. From the plaint it appeared that the case on which the plaintiff came into Court was as follows. Defendant No. 1 was the owner of a cultivatory holding at fixed rates in the Benares district, and defendant No. 2 was his son. Defendant No. 3 was the widow of another son, deceased, who, for the purposes of this report, will be regarded as being himself defendant No. 3. Some time prior to November 1877, one Rabi Dat Dubey had obtained a decree on a mortgage against defendants Nos. 1 and 2, and their rights in the holding already mentioned were advertised for sale. With the sanction of the Court executing the decree, defendants 1 and 2, with the

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* Second Appeal No. 1445 of 1881, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 21st July 1881, affirming a decree of Babu Mritonjoy Mukarji, Munsif of Benares, dated the 14th February 1881.

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consent of defendant 3, on the 12th November 1877, sold their rights to the plaintiff for Rs. 800. At that time defendant 4 was in actual occupation of the holding, as a sub-tenant of defendants 1 and 2, though on the 25th June preceding they had obtained an order for his ejectment from the Revenue Court. On the 2nd March 1878, the defendants 1 and 2, this time in conjunction with defendant 3, applied for a fresh ejectment order, and while this matter was pending, the plaintiff made an effort to obtain possession of the holding from defen- **[165]** dant 4, but was opposed by him. Thereupon he instituted proceedings for criminal trespass against defendant 4, and these were undetermined, when on the 14th September 1878 defendants 1, 2 and 3 got a new order for the ejectment of defendant 4. On the strength of this they obtained possession of the land, as also of the crop planted by defendant 4, and sold the same to defendant 5, on the 22nd September 1878. On the 25th of the same month the plaintiff's charge of criminal trespass against defendant 4 was dismissed, on the ground that the defendants 1, 2 and 3 were in possession, and that the plaintiff had never obtained possession under his purchase. As regards defendants 6 and 7, the allegation of the plaintiff was that defendants 1, 2 and 3 leased the holding to them in 1287 fasli, (September 1879—September 1880) and that they were in possession at the date of the institution of the present suit. Three causes of action were stated in the plaint as having accrued to the plaintiff; (i) on the 12th November 1877, the date of the sale; (ii) on the 30th March 1878, when defendants, 1, 2, and 3 issued a second ejectment notice to defendant 4; (iii) on the 22nd September 1878, when the defendants 1, 2, and 3 having taken possession of the lands in suit, kept the plaintiff out of possession. The following several reliefs were prayed:—(i) declaration of right to, and possession of, the holding sold on the 12th November 1877, by ejectment of all the defendants; (ii) damages in the shape of mesne profits (Rs. 91-4) for the year 1285 fasli (September 1877—September 1878) against defendants 1, 2, 3, and 4; (iii) damages in the shape of mesne profits (Rs. 91-4) for the year 1286 fasli (September 1878—September 1879) against defendants 1, 2, 3, and 5; (iv) damages in the shape of mesne profits (Rs. 91-4) for the year 1287 fasli (September 1879—September 1880) against defendants 1,2,3, 6 and 7. It was contended in second appeal on behalf of the plaintiff-appellant that the plaint was not open to objection on the ground of misjoinder of defendants or joinder of causes of action which ought not to be joined, and should not have been rejected. The Divisional Bench (Straight and Mahmood, JJ.) before which the appeal came for hearing referred the question thus raised to the Full Bench.

[166] The *Senior Government Pleader* (*Lala Juala Prasad*), for the appellant.

Mr. *Dillon*, Munshi *Hanaman Prasad*, and Munshi *Kashi Prasad*, for the respondents.

The following judgments were delivered by the Full Bench:—

JUDGMENTS.

STUART, C.J., and STRAIGHT, BRODHURST, and TYRRELL, JJ.—Perhaps the most convenient mode in which to consider the matter will be to examine the provisions of the Procedure Code, firstly, as to parties to suits; and secondly, as to the frame of suits; and in doing so it will be instructive to see in what respects the rules of the English Judicature Act, from which they have been taken, are followed or departed from.

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With regard to the former, they are to be found in chapter III, and in substance are as follows :—By s. 26 it is enacted that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative, *in respect of the same cause of action*, and judgment may be given for such one or more of the plaintiffs as may be found entitled to relief for such relief as he or they may be entitled to, without any amendment." With the exception of the words "in respect of the same cause of action," this section is identical with Rule 1 of Order XVI of the English Judicature Act. Section 27, like Rule 2 of the above Order, provides for the substitution or addition of plaintiffs. Section 28 declares that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, *in respect of the same matter*, and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment." These are *ipsissima verba* with Rule 3 of Order XVI save as to the interpolated words "in respect of the same matter." Section 29, like Rule 5, provides for the joinder of all or any of the parties "liable on any *one* contract." It may here be observed that Rule 4 of Order XVI, which states that "it shall not be necessary that every defendant to any action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein," and Rule 5, "where the plaintiff is in doubt as to the person from whom he is entitled to redress," as to the joinder of **[167]** "two or more defendants to the intent that in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action," have not been imported into the Procedure Code, and must be presumed to have been intentionally left out. Section 30 of the Code, and Rule 9 as to one party suing or defending on behalf of others in the same interest, are pretty much the same in language. Section 31 corresponds with the first paragraph of Rule 13, but it contains the additional and important provision that "nothing in this section shall be deemed to enable plaintiffs to join in respect of distinct causes of action." Section 32, and the latter paragraph of Rules 13 and 14 and 15 are similar in terms, and deal with the question as to striking off or adding parties, the service of summonses, where defendants are added, and the consequent necessary amendment of plaint. Section 34 of the Code enacts that "all objections for want of parties, or for joinder of parties not interested, or for misjoinder of plaintiffs or defendants must be taken at the earliest possible opportunity, and in all cases before the first hearing." Rules 17, 18, 19, 20 and 21, which relate to cases where contribution or indemnity is claimed by a defendant over or against a person not a party to the suit, or where the Court or Judge thinks that a question in the action should be determined, not only as between the plaintiff and defendant, but between them and such other person, or any of them, and to the procedure to be followed therein, have not been enacted in the Code, probably because it was very rightly anticipated that they would be found too complicated and confusing for our subordinate judicial tribunals. Putting the matter shortly then upon the first point to be considered, namely, the joinder of parties, it would appear that any number of plaintiffs may join in respect of the same cause of action; that they may not join in respect of distinct causes of action; that any number of defendants may be joined, where the relief sought against them is "in respect of the *same matter*," or of any *one*

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contract; that no suit shall fail for mere misjoinder; that except where plaintiffs have joined in respect of distinct causes of action, "the Court may in every suit deal with the matter in controversy as far as regards the rights and interests of the parties actually before it."

[168] When this reference was under discussion before the Full Bench, great stress was laid by the pleader maintaining the validity of the plaint on the terms of s. 28 of the Code and the words "jointly, severally, or in the alternative." But, as was pointed out to him, this liability must be in respect of the "same matter"—an expression it is difficult to interpret as meaning more than the same "cause of action." Had Rule 4 of Order XVI declaring that every defendant need not be interested in *all* the relief prayed for, or as to every cause of action, been made part of s. 28, a more comprehensive effect might perhaps then have been given to the words "same matter." It is, however, to be observed that, while by s. 26 all plaintiffs may join in respect of the same "cause of action," in whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, by s. 28 all defendants may be joined, against whom the right to any relief in *respect of the same matter*, whether jointly, severally or in the alternative, is alleged to exist. Whether the use of the two expressions "cause of action" and "matter" was intended to convey any very important distinction or difference, is not particularly clear, though there is no doubt force in the argument that coming so near to one another in the Act, they can scarcely be construed as bearing precisely the same meaning. This much upon the portion of the Code that deals with the joinder of parties, as to which it may be added that it must necessarily be read with and controlled by the subsequent provisions of chapter IV regulating a still more important subject, namely, the "frame of the suit." Now, it is to be borne in mind, in considering the present reference, that the real ground upon which the Munsif rejected the plaint was not for misjoinder of defendants, but because it disclosed several claims not against the same defendants *jointly*, or in other words, because it united several causes of action against several sets of defendants, and was therefore not within the permission of s. 45 of the Procedure Code. Let us again for a moment turn to the Rules under Order XVII of the English Judicature Act as to "joinder of causes of action," and see how far they have been reproduced in chapter IV of the Procedure Code. Section 44 provides that a plaintiff, with a suit for recovery of immoveable property, may join claims for mesne profits, or [169] arrears of rent, or for damages for breach of any contract under which such property, or any part of it, has been held, or by a mortgagee to enforce any of his remedies under his mortgage, and this partly corresponds with Rule 2 of Order XVII. Rule (*b*) of s. 44 and Rule 5 are pretty much alike. Section 45 says that, "subject to the rules contained in chapter II (as to jurisdiction) and in s. 44 (as to the claims that may be joined with a suit for recovery of immoveable property), the plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are *jointly* interested against the same defendant or defendants *jointly* may unite such causes of action in the same suit. This, it will be remarked, is widely different from the much more general language of Rule 1 of Order XVII—"the plaintiff may unite in the same action and in the same statement of claim several causes of action,"—and of Rule 6—"claims by plaintiffs *jointly* may be joined with claims by them or any of them *separately* against the same defendant"—which latter provision is

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diametrically opposite to the prohibition of the Procedure Code, "that plaintiffs may not join in respect of different causes of action;" and the terms of the concluding paragraph of ss. 45 and 46 of the Code and Rule 8 are about identical, and the same remark applies to s. 47 and Rule 9. Putting it shortly, then, the provisions of chapter IV of the Code, excepting s. 43, which does not appear to have any relevancy to the point under discussion, seem to provide that any plaintiff or plaintiffs having several causes of action, in which they are *jointly* interested, against one defendant or several defendants *jointly* may unite them in the same suit, but that unless such causes of action are of the kind mentioned in clauses *a*, *b*, *c*, of s. 44, they may not be joined, without leave of the Court, with a suit for the recovery of immoveable property; that where a plaintiff or plaintiffs have united in the same suit several causes of action against a defendant or defendants jointly within the terms of s. 44 of the Procedure Code, the Court of its own motion, or on the application of the defendants, or upon agreement of the parties, may order separate trials, or confine the scope of the suit, or exclude causes of action, and direct amendment of the plaint, where, by the joinder [170] of several causes of action, inconvenience and confusion are likely to be caused. If then, as has already been remarked, ss. 28 and 45 must be read together, the joint, several or alternative liability of defendants mentioned in s. 28, means a joint, several or alternative liability in respect of one or several causes of action, which cause or causes of action are united in the same suit against the same defendants jointly; in other words, while the cause or causes of action must be joint as to all the defendants, the relief asked may be joint, several or in the alternative. Attention has been drawn to the omission from the Procedure Code of Rules 4 and 6 of Order XVI of the Judicature Act, as well as of their relations to contribution, indemnity, &c., 17, 18, 19, 20 and 21, and the inference, therefore, that it was not intended to introduce into this country the wide scope now afforded to suits in the English Courts, is irresistible. Indeed, it seems far better to leave the matter upon the simple footing that defendants may be joined, where there is or are common cause or causes of action, in which they are jointly interested, and that judgment may be given against them according to their several liabilities. It was suggested by Mr. Justice Mahmood at the hearing that there was one cause of action in the case to which this reference related, wherein all the defendants were concerned, namely, the keeping the plaintiff out of possession, and that the suit ought therefore to be regarded as covered by ss. 44 and 28 of the Procedure Code. As an answer to this, it seems almost enough to say that such is not the contention of the plaintiff himself. On the contrary, as has already been stated, his plaint distinctly covers three different causes of action on three different dates. But more than this, it is impossible to hold that there is any one cause of action for a suit for the recovery of immoveable property against all the defendants, two of whom are admittedly not in possession of the holding at all, and one of whom never has been at all involved in the act of trespass that is required to lay the foundation for a suit to recover immoveable property, with which, under the terms of s. 44, claims for mesne profits may be joined. Nothing is to be found in ss. 28 or 44 that authorizes a suit by a plaintiff against *A* for dispossessing him or opposing his obtaining possession with distinct claims against *B*, *C*, *D*, and *E*, for damages, for separate years, [171] in respect of such primary wrongful act on the part of *A*. What s. 44 does contemplate is a suit for the recovery of immoveable property from

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the trespasser or trespassers wrongfully in possession of it at the time of suit, and the joinder of a claim or of claims for mesne profits or arrears of rent against such trespasser or trespassers. The plaint now before us shows nothing of this kind; the causes of action alleged are separate; the defendants are arrayed in different sets; the reliefs sought are declared in respect of distinct matters. It therefore comes to this, that the plaintiff has united different causes of action in one suit against different defendants, who are not jointly liable in respect of each and all of such causes of action—a mode of procedure that the law does not sanction. It is impossible for us to hold that under these circumstances the Munsif improperly exercised the discretion given him by s. 53 of the Code in rejecting the plaint. Indeed, we would go further and say that he was right in doing so. It is no part of our duty to enter into a consideration of questions of policy, or as to what the Legislature contemplated or intended. We have before us the seemingly plain language of the Act, and it is as to this and not upon our own speculations as to what would be most convenient or conducive to limiting litigation that our opinion must be formed and expressed. At the same time, taking a claim like that disclosed in the present plaint, we cannot concede that it would have been either advantageous or desirable for the suit to proceed with all the seven defendants as parties to it. The plaintiff's true and primary remedy was against defendants 1, 2 and 3, who failed to give him possession under the sale-deed of the 12th November 1877, and save through them he could not hope to attach any liability to the other defendants. They were obviously liable for any and all loss or damages sustained by the plaintiff during such time as he was kept out of possession. On the other hand, defendants 4 and 5, for example, must necessarily have been adverse, not only to the plaintiff, but to defendants 1, 2, and 3, and to one another, while they could have no possible community of interest with defendants 6 and 7. The trial of the suit under these circumstances would have been most confusing and embracing, as not only would there have been a contest going on between the plaintiff and all the [172] defendants, but a conflict amongst the defendants *inter se*. As we have already stated, we think that the Munsif rightly rejected the plaint, and this reference must be answered by our saying that we are of opinion that it was open to objection, not for misjoinder of defendants, but because different causes of action against different defendants separately were joined, and for such procedure no sanction is to be found in the Procedure Code.

MAHMOOD, J.—As the judgment of the majority of my honorable colleagues has fully set forth the allegations on which the plaintiff's claim is based, I shall confine my observation to the exposition of the reasons which have unfortunately prevented me from concurring in the view of the law taken in that judgment. The question raised by this reference may be briefly stated to be whether the plaint, which we are called upon to consider, was open to the objection of "multifariousness." Although the term is not recognized by the Civil Procedure Code, I use it advisedly, as it is comprehensive enough to include the misjoinder of defendants as well as the misjoinder of causes of action—the only points to be considered in answering this reference.

"By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them, —as, for example, the uniting in one bill of several matters perfectly

distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." (Story's Eq., Pl., s. 271.)

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The consideration of the questions involved in this reference virtually amounts to a matter of construing some of the sections of the Civil Procedure Code. I may therefore at the outset state that, according to my view of the rules of construction applicable to statutes like the Civil Procedure Code, the Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle, prohibitions cannot be presumed, and in the [173] present case, therefore, it rests upon the defendants to show that the suit in the form in which it has been brought is prohibited by the rules of procedure applicable to the Courts of Justice in India. It is clear that in the determination of this question, cl. (*f*) of s. 53, under which the plaint was rejected by the Munsif, affords no help, because the misjoinder of parties or the misjoinder of causes of action contemplated by that clause obviously depends upon the provisions to be found in chapters III and IV of the Civil Procedure Code. Some difficulty in this case was felt in the course of the argument, owing to the circumstance that the expression "cause of action" has always unfortunately had a signification which cannot be called precise or definite. The expression is sometimes taken to mean the title together with the injury; in other words, all the circumstances which a plaintiff is required to allege in order to show a right to sue for relief. Sometimes it is used as indicating merely the injury or the wrongful act of the defendant which is the cause of the plaintiff's coming into Court. It was in view of this circumstance, which has been the source of some uncertainty, not only in questions of misjoinder, but also in those of *res judicata* and jurisdiction, that at the hearing of this case I made the occasional remark to which my honorable colleagues have referred in their judgment. For if the expression "cause of action" is to be taken in its most comprehensive sense, the title upon which the plaintiff relies in the suit being one and the same, and his claim amounting only to a vindication of the rights to which he is entitled by virtue of that title, the circumstance that the injuries or wrongful acts complained of by him are alleged to have been committed by more than one person, and at more than one time, would not multiply the whole cause of action, but only some of the circumstances which form the component parts of the cause of action in a suit of this nature. So far as the wording of the plaint is concerned, the Hindustani expression "*bina-i-mukha-samat*" used therein means "the foundation (or origin) of the dispute." The expression is far too indefinite to bind the plaintiff to the contention that there were distinct causes of action in the sense in which that phrase is to be understood as a term of law. It seems unnecessary for the purposes of this reference to [174] arrive at an absolutely precise and inflexible definition of the term "cause of action" as used in the Civil Procedure Code. I have no doubt that the term "matter," as used in s. 28, is not to be taken as a convertible term with the expression "cause of action." The phraseology employed in s. 26, when compared with the wording of s. 28, shows that the word "matter" is used in the Code in a more comprehensive sense than the phrase "cause of action," and this conclusion receives support,

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not only from the circumstance that the two expressions are used in contiguous sections (26, 27, and 28) of the same chapter, evidently in different senses, but also from the fact that the last part of s. 31, which prohibits plaintiffs joining in respect of distinct *causes of action*, is meant to be a limitation or restriction of the latitude allowed by chapter III as to the joinder of parties in respect of the same *matter*. Courts of Justice in India necessarily exercise the combined jurisdiction both of Courts of Equity and of Law, and the Civil Procedure Code, recognizing this circumstance, has provided both the methods of limiting the scope of suits, *viz*., the method which prevailed in the Courts of Chancery, and that which was followed by the Courts of Common Law before the introduction of the recent improvements of the law in England. The former of these methods proceeds upon a system of limitation regulated by consideration of the subject-*matter* of the suit; the latter system upon consideration of the *parties* to the suit. Chapter III of the Civil Procedure Code seems to proceed upon the former of these methods, that is, it assumes the existence of an ascertained subject-*matter* in dispute, and from that point of view lays down rules as to the persons who may be made parties to the suit. Chapter IV proceeding upon the latter method, assumes the existence of ascertained *parties* and deals with the subject-matters of the suit. The two methods as they have been adopted in the Code do not clash with each other.

Where there is identity of the subject-*matter* of the suit, the rules which would govern the case are to be found in chapter III, where there is identity of *parties*, the scope of the action is to be limited by the rules provided in chapter IV. The two chapters regard the action from two different points of view, and the rules contained in the one cannot be regarded as provisos [175] to the rules contained in the other. When a dispute arises and its subject-matter is ascertained, the question which has to be considered is, against whom is the relief to be enforced? The answer to the question is to be found in s. 28, which provides that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment." If the conditions of this section are satisfied, that is, the *matter* in dispute is the same, the course of procedure should be to do complete justice between the parties with respect to that matter, and it is of no consequence whether the case presents a more complicated aspect than an ordinary action at law used to do in England. I have already said that I understand the expression "matter," as used in s. 28, to have a more comprehensive meaning than the term "cause of action," and it seems to me that so long as the matter in dispute is identical, the plaintiff is entitled to bring before the Court all persons whose presence is necessary to afford him full relief in respect of that matter. Section 45 does not appear to me to be applicable to cases in which the subject-matter of the suit is the same, and in which the scope of the suit is to be regarded from that point of view. That section relates to cases in which the causes of action are entirely distinct, that is, all the circumstances which constitute the right to sue as composing one cause of action are distinct from, and therefore independent of, the constituent parts of the other cause of action. For example, cases of two or more independent bonds of which the plaintiffs are joint obligees, would fall under the purview of s. 45, the identity, of *parties*, coupled with

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the joint nature of the right and of the obligation, being sufficient to allow the joinder in one suit of causes of action which would otherwise have been subject-matters of distinct suits.

But such a rule has no reference to a suit such as is contemplated by s. 28, which essentially relates to cases in which the subject-matter is one and the same. I am unable to regard s. 45 as a restrictive proviso to s. 28, for the effect of such a view would [176] be to nullify an important part of the latter section. The very essence of the provisions of s. 45 is that there should be joint rights in the plaintiffs and joint liability of the defendants, whilst s. 28 distinctly contemplates the granting of relief against the defendants, not only jointly and in the alternative, but also *severally*; and I cannot conceive how this can be done in a case in which the liability of the defendants is joint, as required by s. 45. There seems no more reason for holding that s. 45 limits the operation of s. 28, than there is for the view that the latter extends the scope of the former. I am therefore of opinion that s. 28 lays down a rule which is distinct from and independent of the rule laid down in s. 45.

The question then is—Does the plaint in the present suit disclose one and the same subject-matter? The whole case, as stated in the plaint, comes to this—*A*, as the owner of the land, is entitled to its possession and produce. *B*, *C*, and *D* wrongfully keep him out of possession, and during the continuance of such trespass treat *E* as their tenant, who, as such, opposes the plaintiff's possession; they then oust *E*, and sell the produce of the land to *F*, and let the land for cultivation to *G* and *H*, who, as the tenants of the trespassers, are still in possession. Now throughout these allegations the trespass by the first three defendants, *B*, *C*, and *D*, is an essential part of the complaint against the others. The case against any of the other defendants would necessarily be incomplete unless the wrongful act of *B*, *C*, and *D*, is also made subject of complaint. The whole suit forms one connected story, the wrongful acts alleged against *E*, *F*, *G* and *H*, are essentially connected with and subsidiary to the trespass by *B*, *C*, and *D*, and they have all participated in the wrongful invasion of the plaintiff's proprietary right. The plaintiff *A* claims the relief which that proprietary right entitles him to, *viz.*, the possession of the land, and the value of the produce as mesne profits. That claims of this nature can be joined in one suit is clear from the provisions of s. 44, Rule *a*. It is true that only five out of the seven defendants are said to be in possession of the land, and that in claiming mesne profits the plaintiff has specified the various amounts which he claims from the other defendants along with the first three defend-[177]ants; but each of those amounts is claimed also from the first three defendants, and if each of those amounts formed the subject of a separate suit, the first three defendants would, according to the plaintiff's case, be necessary parties to each suit. The specification can only enable the Court, in deciding a suit of this kind, to give judgment against the defendants "according to their respective liabilities," within the meaning of s. 28. The plaintiff values the mesne profits of the land at Rs. 91-4-0 per annum, and as the suit includes mesne profits for three years, the specification is intended to show that the mesne profits of each year are claimed from the principal trespassers jointly with those who participated with them in misappropriating the produce of that year.

But this circumstance, according to my conception of the meaning of s. 28, does not multiply the matter in respect of which the relief is sought, nor does it render the suit multifarious. "The objection (of multifariousness) must be confined to cases where the case of each particular

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defendant is entirely distinct and separate in its subject-matter from that of the other defendants; for the case against one defendant may be so entire as to be incapable of being prosecuted in several suits, and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case, the objection of multifariousness could not be allowed to prevail. So it is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some matters in the suit, and they are connected with the others" (Story's Eq. Pl. s. 271 *a*). To use the language of Vice-Chancellor Leach, "in order to determine whether a suit is multifarious or, in other words, contains distinct matters, the inquiry is not whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the suit be single,—but it happens that different persons have separate interests in distinct questions which arise out of that single object,—it necessarily follows that such different persons must be brought before the Court, in order that the suit may conclude the whole subject" (*Salvidge* v. *Hyde*, 5 Madd. 138). On the interpreta-**[178]**tion of the various sections of the Civil Procedure Code, I cannot hold that the rule to be adopted by the Courts of Justice in India upon the *particular point* under consideration, was intended by the Legislature to be narrower than the rule which prevailed in the Courts of Equity in England. Section 26 of the Code distinctly limits the joinder of *plaintiffs* to suits "in respect of the same *cause of action*," and the last part of s. 31 emphasizes the limitation thus imposed. But the whole of chapter III is entirely devoid of any such limitation in regard to the joinder of *defendants*. On the other hand, s. 28, which gives the widest scope to the joinder of defendants "in respect of the *same matter*," receives emphasis from the provisions of s. 42, which lays down that "every suit *shall*, as far as practicable, be so framed as to afford ground for a final decision upon the *subjects in dispute*, and so to prevent further litigation concerning them."

Now this last provision of the law is imperative, and unless something to the contrary is shown in the Code as amounting to a prohibition, it must, according to my view, be taken that the present suit in the form in which it has been brought was entertainable. Reference was made on behalf of the defence to the provisions of s. 45, but I cannot understand that section, as I have already explained, to be a restrictive proviso to s. 28.

Even upon the hypothesis of the defence, it cannot be denied that it was necessary for the plaintiff to implead defendants Nos. 6 and 7 along with the first three defendants, for they are all in possession and obstructing the plaintiff from entering upon his own property. It is true that defendant No. 4 is no longer in possession, and that the only wrongful act attributed to defendant No. 5 is the purchase of the produce of the land from the first three defendants, the principal trespassers. But the plaintiff's case against them is an off-shoot of the case against the first three defendants, the wrongful acts attributed to defendants Nos. 4 and 5 are essentially subsidiary to and connected with the trespass charged against the first three defendants. It may be that defendants Nos. 4 and 5 can substantiate pleas which, as a matter of substantive law, or, on the merits, would absolve them from liability. But this circumstance has no effect upon the ques-**[179]**tion now under consideration, which is purely a matter of adjective law or procedure. I do not anticipate that any inconvenience can arise in the trial of a suit such as the present. So far

as the allegations in the plaint are concerned, all the defendants are interested in denying the plaintiff's title to the land; they are all interested in showing that during the period in respect of which mesne profits are claimed, the first three defendants had the right to let the land and to deal with the produce thereof.

This would be the subject of the first issue, and the minor questions connected with the mesne profits cannot form the subject of more than three issues, similar to each other, each issue relating to each of the three years (in respect of which mesne profits are claimed), in order to ascertain the respective liabilities of the various defendants. The inference from the contrary opinion would be that the plaintiff is placed under the necessity of bringing at least three separate suits in respect of the mesne profits for each separate year. But an essential part of the plaintiff's claim is, that the first three defendants are liable for the mesne profits of each year along with such other defendant or defendants as participated in the produce of that year. Therefore, to each of the contemplated separate suits the first three defendants must be necessary parties, and plaintiff's title must come into question in every one of the three contemplated suits, and his right to take the produce be subject of adjudication. The policy of the law is to prevent the unnecessary multiplicity of suits. On the other hand, the provisions of ss. 31 and 34, as well as the latter part of s. 45, together with s. 46, seem to indicate that the Legislature intended to remove from the Civil Procedure of India technicalities which formerly defeated suits under a system of procedure not adapted to the method of pleading prevalent in this country. The view of the law taken by me in this reference appears to me to be fortified by the opinion expressed by a Division Bench of the Calcutta High Court in *Janokinath Mookerjee* v. *Ramrunjun Chuckerbutty* (1),—a case in which the points for determination were similar to those which have arisen in the present case.

My answer to this reference must, therefore, be in the negative.

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5 A. 180=2 A.W.N. (1882) 210=7 Ind. Jur. 485.

[180] APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

RAJJO (*Plaintiff*) *v.* LALMAN AND ANOTHER (*Defendants*).*
[2nd September, 1882.]

Pre-emption—Transfer by pre-emptor to "stranger"—Effect on right—"Justice, equity and good conscience"—Muhammadan Law.

Held, applying the doctrine of the Muhammadan law of pre-emption, such doctrine being in accordance with justice, equity and good conscience, that a co-sharer in a village who had under the *wajib-ul-arz* a right to the mortgage of a share in such village, who, in anticipation of obtaining the mortgage, mortgaged such share to a "stranger" (that is, a person who had not a preferential right to mortgage), thereby forfeited such right.

[**R.**, 12 A. 234 (269) (**F.B.**); 18 A. 382 (384); 133 P.R. 1907 (**F.B.**)=84 P.W.R. 1907 =88 P.L.R. 1908; **D.**, 7 A. 107 (109); 14 A. 195 (198); 24 A. 119 (121, 122); A.W N. (1885) 189]

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* Second Appeal, No. 1465 of 1881, from a decree of T. R. Redfern, Esq., Judge of Mainpuri, dated the 17th September 1881, affirming a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Mainpuri, dated the 13th July, 1881.

(1) 4 C. 949.

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THE facts of this case are sufficiently stated for the purposes of this report in the judgment of BRODHURST, J.

Babu *Aprokash Chandar Mukarji* and Munshi *Kashi Prasad*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

The Court (BRODHURST, J., and MAHMOOD, J.) delivered the following judgments :—

JUDGMENTS.

BRODHURST, J.—It appears that Bhikh Narain formerly mortgaged his share in mauza Aujani to Ranjit and others; that after a time these mortgagees called upon Bhikh Narain to pay up the mortgage-debt ; and that he, in order to comply with their demand, executed, on the 8th October 1880, an usufructuary mortgage in favour of the defendant Lalman ; put him in possession ; and caused mutation of names to be effected. The plaintiff, Rajjo, subsequently sued "for possession of the share in question, on payment of Rs. 500, the mortgage-debt, by right of pre-emption, based on a clause in the *wajib-ul-arz*." Bhikh Narain did not make any defence, but Lalman pleaded that Bhikh Narain, being called upon by his mortgagees, Ranjit and others, to pay the mortgage-money, offered to mortgage the share to the plaintiff, and that when she, on account of poverty, declined the offer, Bhikh Narain mortgaged the share to him, Lalman ; and that the former mortgagees being thus displeased, induced Rajjo to institute this suit. The Subordinate Judge found [181] these allegations of Lalman to be proved, and that the former mortgagees had, on the 24th December 1880, got Rajjo to execute a deed of mortgage in their favour, for the very same share, in consideration of Rs. 550, and induced her to bring this suit, on the 4th April 1881 ; that under these circumstances a decree in favour of the plaintiff would actually be a decree in favour of Ranjit and others, who had caused the suit to be filed, and the Subordinate Judge therefore dismissed the claim with costs. The Judge, on appeal, recorded that "the points for decision are (i) whether the defendant, Bhikh Narain, offered to mortgage the property in question to the plaintiff-appellant, and she refused the offer ; and (ii) whether, under the peculiar circumstances of the case, her claim to enforce the right of pre-emption should be allowed. On the first issue, the Judge observed that the refusal to accept the mortgage rested upon evidence of no weighty kind, and that he doubted whether the offer as alleged was made to the plaintiff, as the witnesses adduced did not satisfy him of the truth of this plea ; but on the second issue the Judge found that the plaintiff-appellant had already, in anticipation of the success of her suit, mortgaged the property in dispute to a stranger ; that she would thus, if successful in her suit, defeat the very object for which pre-emption is permitted, and the Judge added, "to prevent Bhikh Narain from mortgaging his own share to a stranger while allowing the plaintiff to mortgage the very same property to another man who is equally a stranger, would, in my opinion, be inequitable"; and he therefore dismissed the appeal with costs. I see no reason to doubt that the suit was not instituted by the plaintiff in good faith, but was brought in collusion with and at the instigation of Ranjit and others, with the object of harassing their former mortgagor, and of retaining possession of his land ; and I consider that the judgment of the lower appellate Court is equitable and should not be disturbed by us in second appeal, and I would therefore dismiss the appeal with costs.

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APPELLATE CIVIL.

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MAHMOOD, J.—I agree in the order proposed by my honourable colleague but I wish to add a few observations in regard to the point of law raised by this appeal. Even if we were to hold that the transaction of the 24th December 1880 was not tainted with [182] fraud and collusion, I should still be of opinion that the plaintiff in this case had entirely lost her right to claim pre-emption in respect of the mortgage of the 8th October 1880. On a recent occasion, in delivering my judgment in the case of *Zamir Husain* v. *Daulat Ram* (1). I have expressed my opinion that there being no system of law prevalent in India, other than the Muhammadan law, which provides systematic substantive rules in regard to the right of pre-emption, Courts of Equity, acting upon the maxim *æquitas sequitur legem*, will follow and adopt the analogies furnished by the rules of that law in dealing with cases of an equitable nature, in which the right of pre-emption is the subject of controversy.

It seems to me that it is upon this principle that Courts of Justice in India, in many cases to be found in the published reports, have held that acquiescence by the pre-emptor in the sale of which he complains, or the joining of a stranger by a co-sharer (entitled to the pre-emptive right) in the purchase, extinguishes the right of pre-emption—involving the defeasance of the pre-emptor's claim in the former case, and in the latter case entitling the other co-sharers to enforce pre-emption which, but for such joining of the strangers, could not be enforced against the purchaser. Similarly, it has been held that a pre-emptor, in enforcing pre-emption, must claim the whole subject of the bargain; that he cannot divide the bargain by claiming only a portion of the property transferred, and that he would be bound by the terms and incidents of such bargain if he succeeded in his pre-emptive claim. These and other similar principles of the Muhammadan law of pre-emption have, by equitable analogy, been applied by the Courts even to cases in which pre-emption is not claimed as a rule of the personal law of the Muhammadans, but in which the right is sought to be enforced on the ground of local custom or the stipulations of the *wajib-ul-arz* irrespective of the race or religion of the parties. The point raised in this case is one in regard to which the terms of the *wajib-ul-arz* are silent, and therefore although pre-emption is claimed on the terms of that document, and has arisen from a mortgage and not from a sale, I am of opinion that the case must be disposed of by equitable analogy of the rule of the Muhammadan law of pre-emption on the subject. According to [183] that law, the very object and basis of the pre-emptive right is to prevent the introduction of strangers as co-sharers in the property; and the right is enforced on the hypothesis that the introduction of a stranger causes inconvenience to the pre-emptive co-sharers. The right is essentially based upon the injury which such inconvenience is supposed to cause. From its very origin and nature, the right of pre-emption is not one which is to be enforced merely as an instrument of capricious power or vindictiveness. It is a transient right in its very conception and nature, and being a personal privilege of the pre-emptor, cannot be made the subject of sale or bargain of any other kind. Any attempt on the part of the pre-emptor to bargain with it, is taken to indicate conclusively that the injury of which the pre-emptor complains in suing to enforce pre-emption is unreal, and that the claim is not dictated by *bona fide* motives. It is unnecessary to cite authorities of Muhammadan law in support

(1) 5 A. 110.

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5 A. 180 = 2 A.W.N. (1882) 210 = 7 Ind. Jur. 485.

of these propositions, for they appear to me to be so perfectly consistent with justice as to make them acceptable to the Courts on the broad principles of equity. Between the parties *in pari delicto* Courts of Equity decline to interfere. In the present case the plaintiff, whilst complaining of the defendant's mortgage of the 8th October 1880, has herself, by the deed of the 24th December 1880, mortgaged the property in suit to strangers, in anticipation of the success of her pre-emptive claim. She has transgressed the fundamental principles of the pre-emptive right by making it the subject of bargain, and her suit amounts to complaining of the infringement of a right which she herself has also infringed. Equity cannot favour such claims; the only system of law in India which provides substantive rules respecting the right of pre-emption positively prohibits such suits. I am, therefore, of opinion that the mortgage by the plaintiff on the 24th December 1880, in respect of the property in suit, whether such mortgage was executed in good faith or otherwise, had the effect of extinguishing the pre-emptive right which she might otherwise have enforced in respect of the mortgage of the 8th October 1880, under the terms of the *wajib-ul-arz*. To guard against being misunderstood, I may add that it is not necessary, for the purposes of this case, to consider whether the rule explained by me would have been [184] different if the mortgage of the 24th December 1880, had related to property other than the one in respect of which pre-emption is claimed by the plaintiff in this suit.

I concur with my brother Brodhurst in dismissing the appeal with costs.

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APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

BHAGWAN SINGH AND OTHERS (*Defendants*) v. MAHABIR SINGH AND OTHERS (*Plaintiffs*).* [8th September, 1882.]

Pre-emption—Purchase-money—Burden of proof—Act 1 of 1872 *(Evidence Act)*, s. 106.

In a suit to enforce the right of pre-emption, in which the plaintiff impugns the correctness of the price stated in the instrument of sale, although the burden of proof *prima facie* is on him to show that the property has in fact been sold below the stated price, yet very slight evidence is ordinarily sufficient to establish his case, and when such case is established, it rests upon the defendants, the vendor and vendee, to prove by cogent evidence that the stated price is the correct one.

The principle laid down by the Privy Council in *Rajah Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh* (1) applied.

Sheikh Mahomed Nocrul Hossein v. *Sheikh Hyder Buksh* (2) and *Sheikh Golam Ayhya* v. *Joy Mungul Singh* (3) referred to.

[F., 6 A. 344 (350); 9 A. 225 (226); 29 A. 618 (621) = 4 A.L J. 531 = A.W.N. (1907) 202; R., 11 A. 438 (451); 6 O.C. 327 (328).]

THIS was a second appeal by the defendants in a suit to enforce the right of pre-emption. The principal contention between the parties from the beginning was, whether the sum actually paid for the property in suit

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* Second Appeal, No. 1045 of 1881, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 16th June, 1881, modifying a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 23rd March, 1881.

(1) 3 I.A. 85. (2) W.R. Jan.—July, 1864, 304. (3) 13 W.R. 435.

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was Rs. 2,000, the amount entered in the instrument of sale, or Rs. 1,005, its market value. The lower Courts had differed on this point; the first Court finding that the sum entered in the instrument of sale had actually been paid, while the lower appellate Court had held that that sum had not been paid, and that the market-value of the property should be paid by the plaintiffs. The main question raised by this appeal was whether the pre-emptor, who alleges that the actual purchase-money is less than that stated in the instrument of sale, is bound to prove what the actual purchase-money is, or the vendor and vendee are bound, **[185]** on such an allegation being made, to prove that the amount stated in the deed is the actual purchase-money.

Pandit *Ajudhia Nath* and Lala *Lalta Prasad*, for the appellants.

Mr. *Conlan* and Shah *Asad Ali*, for the respondents.

The judgment of the Court (MAHMOOD and BRODHURST, JJ.) so far as it related to the question stated above, was as follows :—

JUDGMENT.

MAHMOOD, J.—Before entering into the question as to the amount of the price, we wish to dispose of the contention raised by the learned pleader for the vendees-appellants in regard to the *onus probandi* in this case. It is contended that it lay entirely upon the plaintiffs pre-emptors to prove that the actual price paid was different from that which was recited in the sale-deed, *viz.*, Rs. 2,000; that therefore, even if the evidence produced by the defendants be regarded as insufficient or untrustworthy, the price recited in the deed must be taken to be correct in the absence of proof to the contrary being adduced by the plaintiffs. In support of this contention the rulings of the Calcutta High Court in *Sheikh Mahomed Noorul Hossein* v. *Sheikh Hyder Buksh* (1) and in *Sheikh Golam Ayhya* v. *Joy Mungal Singh* (2) are relied upon by the learned pleader for the appellants. In the former case it was held that "where a party claiming a right of pre-emption impugns the correctness of the price stated in the deed of sale, the burden of proof is on him to show that the property had in fact been sold below the stated price." The rule laid down in the latter case is stated in more qualified terms by Couch, C.J., who held that slight evidence on the part of the plaintiff-pre-emptor would be sufficient to throw on the other party the burden of meeting it with some other evidence. We are of opinion that the rule laid down in the former of these cases cannot be accepted in the unqualified terms in which it has been stated. It seems to us that an allegation to the effect that the price recited in the deed of sale is more than the actual consideration paid, amounts to an imputation of fraud to the vendor and vendee, which it lies upon the plaintiff-pre-emptor, in the first instance, to substantiate by some *prima facie* evidence, and it depends upon the particular circumstances of each case to determine how much evidence is sufficient to establish a *prima facie* **[186]** case in favour of the plaintiff. But when such *prima facie* case is established it lies upon the defendants, vendor and vendee, to prove that the entire amount stated in the deed was actually paid as the price of the property sold. The plaintiff-pre-emptor cannot be held to be bound by the recital in the deed of sale, and it is the interest of the vendee to prove the payment of the sum over and above the admitted amount, *i.e.*, the difference between the amount stated by the plaintiff and that recited in the

(1) W.R. Jan.—July 1864, 304. (2) 13 W.R. 435.

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deed of sale. Moreover, in considering the question of *onus probandi* in such cases, the rule laid down in s. 106 of the Evidence Act (I of 1872) cannot be lost sight of. That rule has been frequently applied to cases between mortgagors and mortgagees, where no evidence whatsoever is forthcoming in regard to the issue as to the amount of the mortgage-debt; and it has been held that in such cases it lies upon the mortgagee to prove that the amount of the mortgage-debt was larger than that stated by the mortgagor. In the case of *Rajah Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh* (1) which was a suit for redemption, and the mortgage-deed being lost, the question was, whether the *onus probandi* as to the terms of the mortgage lay upon the mortgagor or the mortgagee, the Lords of the Privy Council made certain observations, which appear to us to be applicable, in principle, to the question now under consideration. Their Lordships observed:—"In this, as in most other cases, when the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence; and although the burden of proof *prima facie* in this case in their Lordships' view is upon the plaintiff, still they think the consideration should not be omitted that the defendant would naturally have the mortgage-deed, and that it would be *prima facie*, at all events, more in his power to give accurate evidence of its contents than in that of the plaintiff." Applying this principle to cases of pre-emption, it is clear that the pre-emptor, whose rights have been infringed upon, is the last person to have been taken into confidence by the vendor and the vendee, and he is the least likely to know what sum of money passed as consideration of the sale. On **[187]** the other hand, the vendor and the vendee are the persons who are in a position to prove exactly what sum was actually paid; they are supposed to be in possession of receipts and other evidence of similar description such as liquidated bonds, &c., which may have formed part of the consideration of the sale; and it is they who are expected to know the witnesses in whose presence the consideration money changed hands. Considering that the vendor and the vendee of property, subject to the right of pre-emption, are, *ex hypothesi*, wrong-doers, and considering also the temptation to overstate the price in order to evade the exercise of the right of pre-emption, we have no hesitation in holding that very slight evidence is ordinarily sufficient to establish a *prima facie* case in favour of the pre-emptor, and that when such case is established, it rests upon the defendants, vendor and vendee, to prove by cogent evidence that the amount of price actually paid was larger than that stated by the plaintiff-pre-emptor. We may add that we do not consider the rule thus stated by us to be in conflict with the rule laid down by Couch, C.J., in the case of *Sheikh Golam Ayhya* (2) already referred to, or with the view recently adopted by a Division Bench of this Court in S.A. No. 572 of 1881, decided the 13th January 1882 (3).

(1) 3 I.A. 85. (2) 13 W.R. 435. (3) Not reported.

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APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

ASHIK ALI (*Plaintiff*) v. MATHURA KANDU (*Defendant*).*
[6th September, 1882.]

Pre-emption—Mortgage by conditional sale—Construction of wajib-ul-ars—*Purchase-money—Limitation—Act XV of* 1877 (*Limitation Act*), *sch. ii, Nos.* 10, 120.

The limitation applicable to a suit to enforce the right of pre-emption in respect to a mortgage by conditional sale of a fractional share of an undivided mahal is that contained in No. 120, sch. ii of the Limitation Act, 1877. *Nath Prasad* v. *Ram Paltan Ram*, (1) followed.

The *wajib-ul-arz* of a village provided that the right of pre-emption should accrue "not only in respect of absolute sales, but also in regard to conditional sales, mortgages, and '*thika*' leases."

[188] *Held* that under its terms the right of pre-emption accrued on a mortgage by conditional sale becoming absolute. The *ratio decidendi* in *Alu Prasad* v. *Sukhan*, (2) relied on.

The pre-emptor, in the case of a mortgage by conditional sale which has become absolute, is bound to pay as the price of the property the entire amount due on such mortgage at the time it became absolute.

[F., 6 A. 344 (348); **Appl**, 8 A. 502 (507); R., 13 A. 126 (146); A.W.N. (1891) 185; 3 O.C. 184 (187) (F.B.).]

THIS was a suit to enforce the right of pre-emption in respect of the transfer of a certain share in a certain village. The claim was founded on the terms of the *wajib-ul-arz* of the village and local custom. The 13th paragraph of the *wajib-ul-arz* in question related to the right of pre-emption and provided that the right should accrue not only in respect of absolute sales, but also in regard to conditional sales, mortgages, and "*thika*" leases. The transfer in respect of which the suit was brought was a "*bybilwafa*" or deed of mortgage by conditional sale, dated the 18th January 1875, executed in favour of the defendant, Mathura Kandu, by the other defendants, the owners of the share. The money due on the mortgage not having been paid, Mathura Kandu applied for foreclosure under Regulation XVII of 1806, and the usual notice was issued, and the sale became absolute on the 7th January 1879, when the year of grace expired. Thereupon the defendant, Mathura Kandu, sued the mortgagors for possession of the share, by virtue of foreclosure, and obtained possession on the 24th April 1880. The present suit was instituted by the plaintiff to enforce his right of pre-emption on the 23rd April 1881. The defendant pleaded, *inter alia*, that the suit was barred by limitation, and that under the terms of the *wajib-ul-arz* the only way in which the plaintiff could enforce his right of pre-emption in respect of the property, was to have saved it from foreclosure by the payment of the money due on the *bybilwafa* mortgage before the expiry of the year of grace; and that, not having done so, he was not entitled to enforce pre-emption after the sale had become absolute. The Court of first instance, disallowing all the pleas in defence, decreed the claim, making the decree subject to payment by the plaintiff of the sum of Rs. 809-6, the amount due on the

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* Second Appeal, No. 514 of 1882, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 28th January, 1882, reversing a decree of Maulvi Amin-ud-din, Munsif of Muhammadabad, dated the 14th November, 1881.

(1) 4 A. 218. (2) 3 A. 610.

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bybilwafa mortgage at the time of issuing the notice of foreclosure. The lower appellate Court, whilst upholding the judgment of the Court of first instance in every other respect, held that according to the proper interpretation of the terms of the *wajib-ul-*[189]*arz*, the plaintiff was bound (as contended by the defendant) to enforce pre-emption by saving the property from foreclosure; and that the *wajib-ul-arz* conferred no right to enforce pre-emption after the foreclosure of a *bybilwafa* mortgage. The lower appellate Court therefore, reversing the decree of the Court of first instance, dismissed the suit. The plaintiff appealed to the High Court.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the appellant.

Mr. *Conlan* and Munshi *Hanuman Prasad*, for the respondent.

JUDGMENT.

The Judgment of the Court (BRODHURST and MAHMOOD, JJ.) was delivered by

MAHMOOD, J.—The learned pleader for the defendant-respondent, in endeavouring to support the decree of the lower appellate Court, addressed some arguments to us in favour of the plea of limitation, but the question has already been settled by a Full Bench ruling of this Court, in the case of *Nath Prasad* v. *Ram Paltan Ram* (1). Following that ruling we hold that the suit was not barred by limitation.

In regard to the interpretation of the *wajib-ul-arz*, we have attentively heard the arguments of the learned pleaders for the parties. There can be no doubt that the clause in question is not distinctly worded; but we are unable to accept the interpretation placed upon it by the lower appellate Court. In construing documents of this nature, the intention of the parties and the object which they had in view must be regarded as the guiding principle, and if there is any doubt in the meaning of the language employed, the interpretation to be adopted must, as a general rule, be the one most favourable to the object. Now there can be no doubt that the co-sharers of the village in providing for pre-emption and entering it as a stipulation in the *wajib-ul-arz* had no object in view other than the exclusion of strangers from the village co-parcenary, and that their intention was to enable co-sharers to prevent the introduction of strangers. At any rate, they cannot be understood to have aimed at creating such restrictions on the exercise of the right of pre-emption as would favour or facilitate the introduction of strangers in the proprietary co-parcenary of the village. Bearing this in [190] mind, it seems clear to us that the language of the clause supports the interpretation placed upon it by the plaintiff-pre-emptor.

The first part of the clause confers unusually extensive rights of pre-emption, and the latter part extends that right even to redemption. It seems to us inconsistent to hold that a pre-emptor, who is entitled to exclude even a mortgagee and a lessee, should not have a similar right when the form of transfer makes the stranger an absolute owner of a share in the village. Indeed, the first part of the clause distinctly confers the pre-emptive right in respect of absolute sales, and in our opinion it is of no consequence whether such sale is absolute at once, or becomes absolute at a future period. No doubt the last part of the clause entitled the pre-emptor to place himself in the shoes of the *bybilwafa* mortgagee by preventing foreclosure, in the manner provided by the clause; but if he

(1) 4 A. 218.

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did not do so, it does not follow that he forewent his right of pre-emption in respect of the absolute sale. It is perfectly intelligible to us that a co-sharer may be unwilling to be the mortgagee of his co-parcener's share, but at the same time object to a stranger acquiring the absolute ownership of that share. On consideration of the language of the entire clause, we have come to the conclusion that the co-sharers, who were parties to the *wajib-ul-arz*, intended that, in the case of a *bybilwafa* mortgage, the co-sharers should be able to enforce pre-emption, either immediately upon the execution of a mortgage, or by redemption during the year of grace, after issue of the notice of foreclosure, or after the sale became absolute. This interpretation, in our opinion, is fully borne out by the wording of the clause of the *wajib-ul-arz*, and is consistent with the nature, incidents, and objects of the right of pre-emption. We may add that this view is supported by the *ratio decidendi* adopted by the Full Bench of this Court in *Alu Prasad* v. *Sukhan* (1). Under this view of the case, the decree of the lower appellate Court cannot stand, and the decree of the Court of First Instance must be restored, but with some modifications. The learned pleader for the respondent-defendant rightly contends that both the lower Courts were wrong in holding that the plaintiff-pre-emptor was bound to pay to the defendant-vendee only Rs. 809-6, the **[191]** amount due on the *bybilwafa* at the time of issuing the notice of foreclosure. We have no hesitation in holding that the pre-emptor, in enforcing pre-emption in respect of a sale which was originally conditional, but subsequently becomes absolute, is bound to pay to the vendee the price in lieu of which the latter became absolute purchaser. That price is not the sum due at the date of issuing notice of foreclosure, but the entire omount due on the *bybilwafa* at the expiry of the year of grace, when the sale becomes absolute for non-payment of the sum due. The learned pleaders who have appeared before us on behalf of the plaintiff-pre-emptor and the defendant-vendee have admitted before us that in the present case the sale became absolute on the 7th January 1879, by expiry of the year of grace, and that the amount due on the *bybilwafa* on that date was Rs. 921-8-6. This amount must, therefore, be regarded as the price in lieu of which the sale became absolute, and which the plaintiff-pre-emptor is bound to pay before he can obtain possession under the decree to be passed in this case. We accordingly decree this appeal, and setting aside the decree of the lower appellate Court, restore that of the Court of First Instance, with this modification, that the plaintiff shall, upon payment into Court of the sum of Rs. 921-8-6 on or before the first day of December 1882, obtain possession of the property in suit, and recover the costs incurred by him in all the Courts from Mathura Kandu, defendant-vendee, respondent; but that if the sum above-named be not so paid by the plaintiff, the suit shall stand dismissed, and the plaintiff shall pay to the defendant-vendee respondent, the costs incurred by him in all the Courts.

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(1) 3 A. 610.

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APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

BADRINATH AND OTHERS (*Defendants*) *v.* BAJAN LAL (*Plaintiff*).*
[12th September, 1882.]

Lease for a term of years—Death of lessee before expiration of term—Lease binding on representatives of lessee—Construction of lease—Separate liability of lessee—Jurisdiction—Suit partly cognizable in the Revenue Court and partly in the Civil Court—Act XII of 1881 (*N.W.P. Rent Act*), ss. 206, 207.

A suit was instituted in a Court of revenue which was partly cognizable in the Civil Courts: *held*, on the question, raised on appeal, whether the Revenue [192] Court had jurisdiction to entertain the suit, that the provisions of ss. 206 and 207 of the Rent Act (North-Western Provinces) 1881, rendered the plea in respect of jurisdiction ineffective.

In the absence of words to the contrary, a lease of zemindari rights for a term of years does not terminate before the expiration of the term by the mere fact of the death of either the lessor or lessee. *Maharaja Tej Chund* v. *Sri Kanth Ghose* (1) and *Raja Burdakanth Roy* v. *Aluk Munjooree Dasiah* (2), relied on. On the question whether the lessees in this case were jointly as well as severally liable, *held*, that the terms of the lease indicated that the liability of the lessees was intended to be several, but equal in extent.

[R., 37 C. 377 (381)=5 Ind. Cas. 500.]

ON the 22nd October 1873, Hira Lal and Khiali executed a "*kabuliyat*" or counterpart of a lease in favour of the plaintiff in this case, whereby they took a lease (*thika*) of a certain village for nine years (1281—1289 Fasli or September 1873—September 1882), agreeing to pay Rs. 265 annually, in equal shares, in the month of Sawan of each year, and undertaking to pay the Government revenue, etc., for the village during the continuance of the lease. There was an express clause in the *kabuliyat* to the effect that the lessees should have no power to relinquish the lease before the expiry of the stipulated term. The other conditions of the *kabuliyat* need not be noticed. Under the terms of the *kabuliyat* the lessees were placed in possession of the village, and acted according to the terms of the contract. About the 5th September 1879, Hira Lal died, and Khiali died about the middle of 1288 Fasli (February 1881). The lessees, and after them their heirs, the present defendants, made default in payment of the Government revenue, and the plaintiff had to pay Government revenue for 1287 and 1288 Fasli (September 1879—September 1881). The present suit was commenced on the 26th May 1881, having for its object the recovery of the Government revenue so paid by the lessor on behalf of the lessees, and for arrears of rent due under the *kabuliyat* for the years 1286 and 1287 Fasli (September 1878—September 1880), together with interest on the sum so claimed. The defendants were the heirs of Hira Lal and Khiali, the original lessees. The main pleas on behalf of the defendants were, that the suit was not cognizable by the Revenue Court, by reason of the joinder of the claim for rent with a claim for money paid as arrears of revenue; that the lease being a merely personal contract, the death of the [193] original lessees terminated the lease; that the defendants had given notice to

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* Second Appeal No. 428 of 1882, from a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 2nd January 1882, modifying a decree of A. Sells, Esq., Collector of Farukhabad, dated the 22nd August 1881.

(1) 3 M.I.A. 261. (2) 4 M.I.A. 321.

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the lessor of their determination to relinquish the lease, and they were therefore not liable to the claim; that even if they were liable, a joint decree could not be passed against them, the liability of the lessees under the *kabuliyat* being several. The Court of First Instance decreed the claim with costs "as against the representatives of Khiali, deceased, for the whole, but as against the representatives of Hira Lal, deceased, to the extent of Rs. 1,003-0-9 only out of the whole, amount." From this decree the defendants preferred an appeal to the District Judge, repeating the pleas urged by them in the Court of First Instance. The District Judge declined to enter into the question of jurisdiction, relying on the provisions of s. 207 of the Rent Act. On the other points in this case, he held that the heirs of the lessees were not bound by the contract of the *kabuliyat*, but that Hira Lal having during two or three months of 1287 Fasli collected rents, his estate was liable; that under the lease, notwithstanding the specification of the shares of the two lessees, their liability was joint, for the reason that "as between themselves the lease shows they were equal sharers, but they executed the lease jointly, and since the death of Hira Lal, Khiali held the whole of the leased property." The District Judge, however, disallowed the interest claimed by the plaintiff, and passed the following order in appeal:—"The decree will be for Rs. 882-8 against the estate of Hira Lal and Khiali Ram, and for Rs. 90-10 against the estate of Khiali Ram; costs in both Courts in proportion to the success of the parties." From this decree the present second appeal was preferred by the defendants, and the grounds of appeal raised three points for determination—(i) whether the suit was cognizable by the Revenue Court; (ii) whether the defendants were bound by the terms of the lease of 22nd October 1873, so far as the present claim was concerned; and (iii) whether the liability of the two lessees under the lease was joint or several.

Pandit *Ajudhia Nath*, for the Appellants.

Mr. *Howell*, for the Respondent.

JUDGMENT.

The judgment of the Court (TYRRELL and MAHMOOD, JJ.) was delivered by

[194] MAHMOOD, J. (who, after stating the facts as stated above, continued):—In regard to the first point, we agree with the District Judge in the view that ss. 206 and 207 of the Rent Act render the plea ineffective, and we therefore consider it unnecessary to enter into the question of jurisdiction with reference to the nature of the suit. But on the remaining two points in appeal we cannot accept the view of the District Judge as correct in law. We are not aware of any rule of law by which a *thika* lease of zemindari rights in India expires before the stipulated term owing to the death of the lessor or the lessee during the continuance of the term of the lease, or by which the estate of either of them can escape the obligations created by the lease. It is true that the *thika* lease in question in this case contains no words which would necessarily and expressly signify, that the lessor and the lessee intended that the obligations and rights created by the stipulations of the lease should continue after the death of either of the parties so as to bind those who inherit their estates; but this circumstance is of no avail in face of the fact that the *thika* was given expressly for a fixed term of 9 years; and whilst the deed is devoid of any expressions to the contrary, the lessees expressly agreed to have no power to relinquish the lease before

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the expiry of the stipulated period. Under these circumstances, it would be inequitable to hold that those who have by inheritance succeeded to the estates of the deceased lessees are not bound by the terms of the lease, and can escape the liabilities which the obligations of the *thika* create. This view is supported by the rulings of the Privy Council in *Maharaja Tej Chund* v. *Sri Kanth Ghose* (1) and in *Raja Burdakanth Roy* v. *Aluk Munjoory Dasiah* (2) which we regard as authorities for the principle that, in the absence of words to the contrary, a lease for a fixed term of years does not terminate before the expiry of the stipulated term by the mere fact of the death of either the lessor or the lessee.

Turning now to the question whether the liability under the lease was joint or several, we are of opinion that the specification of the shares in the lease indicates that the obligation of the lessees was intended to be several. Every covenant in the lease is accom-[195]panied by the Hindustani expression "*ba hissa-i-musawi*" (in equal shares) or "*nisf nisf*" (half and half), and these expressions occur in no less than six places. In our opinion they leave no doubt that the liability of the lessees was intended to be several, but equal in extent.

Under this view of the case we partially decree the appeal, and, without altering the amount decreed by the lower appellate Court, modify the decree of that Court so as to decree the sum of Rs. 486-9-0 against the defendants, heirs of Hira Lal, and a like sum of Rs. 486-9-0 against the defendants, heirs of Khiali Ram, the sums aforesaid being severally recoverable, with proportionate costs incurred by the plaintiff in the Courts below, from the estates of the two persons abovenamed respectively; and, on the other hand, the defendants to recover from the plaintiff the costs incurred by them in the lower Courts to the extent of the dismissal of the plaintiff's claim, half of such costs being recoverable by the defendants, heirs of Hira Lal, and the other half by the defendants, heirs of Khiali Ram. But as this appeal has partially prevailed, we make no order as to the costs incurred in this Court.

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5 A. 195=2 A.W.N. (1882), 215.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

MADAN MOHAN *v.* RAMDIAL AND ANOTHER.* [12th September, 1882.]

Certificate for collection of debts—Grant to several persons jointly—Act XXVII of 1860.

A certificate under Act XXVII of 1860 should not be granted to several persons jointly, but, where there are several claimants to the certificate, the District Court should determine which of such persons has the best title to the certificate, and grant the same accordingly.

[F., 15 B. 684 (685); R., 15 M.C.C.R. 283 (284).]

MADAN MOHAN, the brother's son of one Radhe Lal, deceased, applied for a certificate to collect the debts due to the estate of the deceased under Act XXVII of 1860. Certain persons objected, severally claiming to be entitled to the grant of the certificate, among them Dwarka, Madan Mohan's brother, and Ramdial, the son of another brother of the deceased.

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* First Appeal No. 82 of 1882, from an order of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 25th January 1882.

(1) 3 M.I.A. 261. (2) 4 M.I.A. 321.

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The District Court made an order granting a joint certificate to Madan Mohan, Dwarka, and Ramdial.

[196] On appeal to the High Court, Madan Mohan contended that the District Court was wrong to grant a joint certificate to three persons, and should have determined which of the three should have preference.

Munshi *Hanuman Prasad* and Maulvi *Mehdi Hasan*, for the Appellant.

Pandit *Nand Lal*, for the Respondent, Ramdial.

The Court (TYRRELL, J., and MAHMOOD, J.) made the following

ORDER OF REMAND.

TYRRELL, J.—The question of the superior title to get a certificate to collect the debts due to the estate of Radhe Lal is now narrowed down in the case before us to the competitive claims *inter se* of his two nephews, Madan Mohan and Ramdial, who obtained from the Judge of Cawnpore a joint certificate in that behalf along with a third person who has withdrawn his pretensions by a petition presented to us.

We have no hesitation in holding that the grant of a joint certificate to two or more persons is not only fraught with obvious inconvenience, but is opposed to the whole spirit and policy of the Act No. XXVII of 1860, which was specifically directed to providing greater security for persons paying to the representatives of deceased persons debts due to their estates, and to facilitating the collection of such debts by removing all doubts as to the legal title to demand and recover the same.

It is clear to us that the issue of joint certificates would ordinarily defeat instead of subserving both those objects. We are fortified in this view by a ruling of a Bench of this Court in *In re Goura* v. *Kekree Singh* (1) wherein it was ruled that "Act XXVII of 1860 (an Act for facilitating the collection of debts on successions) gives a Judge no power to grant a joint certificate to two persons; his duty is to determine which of the applicants has the better right."

We therefore set aside the Judge's order in this respect and remand the case for a finding on the issue which of the two claim-[197]ants, Madan Mohan, or Ramdial, is in all respects better entitled to have a certificate under the Act.

On the receipt of the Judge's finding on this issue, ten days will be allowed for objections from a date to be fixed by the Registrar.

Case remanded accordingly.

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(1) N. W. P. H. C. R. (1872) p. 60.

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5 A. 197=2 A.W.N. (1882), 217=7 Ind. Jur. 487.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

BHAWANI PRASAD (*Defendant*) *v.* DAMRU (*Plaintiff*).*
[14th September, 1882.]

Pre-emption—Suit by pre-emptor and "stranger" to enforce right—Effect on pre-emptor's right—Justice, equity and good conscience—Muhammadan Law.

Held applying the doctrine of the Muhammadan law of pre-emption, such doctrine being in accordance with justice, equity and good conscience, that a co-sharer in a village who had under the *wajib-ul-arz* a right of pre-emption in respect of the sale of a share who joined a "stranger," (that is, a person who had not such right), with himself in suing to enforce such right, thereby forfeited such right.

Sheodyal Ram v. *Bhyro Ram* (1) *Guneshee Lal* v. *Zaraut Ali* (2) and *Fakir Rawat* v. *Sheikh Emambaksh* (3) referred to.

[**Diss.**, 1 O.C. 308 (315) (**F.B**).; 83 P.R. 1893; **F.**, 15 C. 224 (226); **Appl.**, 6 A. 423 (425); **Expl.**, 8 A. 462 (465); **R.**, 7 A. 118 (119); 12 A. 234 (269) (**F.B.**); 19 A. 324 (326); 31 A. 623 (**F.B.**)=6 A.L.J. 887=3 Ind. Cas. 820=6 M.L.T. 352; 4 A.L.J. 210; A.W.N. (1907) 88; 7 O.C. 22 (24, 26).]

THE plaintiff Damru was the co-sharer of the patti in which a two annas four pies share was owned by Ranjit, father of the defendant Kunji. Ranjit executed a *bybilwafa* mortgage of his share in favour of Bhawani Prasad, defendant, on the 15th April 1879. Under the deed the mortgage-debt was to be repaid by instalments within the year, and the mortgagee was to be entitled to foreclose the mortgage on default of due payment of the instalments. Default occurred, and the notice of foreclosure was issued by the mortgagee on the 2nd February 1880, and the year of grace expired on the 2nd February 1881. Thereupon Bhawani, defendant-mortgagee, had his name entered in the revenue records as owner of the share, without any opposition by the heirs of Ranjit, who appeared to have died in the meantime. On the 19th August 1881, a fresh deed was executed between Bhawani Prasad, defendant, and the heirs of Ranjit, whereby the former abandoned the possession he had acquired by foreclosure, and accepted a fresh **[198]** *bybilwafa* mortgage of the same share in lieu of Rs. 2,401-0-0 payable by instalments up to 1942 Sambat. This deed purported to cancel the former *bybilwafa* deed of 15th April 1879. The suit from which this appeal arose was commenced on the 29th August 1881, by Damru, Barik Rai and Baiju, having for its object the enforcement of pre-emption under the terms of the *wajib-ul-arz*; in respect of the foreclosure of 2nd February 1881, which had taken place under the terms of the *bybilwafa* mortgage-deed, dated the 15th April 1879.

In resisting the claim, the defendants pleaded that the suit was barred by limitation; that the defendant-vendee being himself a co-sharer in the village, the plaintiffs had no preferential right of pre-emption under the terms of the *wajib-ul-arz*; that the plaintiffs had acquiesced in the sale by refusing an offer of pre-emption; and lastly, that the deed of 19th August 1881, having cancelled and annulled the former deed of 15th April 1879,

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* Second Appeal No. 64 of 1882, from a decree of W. Kaye, Esq., Officiating Commissioner of Jhansi, dated the 23rd November 1881, modifying a decree of J. J. McLean, Esq., Assistant Commissioner of Jhansi, dated the 22nd September 1881.

(1) N.W.P.S.D.A.R. (1860), p. 53. (2) N.W.P.H.C.R. (1870) 343.
(3) B.L.R. (F.B.) Rul. 35.

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and the foreclosure proceedings which had been taken thereupon, the plaintiffs could not enforce pre-emption in respect of a foreclosure which was no longer subsisting. The Court of First Instance disallowing the first three pleas held that the second deed was "a mere device to avoid the present claim," and decreed the suit. On appeal by the defendant-purchaser the lower appellate Court concurred with the Court of First Instance in its finding respecting the deed of 19th August 1881, but held that two of the plaintiffs, *viz.*, Berik Rai and Baiju, had no preferential right to enforce pre-emption against the purchaser; that Damru, plaintiff, who admittedly had such preferential right, could not join the other two plaintiffs in enforcing pre-emption. On this finding the lower appellate Court modified the decree of the Court of First Instance, by dismissing the claims of Barik Rai and Baiju, and excluding them from the category of plaintiffs, but upheld the decree in favour of Damru, plaintiff. The defendant-vendee appealed to the High Court.

Mr. *Conlan* and Pandit *Ajudhia Nath*, for the Appellant.

Pandit *Bishambhar Nath* and Maulvi *Mehdi Hasan*, for the Respondent (Damru).

JUDGMENT.

The judgment of the Court (TYRRELL, J., and MAHMOOD, J.) was delivered by

[199] MAHMOOD, J. (who, after stating the facts, as stated above, continued) :—In view of a recent Full Bench ruling of this Court, the learned pleader for the appellants has withdrawn the first ground of appeal before us which relates to the plea of limitation. Nor does he insist upon the somewhat vague plea urged as the third ground of appeal. The second ground of appeal however has been argued before us with much force. That ground relates to the legal effect of the circumstance that Damru, in claiming pre-emption, associated with him two other persons who admittedly had no right to claim pre-emption against the defendant-vendee, and must therefore for the purposes of this case be regarded as strangers. On the authority of certain cases decided by this Court, in which it was held that co-sharers purchasing property jointly with strangers forfeited their pre-emptive right and rendered the entire sale liable to pre-emption at the instance of other co-sharers, who, but for such joinder of strangers in the purchase, would not be entitled to claim pre-emption, that learned pleader for the appellant contends that the same rule must be held applicable to the case of a co-sharer who, having himself the right of pre-emption, associates others having no such right in preferring a suit in which pre-emption is claimed. In support of the former part of this contention we have been referred to the case of *Sheodyal Ram* v. *Bhyro Ram* (1). The only other reported case to which our attention has been called, is that of *Guneshee Lal* v. *Zaraut Ali* (2), in which a similar rule appears to have been laid down by a Division Bench of this Court. We have, however, not been able to find any case in which the exact point now under consideration has been the subject of decision, and it may be taken that the point has not yet been settled by any authoritative ruling.

It is clear that there exist no definite rules of substantive law by which questions of this nature, relating to the right of pre-emption claimed under the terms of the *wajib-ul-arz*, are governed. It is only

(1) N.W.P.S.D.A.R. (1860) p. 53. (2) N.W.P.H.C.R. (1870) p. 343.

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on the broad principles of justice, equity and good conscience that such questions can be dealt with by the Courts. The right of pre-emption, though it has undergone some essential alterations, induced either by the force of custom or the express stipu-[200] lations of co-parcenary bodies of landed proprietors, is not traceable, at least in these provinces, to any sources other than the influence of the Muhammadam Law. A Full Bench of the Calcutta High Court in the case of *Fakir Rawot* v. *Sheikh Emambaksh* (1) arrived at similar conclusions: and in two recent cases a Division Bench of this Court has broadly accepted the principle that, in the absence of circumstances to the contrary, the Court, in administering equity in cases of pre-emption, will follow the analogies furnished by the rules of the Muhammadan Law of pre-emption, so long as those rules are consistent with the principles of justice, equity and good conscience.

Viewing the case in this light, we are of opinion that the argument pressed upon us by the learned Pandit, who has appeared in support of this appeal, must prevail.

The rule of law by which a person, entitled to pre-emption, forfeits his right, is based upon the principles of equitable acquiescence, which forms one of the most important elements of restrictions imposed upon the vindictive or capricious exercise of the right of pre-emption. Those restrictions appertain to the very essence and nature of the right—restrictions which, if ignored, would defeat the policy on which the right of pre-emption is based. A person who, whilst possessing the pre-emptive right, takes part in transacting the sale to a stranger, or who, in purchasing property himself, joins a stranger in such purchase, cannot, on the one hand, subsequently object to the sale which has with his acquiescence violated the pre-emptive right; nor, on the other hand, can he resist the claim of other pre-emptors who, in suing for pre-emption, vindicate the policy of the right. The rule is, that a person cannot claim a right which he has himself violated, nor can he be allowed to complain of an injury in which he has himself acquiesced. Applying these principles to the present case, it seems to us that the very fact that Damru, in suing for pre-emption, joined with him two other persons who had no such right, must be taken to amount to such acquiescence in the sale as estops him in equity from complaining of the sale. Whatever the extent of the shares claimed by those two other persons may be, it is clear that [201] so far as Damru himself was concerned, he cannot be allowed to say that, whilst he consented to those shares being acquired by his co-plaintiffs, he has been injured by those shares being purchased by the vendee—the co-plaintiffs and the vendee being both strangers. In other words, Damru must be regarded to have foregone his pre-emptive right to the extent of the shares of his co-plaintiffs, and could not therefore, at all events, contest the sale to that extent. To that exent, therefore, the sale in favour of the defendant-vendee must be held to have remained uncontested by Damru, and it has been ingeniously urged by the learned pleader for the appellant that to that indefinite extent the vendee must be regarded to be the co-sharer of the patti in which the share in dispute is situate, and therefore entitled to the pre-emptive rights equally with the plaintiff Damru. The arguments addressed to us on behalf of the respondent aimed at drawing a distinction between the present case and cases in which a person possessing the pre-emptive right has joined

(1) B.L.R (F.B.) Rul. 25.

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a stranger in the purchase. But for the reasons already stated, we are of opinion that no such distinction in principle exists, and we hold that, as a co-sharer entitled to pre-emption forfeits the benefit of the right by joining a stranger in purchasing the property, so a pre-emptor loses his right of enforcing pre-emption by joining in his claim persons who are as much strangers as the vendee. We decree this appeal, and setting aside the decrees of both the lower Courts, dismiss the suit, the plaintiff-respondent paying the costs incurred in all the Courts.

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5 A. 201 = 2 A.W.N. (1882,) 221.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

JANKI PRASAD (*Decree-holder*) v. GHULAM ALI (*Judgment-debtor*).*
[14th September, 1882.]

Execution of decree—Acknowledgment in writing—Part-payment—Act XV of 1877 (*Limitation Act*), ss. 19, 20 *and sch.* ii, *No.* 179.

A decree for money, dated the 24th June 1878, directed that a certain instalment should be paid on the 22nd July 1878, and a like one on the 20th December 1878, and the balance by certain instalments commencing from a certain date; and that, in case of default, the decree-holder might realize the whole amount of the decree. The instalments were not paid at the fixed dates, but part-payments of the amount [202] of the decree were made by the judgment-debtor from time to time out of Court. On the 7th May 1879 he made a part-payment and an endorsement on the decree to the following effect:—" I,G, judgment-debtor of this decree, have myself paid Rs. ——, and have endorsed this payment on the decree in my own handwriting." On the 5th September 1881 the decree-holder applied for execution of the whole decree.

Held, by the Court, that the application was governed by the rule contained in s. 19 of the Limitation Act, 1877, that the endorsement made by the judgment-debtor on the decree was an acknowledgment of liability under the decree; and that consequently the period of limitation for the application should be computed from the time such endorsement was made, and the application was therefore within time. *Ramhit Rai* v. *Satgur Rai* (1) followed, but with doubt.

Per MAHMOOD, J.—That, following the *ratio decidendi* in *Ramhit Rai* v. *Satgur Rai* (1), the part-payment made and endorsed on the decree by the judgment-debtor fell within the terms of s. 20 of the Limitation Act, 1877. *Asmutullah Dalal* v. *Kally Churn Mitter* (2), distinguished.

Also *per* MAHMOOD, J.—That it was doubtful whether in this case the decree-holder was bound to execute the whole decree when the first default occurred, as the terms of the decree appeared to give the decree-holder an option in the matter, and therefore whether the application for execution was barred because it was made more than three years after that date. *Shib Dat* v. *Kalka Prasad* (3), distinguished.

[**F.**, 7 A. 424 (430); 26 A. 36 (39) = A W.N. (1903) 179; **Appr.**, 12 A. 399 (403) (**F.B.**); **R.**, 15 M.C.C.R. 64 (66); **D.**, 22 B. 998 (1001).]

THERE were originally two judgment-debtors in this case, but the appeal related only to Ghulam Ali. The decree in this case was passed on the 24th June 1878. It was a decree directing the payment of money by instalments of Rs. 150 on the 22nd July 1878, and the 20th December 1878, and the remaining amount was to be paid by yearly instalments of Rs. 125 each, commencing from the end of Jaith 1286 Fasli. There was

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* Second Appeal, No. 14 of 1882, from an order of W. Duthoit, Esq., Judge of Allahabad, dated the 15th January 1882, reversing an order of Babu Promoda Charan Banarji, Subordinate Judge of Allahabad, dated the 12th November, 1881.

(1) 3 A. 247. (2) 7 C. 56. (3) 2 A. 443.

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a condition attached to the decree, of which the following is a translation:—"In case of breach of agreement, the plaintiff has the power that, by cancelling the fixed instalments, he may realise the entire decretal money by enforcement of lien on the hypothecated property in execution of the decree." It was admitted that the instalments fixed by the decree were not duly paid, but that on the 7th May 1879, a payment of Rs. 50 was made on behalf of Ghulam Ali, judgment-debtor; and again on the 4th February 1880, he paid Rs. 70; and a further sum of Rs. 80 on the 13th January 1881. All these payments were made out of Court, and on the [203] last two occasions the judgment-debtor endorsed the decree in his own handwriting in the following words:—"I, Ghulam Ali, judgment-debtor of this decree, have myself paid Rs.——, and have endorsed this payment on the decree in my own handwriting." The present application for execution of the decree was made on the 5th September 1881. The judgment-debtor having pleaded limitation, the Court of first instance, following *Shib Dat* v. *Kalka Prasad* (1), held that the whole amount of the decree became due on the 22nd July 1878, when default in payment of the first instalment took place, and that the decree would therefore, under ordinary circumstances, be barred by limitation. But the Court held that the endorsements of the 4th February 1880, and the 13th January 1881, amounted to written acknowledgments within the terms of s. 19 of the Limitation Act (XV of 1877), and that the application for execution was therefore within limitation. The lower appellate Court, without considering it necessary to determine whether the endorsements amounted to an acknowledgment, held, following the ruling of the Calcutta High Court in *Kally Prosonno Harra* v. *Heera Lall Mundle* (2) and in *Mungal Prashad Dichit* v. *Shama Kanto Lahory Chowdhry* (3) that the word "*debt*" in ss. 20 and 21 of Act IX of 1871 did not include a judgment-debt; that although that Act had been repealed, the reasons on which the rulings of the Calcutta High Court were based were still applicable; and that therefore if the word *debt* was not large enough to cover a judgment-debt, still less would the word "*right*" as used in s. 19 of the present Limitation Act be wide enough to include the right of the decree-holder to execute his decree. The lower appellate Court further held, relying upon the ruling of the Calcutta High Court in the case of *Asmutullah Dalal* v. *Kally Churn Mitter* (4), that "there is nothing in the present law to show that there are, or may be, various recurrent starting points from which limitation is to run in respect of the execution of a decree as a whole after it has become final, excepting that each application or notice referred to in clauses 4 and 5 of art. 179 of the second schedule gives a fresh starting point, otherwise there is but [204] one starting point provided for limitation in respect of execution of a decree *as a whole*, *viz.*, the date of its becoming final; or, if the decree orders that the whole amount be paid on a certain date, then such date." On this ground the lower appellate Court reversing the order of the first Court held that the execution of the decree was barred by limitation.

In second appeal the contention of the parties involved the determination of the following points:—(i) Whether the rule contained in s. 19 of the Limitation Act (XV of 1877) governs applications for execution of decrees? (ii) If so, whether the endorsements by Ghulam Ali, judgment-debtor, amounted to such acknowledgment as is contemplated by that

(1) 2 A. 443. (2) 2 C. 468. (3) 4 C. 708. (4) 7 C. 56.

section? (iii) Whether part-payment of the decretal money by the judgment-debtor Ghulam Ali amounted to such part-payment as would fall under the purview of s. 20 of the Limitation Act (XV of 1877)? (iv) Whether, under the terms of the decree, the default in payment of the first instalment, which became due on the 22nd July 1878, had the effect of rendering the entire decree necessarily executable at once, so as to bar the execution of the decree even in respect of such instalments as would otherwise be within limitation?

Babu *Ratan Chand*, for the appellant (decree-holder).

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Pandit *Ajudhia Nath*, for the respondent (judgment-debtor).

The Court (TYRRELL and MAHMOOD, JJ.) delivered the following Judgments:—

JUDGMENTS.

MAHMOOD, J. (after stating the facts of the case as they have been stated above, continued).—I confess that at the hearing of the case I entertained serious doubts whether the words of ss. 19 and 20 of the present Limitation Act included the rights of a decree-holder and judgment-debts. And, whilst I was not satisfied with the reasons on which the judgments of the Calcutta High Court in the cases already referred to are based, the argument on behalf of the judgment-debtor addressed to us by the learned *Junior Government Pleader* produced an impression upon my mind. It was therefore my intention, with the concurrence of my brother TYRRELL, to refer the question to the Full Bench; but I have since been referred [205] to a recent Full Bench ruling of this Court in *Ramhit Rai* v. *Satgur Rai* (1) in which all the learned Judges have held that "an application for the execution of a decree is an application in respect of a '*right*,' that is to say, the right of the decree-holder to execution within the meaning of s. 19 of Act XV of 1877." I think we are bound to follow the ruling, and I hold accordingly in regard to the first point in appeal.

In regard to the second point in this case, I am of opinion that the wording of the endorsement by Ghulam Ali leaves no doubt that they were intended to be acknowledgments of his liability under the decree. The original Hindustani words "*madyun-i-digri-i-haza*," though no doubt descriptive of the judgment-debtor, necessarily imply the admission of liability under the decree, as they undoubtedly would if the endorsements had been made on a bond, using of course, in the latter case, the words "*madyun-i-tamassuk-i-haza*" instead of "*madyun-i-digri-i-haza*."

I now come to the third point in the case, *viz.*, the question of part-payment. In deciding this point it seems to me that we are again bound to follow the Full Bench ruling already cited. Sections 19 and 20 of the Limitation Act contain rules of the same nature in regard to limitation. They are both rules whereby the period of limitation is interrupted, and the effect of those two sections, so far as debts are concerned, is to place acknowledgment and part-payment on the same footing—the acknowledgment and the part-payment being equally required to be made within limitation, and the fact to appear in the handwriting of the person making the same. Both those sections must therefore be read together, and the *ratio decidendi* in regard to both questions must therefore be the same. In the case of *Asmutullah Dalal* (2) relied upon by the lower appellate

(1) 3 A. 247. (2) 7 C. 56.

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Court, the effect of s. 20 of the Limitation Act does not appear to have been considered, and the judgment would, at first sight, seem to proceed upon the implied assumption that that section has no application to part-payment of judgment-debts at all. It does not, however, appear that in that case the fact of part-payment appeared in the handwriting of the judgment-debtor as required by s. 20. I therefore hold that that ruling has no application to the point now under con-[206]sideration, and that the part-payments made and endorsed by Ghulam Ali on the decree fall within the terms of s. 20 of the Limitation Act, as they were made within limitation from the date the decree became capable of execution.

The view which I have taken in regard to the first three points makes it unnecessary to decide the last; for, according to that view, the effect of the acknowledgments and the part-payments by Ghulam Ali is to bring the present application for execution within the limitation as against him. I may, however, express a doubt whether the terms of the decree in the present case are not to be distinguished from the decree in the case of *Shib Dat*, (1) on which the Subordinate Judge has relied for holding that the decree-holder was absolutely bound to execute the decree when the default in payment of the first instalment took place, and that the present application having been made three years after that date, would have been altogether barred by limitation, but for the acknowledgments in writing made by Ghulam Ali, judgment-debtor. The terms of the decree in *Shib Dat's Case* would appear to be imperative, whilst in the present case they would seem to be only optional. I would decree this appeal, and reversing the order of the lower appellate Court, restore that of the Subordinate Judge.

TYRRELL, J.—The unanimous ruling of this Court in the Full Bench case of *Ramhit Rai* v. *Satgur Rai* (2) which we are bound to follow and apply, disposes of this appeal.

But with great respect for the authority of that judgment, I am unable to accept its doctrine, or to think that s. 19 of the Indian Limitation Act has any reference to debts of record, and can be applied to affect the limitation provided by that Act for the execution of decrees. It is, however, unnecessary to discuss the question here. Applying the law as it at present stands ruled, this appeal must be decreed.

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5 A. 207=2 A.W.N. (1882) 219.

[207] APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

PRAGI LAL (*Defendant*) v. FATEH CHAND (*Plaintiff*).*
[14th September, 1882.]

Wrongful attachment of property—Assignment of right to sue for compensation.

The mere right to sue for compensation for the wrongful attachment of moveable property in execution of a decree is not transferable by sale.

[Rel., 14 M.L.T. 319=25 M.L.J. 410=(1913) M.W.N. 918=21 Ind. Cas. 387.]

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* Second Appeal, No. 373 of 1882, from a decree of J. M. C. Steinbelt, Esq., Judge of Banda, dated the 27th January 1882, modifying a decree of Kazi Wajehul-lan-Khan, Subordinate Judge of Banda, dated the 23rd August 1881.

(1) 2 A. 443.

(2) 3 A. 247.

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5 A. 207= 2 A.W.N. (1882) 219.

PRAGI LAL, defendant, held a decree against Mata Din, the deceased father of Jammu and Lallu, and in execution of his decree he attached a godown belonging to the judgment-debtors, which contained some cotton, on the 1st December 1880. The plaintiff, Fateh Chand, representing himself to be a broker in charge of the cotton for selling it, objected to the attachment of the cotton, which was released by the order of the Court executing the decree on the 16th December 1880. In the meantime Parbati and Ishri, representing themselves to be the owners of a part of the cotton, executed a deed of sale on the 3rd December 1880, conveying their share of the cotton to the plaintiff, together with the right to sue for such damages as might have been sustained by reason of the attachment above referred to. A similar deed of sale was executed on the 29th January 1881, by Jodha, who represented himself to be the owner of the rest of the cotton. On the 31st January 1881, the plaintiff sold the cotton; and on the 5th August 1881, instituted the present suit, on the allegation that at the time of attachment, the market rate at which cotton sold was Rs. 18 per maund or Rs. 54 per *addha* (3 maunds); that by reason of the attachment the cotton could not be sold at that rate; that during the attachment the cotton sustained injuries, and being reduced in value was sold on the 31st January 1881, at the reduced rate of Rs. 29-15-0 per *addha*; and that the entire quantity of the cotton was 26 *addhas*. On these allegations the plaintiff sued the defendant, Pragi Lal, for recovery of Rs. 625-10-0 on account of loss in cotton, Rs. 83-15-9 interest thereon at one per cent. per mensem, Re. 1 as brokerage, and Rs. 5 on account of rent; these sums forming a total of Rs. 716-9-9. The Court of first instance dismissed the suit on various grounds relating to the merits, which however need not be noticed here. The lower appellate Court, dissenting from the find-[208]ings of the Court of first instance, held that the plaintiff had acquired a valid title to the cotton; that the defendant had failed to prove that the cotton belonged to his judgment-debtors; that his action in attaching the cotton, and in opposing its release was "quite unjustifiable;" that although it was not proved that the cotton had been damaged during the attachment, yet it had by the time of its release become what is technically called "old" and had consequently fallen in value; that at the time of attachment the current price of cotton was about Rs. 18 per maund, and at the time of its release the cotton being "old" was worth only about Rs. 14 per maund. On these findings the lower appellate Court calculated the loss on cotton to amount to Rs. 308, and, besides this sum, held the plaintiff entitled to recover Rs. 5-4-0 the rent of the godown for the period of attachment, and thus decreed Rs. 313-4-0 *plus* interest thereon up to the date of the institution of the suit.

The present appeal was preferred by the defendant, whilst the plaintiff preferred objections to the decree of the lower appellate Court under s. 561 of the Civil Procedure Code.

Pandit *Ajudhia Nath* and Babu *Aprokash Chandar Mukarji*, for the appellant.

Munshi *Hanuman Prasad* and Mr. *Simeon*, for the respondent.

JUDGMENT.

The judgment of the Court (TYRRELL, J., and MAHMOOD, J.) was delivered by

MAHMOOD, J. (who, after stating the facts of the case, as stated above, continued).—We are of opinion that the lower appellate Court is

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wrong in holding that a mere right to sue for compensation for injury caused by a wrongful act can be made the subject of sale. The attachment of 1st December 1880, if it caused any injury might have given a cause of action to the persons who owned the cotton at the time, and they might have sued the defendant for damages. But they could not convey such right of suing for compensation to the plaintiff. The attachment cannot be regarded as having injured the plaintiff, who was not, as he admits, proprietor of the cotton at the time. The property was in the house belonging to the defendant's judgment-debtors, and it was attached in circumstances which gave no reason to the defendant to believe that it [209] belonged to any person other than the owners of the house, his judgment-debtors. The plaintiff purchased the cotton with full knowledge of these circumstances, and must be understood to have purchased it subject to the consequences of the attachment, and at a price which took into account the risks which the attachment involved. The sale by Jodha was made after the attachment had been removed. The cotton was released only because the decree-holder failed to prove that it belonged to his judgment-debtors, and even in this case, while the Court of first instance found that the plaintiff had totally failed to prove that the cotton belonged to his vendors, all that the lower appellate Court has found is that the plaintiff "received it from Parbati, Ishri and Jodha"; and that "if they were not the actual owners of the cotton, they were brokers or agents for the sale of it"—a finding which clashes with the plaintiff's own allegation, that he himself was the broker to whom the cotton had been intrusted for sale.

We decree this appeal and disallow the respondents' objections; and setting aside the decree of the lower appellate Court, restore that of the Court of first instance. The costs incurred in all the Courts to be borne by the plaintiff-respondent.

Appeal allowed.

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5 A. 209=2 A.W.N. (1882) 220.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

RADHA PRASAD SINGH (*Plaintiff*) *v.* RAJENDRA KISHORE SINGH AND OTHERS (*Defendants*).* [14th September, 1882.]

Compromise—Assignment pending suit—Civil Procedure Code, s. 372.

The "cases of assignment, creation or devolution" of any interest pending a suit contemplated by s. 372 of the Civil Procedure Code are those in which "the person to whom such interest has come" is arrayed on the same side in the suit as "the person from whom it has passed."

Held, therefore that a compromise in a suit for land, between the plaintiff and one of the defendants, whereby the latter consented to a decree being given to the former for half the land, was not a "case of assignment" of an interest in such land within the meaning of that section.

DURING the pendency of this suit in the Court of first instance a deed of compromise was executed by Maharaja Radha Prasad Singh, Bahadur, Maharaja of Dumraon, plaintiff, and Maharaja Krishn [210] Partap Sahi, Bahadur, Maharaja of Hatwa, one of the defendants to the suit, on the 18th August 1879, which ended in the following terms:—"We, the two parties, have, after full consideration and deliberation,

* First Appeal, No. 154 of 1881, from an order of Maulvi Mahmud Baksh, Subordinate Judge of Ghazipur, dated the 11th November 1881.

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settled the dispute in question, and we therefore file this deed of compromise containing the terms mentioned above, and pray that it may be accepted, and a decree may be given to the plaintiff for half of the land in suit under the terms of this deed." The compromise appeared to have been filed on the 9th October 1879, and the issues in the case were fixed on the 26th February 1881. On the 8th November 1881, an application was made on behalf of the plaintiff on the ground of the compromise above-mentioned, and the material portion of the application stated that at the time of the institution of the suit the land in dispute was in the possession of the Maharajas of Betia and Hatwa, who were both defendants to the suit; that "during the pendency of the suit the Maharaja of Hatwa, defendant, admitting the petitioner's right and the justness of his claim, withdrew his possession and acknowledged the petitioner's right by a deed of compromise, dated 9th October 1879"; that "the half of the land in dispute, regarding which the Maharaja of Hatwa, defendant, had acknowledged the petitioner's right and withdrawn his possession, was put in the possession of the Maharaja of Betia, defendant, by the Government, and the Board of Revenue decided that the settlement of the said half of the land should be made with the Maharaja of Betia." On these allegations the application went on to say :—"As this transfer of possession took place while the suit was pending, and it is necessary to amend the petition of plaint as to this portion of land to obtain the consequential relief, it is prayed by this petition under s. 372 of the Civil Procedure Code, that permission may be given to amend the petition of plaint under the provisions of the said section." The application was opposed on behalf of the Secretary of State (one of the defendants), *inter alia*, on the ground that the compromise was the result of collusion between the parties thereto, and that it made no difference in the points at issue which had to be determined in the case. The Subordinate Judge held that the application could not be made under s. 372 of the Civil Procedure Code, and declining to amend the plaint, rejected the application on the 11th November 1881.

[211] From this order the present appeal was preferred by the plaintiff, and the learned counsel who appeared in support of the appeal contended that, although the order appealed from was interlocutory, it was appealable under cl. (21) of s. 588, Civil Procedure Code. He further contended that the deed of compromise must be regarded as an "assignment, creation or devolution of an interest pending the suit," within the meaning of s. 372, Civil Procedure Code; and that, under the circumstances of the case, the lower Court should have acted under that section, the case being one in which the Court should have directed that the suit "be continued by or against the person to whom such interest has come, either in addition to or in substitution for the person from whom it has passed."

Mr. *Conlan* and Lala *Lalta Prasad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), Pandit *Bishambhar Nath*, and Babu *Sital Prasad Chattarji*, for the respondents.

JUDGMENT.

The judgment of the Court (TYRRELL, J. and MAHMOOD, J.) was delivered by

MAHMOOD, J. (who, after stating the facts of the case as set out above, continued) :—In considering this case, we have had considerable

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difficulty in understanding the exact nature of the prayer contained in the plaintiff's application of the 8th November 1881. That prayer does not specify the amendments for which permission was prayed. If it may be regarded as an application merely for amending the plaint, the order rejecting it is clearly not appealable. On the other hand, if we accept the interpretation which the learned counsel for the appellant seeks to place upon it, we are of opinion that the case does not fall under s. 372 of the Civil Procedure Code. The deed of compromise is an ordinary agreement whereby the parties thereto agree to adjust the matter in dispute between them, and to which effect can be given only in the decree to be passed in the case; and indeed such was the prayer in the deed of compromise itself. Section 372 occurs in chapter XXI of the Civil Procedure Code, which deals principally with incidental proceedings arising from "the death, marriage and insolvency of parties"; and it is intelligible [212] that the Legislature, whilst providing for those incidents, should at the end of the chapter make provision also for "other cases of assignment, creation or devolution of any interest pending the suit." But it is clear to us that a deed of compromise filed in the Court during the pendency of a suit cannot be regarded as an "assignment" within the meaning of s. 372. No "addition" or "substitution" of parties, as contemplated by that section, can be made in a case like the present, in which the entire contention of the plaintiff amounts to a request that his name should be substituted for that of one of the defendants who has joined the compromise. This shows the anomaly to which the contention for the appellant naturally leads. We have no hesitation in holding that the "cases of assignment, creation or devolution" contemplated by s. 372 are those in which "the person to whom such interest has come" must be arrayed on the same side in the suit as "the person from whom it has passed"—an interpretation which is in keeping with the contemplation of all the other sections of Chapter XXI.

Whatever the legal effect of the compromise in this case may be, that effect must be the subject of consideration in the final decision of the case. No effect can be given to it at this stage of the suit; and since we agree with the Subordinate Judge in holding that s. 372 has no application to this case, we dismiss the appeal with two sets of costs.

Appeal dismissed.

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5 A. 212 = 2 A.W.N. (1882) 191.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

HOTI LAL (*Decree-holder*) *v.* HARDEO AND ANOTHER (*Judgment-debtors*).* [29th August, 1882.]

Execution of decree—Certificate for collection of debts—Act XXVII *of* 1860—*Application for execution by representative of deceased decree-holder—Objection to title—Order refusing to allow representative take out execution until granted certificate—Appeal —Civil Procedure Code, s.* 244.

On appeal from an order allowing an application by the legal representative of a deceased decree-holder for execution, the appellate Court, holding that the

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* Second Appeal, No. 25 of 1882, from an order of E. B. Thornhill, Esq., Judge of Aligarh, dated the 11th April 1882, reversing an order of Munshi Mata Prasad, Munsif of Aligarh, dated the 13th March, 1882.

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APPELLATE CIVIL.

5 A. 212= 2 A.W.N. (1882) 191.

applicant must obtain a certificate under Act XXVII of 1860 before he could take out execution of the decree, made an order directing that execution of the decree should be stayed until the applicant had obtained such certificate.

[213] *Held*, that such order fell under s. 244 of the Civil Procedure Code, and was therefore appealable.

Also, following the principle enunciated in *Lachmin* v. *Ganga Prasad* (1) that the possession of a certificate under Act XXVII of 1860 was not "an imperative condition precedent to the institution" of execution-proceedings by the representative of a deceased decree-holder; but that, where the judgment-debtor objects to the title of the person claiming to execute the decree, the Court should consider whether the objection is vexatiously raised or is a *bona fide* one.

[R., 13 C. 47 (49); 23 C. 87 (F.B.).]

THE appellant in this case applied, as the adopted son of one Lalji Mal, deceased, for execution of a decree held by the latter against the respondents in this case. The respondents objected to this application being granted, on the ground that the appellant was not the adopted son of Lalji Mal; that if he were, there were other heirs of Lalji Mal in existence, who should have joined in the application; and that before making the application the appellant should have obtained a certificate to collect the debts of Lalji Mal under Act XXVII of 1860. Upon the questions whether the appellant was competent to apply for execution of the decree, and whether it was necessary for him to obtain a certificate under Act XXVII of 1860 before doing so, the Court of first instance held that it was proved that the appellant was the adopted son and heir of Lalji Mal, and therefore he was competent to apply for execution of the decree; and that, his heirship to and his adoption by Lalji Mal being proved, it was not necessary that the appellant should obtain a certificate under Act XXVII of 1860, the possession of such a certificate not being indispensable. The Court therefore disallowed the objections of the respondents. On appeal, the lower appellate Court held that the question of the appellant's right of succession to Lalji Mal could not properly be decided in the execution department; and that until the appellant produced a certificate under Act XXVII of 1860 authorizing him to collect the debts due to Lalji Mal's estate, execution of the decree should be stayed. The lower appellate Court therefore made an order directing the Court of first instance "to stay proceedings in execution and to allow Hoti Lal a proper period of grace to obtain a certificate to collect debts due to the estate of Lalji Mal, deceased, and to present it to the lower Court, before payment is exacted from the judgment-debtors at his instance."

[214] In second appeal the appellant contended that the lower appellate Court was wrong in holding that he must obtain a certificate under Act XXVII of 1860 before he could be permitted to take out execution of the decree; and that the question whether he was competent, as the legal representative of the deceased decree-holder, to take out execution of the decree should be determined in this very case.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the appellant.

Mr. *Howell* and Babu *Jogindro Nath Chaudhri*, for the respondents.

The Court (BRODHURST, J., and MAHMOOD, J.) delivered the following judgment:—

JUDGMENT.

MAHMOOD, J.—The learned pleader for the respondents has urged a preliminary objection to the entertainment of this appeal. He contends

(1) 4 A. 485.

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that the order of the lower appellate Court did not fall under s. 244, Civil Procedure Code, as it did not finally dispose of the question as to the execution of the decree. But we have no hesitation in holding that orders of this nature fall within the purview of cl. (*c*), s. 244, Civil Procedure Code, and that this appeal was therefore rightly preferred.

As to the points raised in the appeal, we are of opinion that they have force. The case is governed by the principle of the rule laid down in a recent case—*Lachmin* v. *Ganga Prasad* (1)—by a Division Bench of this Court. Following the principle enunciated in that case, we hold that the possession of a certificate under Act XXVII of 1860, is not "an imperative condition precedent to the institution" of execution proceedings by the representatives of a deceased decree-holder, but that in such cases the Court should consider whether the objections to execution are vexatiously raised or they are *bona fide* objections on the part of the judgment-debtor to the title of the person seeking to execute the decree. The determination of such questions naturally depends upon the merits of each case; but the view of the law taken by the lower appellate Court in this case has prevented it from considering the case on the merits. We therefore set aside the order of the lower appellate [215] Court, and decreeing this appeal, remand the case to that Court for disposal *de novo* with reference to the observations which we have made. The costs of this appeal will abide the result.

Cause remanded.

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5 A. 215 = 2 A.W.N. (1882) 225.

REVISIONAL CRIMINAL.

Before Mr. Justice Mahmood.

EMPRESS OF INDIA *v.* PITAM RAI. [25th September, 1882.]

False charge—Act XLV of 1860 (*Penal Code*), s. 211.

The actual institution of criminal proceedings on a false charge is essential to the application of the latter part of s. 211 of the Indian Penal Code, and if a person only makes a false charge, his case falls under the first part of the section irrespective of the fact that the false charge relates to "an offence punishable with death, transportation for life, or imprisonment for seven years or upwards."

[**Diss.**, 20 M. 79 = 1 Weir 189; 4 Cr.L.J. 20 = 2 N.L.R. 119 (120); **F.**, 5 A. 598 = A.W.N. (1883) 149; 16 A. 124 (125); 14 C. 633 (634).]

THIS was a reference to the High Court by Mr. H. F. Evans, Officiating Sessions Judge of Bareilly, under s. 296 of the Criminal Procedure Code, 1872. It appeared from the Sessions Judge's referring letter that one Pitam Rai had been charged before a Magistrate with, and convicted of, having brought a false charge against one Parme, and punished under the first part of s. 211 of the Indian Penal Code. The Sessions Judge, being of opinion that the false charge related to an offence punishable with imprisonment for seven years, and that consequently the Magistrate was not competent to try Pitam Rai, but should have committed him for trial before the Court of Session under the latter part of s. 211, reported the case to the High Court for orders. It appeared from the record of the case that Pitam Rai had preferred the charge in question to a police officer, and that criminal proceedings had not been instituted against Parme in consequence of such charge.

(1) 4 A. 485.

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5 A. 215 = 2 A.W.N. (1882) 225.

Mr. *Hill*, for Pitam Rai, contended that, as criminal proceedings had not been instituted against Parme on the false charge made against him by Pitam Rai, the latter had not committed the offence punishable under the latter part of s. 211, and the case was therefore triable by the Magistrate.

JUDGMENT.

MAHMOOD, J.—This reference relates only to the case of Pitam Rai, the appeal of the other prisoner, Gauri, having been disposed [216] of by the Sessions Judge. The learned Judge is of opinion that "the false charge made by Pitam was that Parme had committed by night theft in a building used for the protection of property, an offence punishable either under s. 380 or s. 457, Indian Penal Code, with seven years' imprisonment, and that he should therefore have been committed for trial by the Court of Session under the latter part of s. 211, Indian Penal Code." I am of opinion that the view of the learned Judge is only partially right. The false charge brought by the prisoner against Parme no doubt related to an offence punishable with "imprisonment for seven years or upwards" within the meaning of the latter part of s. 211, Indian Penal Code. But that section is divided into two distinct parts. The first part relates to two matters, (i) *institution* of false criminal proceedings, (ii) falsely *charging* any person with having committed an offence. All cases of false criminal proceedings and of false charges fall under the first part of the section, except those specified in the second part of the section. The purview of the second part of the section is, however, limited to *institution* of criminal proceedings on a false charge, and does not include the making of a false charge which falls short of the institution of criminal proceedings. Penal statutes must be strictly construed, and on consideration of the language of s. 211, Indian Penal Code, I am of opinion that the latter part of that section has no reference to false charges, but to cases in which such false charge is followed by, and is made the basis of, the institution of criminal proceedings. The language of the statute is :—*If such criminal proceeding be instituted* on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, &c., &c." These words, compared with the phraseology of the first part of the section, leave no doubt on my mind that the *actual institution* of criminal proceedings on a false charge is essential to the application of the latter part of s. 211, Indian Penal Code, and that if the offence of the accused stops at making a false charge, his case falls under the first part of the section irrespective of the fact that the false charge relates to "an offence punishable with death, transportation for life, or imprisonment for seven years or upwards."

[217] In the present case it is clear that the offence of which the prisoner, Pitam Rai, has been convicted consisted only of making a false charge. He instituted no criminal proceedings on such false charge. The case therefore was triable by the Magistrate, and there was no necessity for a commitment to the Court of Session.

These observations dispose of the only legal point referred to by the Sessions Judge. On the merits of the case I do not wish to express any opinion. The case will go back to the Sessions Judge for disposal according to law.

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APPELLATE CRIMINAL.

5 A. 217=
2 A.W.N.
(1882) 227.

5 A. 217=2 A.W.N. (1882) 227.

APPELLATE CRIMINAL.

Before Mr. Justice Mahmood.

EMPRESS OF INDIA *v.* FATEH AND ANOTHER.
[2nd October. 1882.]

Forgery—Using a "forged" document—Using "false" evidence—"Dishonestly"—"Fraudulently"—Correction of mistake in document—Act XLV of 1860 *(Penal Code), ss.* 24, 25, 196, 464, 470, 471*—Further inquiry by appellate Court—Act X of* 1872 *(Criminal Procedure Code), s.* 282.

The vendees of a plot of land altered the number by which the land was described in the deed of sale, doing so because such number was not the right number. Having made this alteration they used the deed of sale as evidence in a suit. *Held*, that the alteration of the deed did not amount to "forgery" within the meaning of s. 463 of the Indian Penal Code, nor could the deed after the alteration be designated a "forged document" as contemplated by s. 470, the intention to cause wrongful loss or wrongful gain or to defraud being wanting; nor could it be said that in using the deed, the vendees were "dishonestly" or "fraudulently" using as genuine a "forged document," and therefore the use by the vendees of the deed did not constitute an offence under s. 471 of the Indian Penal Code. Further, that their use of it did not render them liable to conviction under s. 196 of that Code.

Observations as to the exercise by an appellate Court of the powers conferred on it by s. 282 of Act X of 1872 (Criminal Procedure Code).

[R., 5 A. 221 (222); D., 11 M. 411=1 Weir 549.]

THIS was an appeal from a judgment of conviction of Mr. H. G. Keene, Sessions Judge of Saharanpur, dated the 10th July 1882. The facts of the case are sufficiently stated in the judgment of the High Court.

Mr. *Carapiet*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the Crown.

JUDGMENT.

[218] MAHMOOD, J.—The prisoners appellants in this case have been convicted by the Sessions Judge under s. 471 of the Indian Penal Code. The facts from which the case has arisen may be briefly stated.

Bakhshi and Harnam, two brothers, owned certain land in common with some other persons. Harnam executed a registered deed of sale on the 3rd June 1881, purporting to convey the entire land above mentioned to the prisoners, Fateh and Harbhuj in lieu of Rs. 900. The sale-deed describes the four boundaries of the property sold. Thereupon Bakhshi and his co-sharers objected to the sale, and stating themselves to be the owners of shares in the property, sued the vendees for their shares, designating the property sold as plot No. 272. The suit was resisted by the prisoners vendees on the ground of the sale-deed, which was produced by them in the Court, and was found to describe the property sold as plot No. 272.

It was, however, subsequently found that the copy of the sale-deed kept in the registration office described the property sold as plot No. 10 and not as plot No. 272. The rest of the original deed produced corresponded with the registration office copy. Bakhshi and his co-sharers succeeded in their suit, and the prisoners were thereupon committed by the Civil Court to the Magistrate, who committed them to the Court of the Sessions Judge to take their trial on a charge of using a forged

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document, within the meaning of s. 471, Indian Penal Code, and a second charge under s. 193, Indian Penal Code. On the evidence produced in the case, the learned Sessions Judge, agreeing with the assessors, has found that the original sale-deed had been tampered with after its registration, that is to say, the figure "272," as representing the number of the plot sold, had been substituted for the figure "10," which originally stood in the deed. Such an alteration was no doubt easily feasible in the Hindustani characters, and on the merits of the evidence produced I agree with the learned Sessions Judge in the conclusions at which he has arrived upon this point.

But I am of opinion that the facts proved in this case do not constitute the offence of which the prisoners have been convicted.

[219] To ascertain the nature of the offence punishable under s. 471 of the Indian Penal Code, it is necessary to consider some of the provisions of the Code which precede that section. Section 463 defines the offence of "forgery," but that definition depends upon the meaning to be attached to the expression "makes a false document," which is explained in s. 464. The next section (465) provides the punishment for the offence of forgery; s. 470 defines a "forged document," with reference to the provisions of s. 464; and s. 471 provides the same punishment for using a forged document as for forgery itself. In all these definitions the most important point is that the act which is said to constitute forgery should have amounted to making a false document within the meaning of s. 464. But in the definitions given in that section the words "dishonestly or fraudulently" uniformly occur; they are the most important, and must be understood in the sense in which they are defined in the Code. The words occur also in s. 471.

The questions then which require determination in this case are—

(i) Did the substitution of the figure "272" for the figure "10" in the sale-deed of 3rd June 1881, amount to making a false document within the meaning of s. 464? (ii) Did the alteration so made render the sale-deed a forged document within the meaning of s. 470? (iii) Did the prisoners use the document fraudulently or dishonestly within the meaning of s. 471?

It seems to me that the answers to these questions depend upon the meaning of the words "dishonestly" and "fraudulently." Section 23 of the Code defines "wrongful gain" and "wrongful loss." The next s. 24 provides that "whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing *dishonestly*." Section 25 lays down that "a person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise."

Now in the present case there is no question that the substitution of the figure "272" where the figure "10" stood before in the original sale-deed had not the effect of confounding the identity of the property sold and of which the four boundaries are clearly stated in the sale-deed. Indeed it has been shown that plot No. 10 [220] was not the plot included in those boundaries but plot No. 272 is so included. All that could have been intended by the alteration in the sale-deed was to substitute the right number for the wrong number. The identity of the property which the deed of sale purported to convey could not possibly be affected by the alteration of the figures, and the substitution of one number for the other could not possibly defraud any one or have the effect of causing

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wrongful loss or wrongful gain to any person. If the object of the alteration were to make it appear that the property intended to be conveyed by the sale-deed was other than that which it actually did purport to convey, the case would of course have been different; but such is not the case for the prosecution. All that the prisoners have been convicted of is, that subsequent to the registration of the sale-deed they substituted the right number of the plot sold for the wrong number. The identity of the property which the sale-deed purported to convey being unaffected, the alteration cannot fall under the definition of making a false document within the meaning of s. 464, Indian Penal Code. However foolish or blameable the conduct of the prisoners may be, the alteration cannot be called "forgery" within the meaning of s. 463, nor can the sale-deed after the alteration be designated "a forged document" as contemplated by s. 470 of the Penal Code, the most important element of the offence, namely wrongful loss or wrongful gain, or the intent to defraud being totally wanting in the case. Nor can it be held that in producing the sale-deed in the Civil Courts the prisoners were fraudulently or dishonestly using as genuine a document which they knew to be a "forged document" within the contemplation of the law. The conviction therefore under s. 471, Indian Penal Code, cannot stand.

But I am asked by the learned Government Pleader to consider whether the conviction cannot be sustained under s. 196, Indian Penal Code. That section must be read with s. 192, which defines the offence of fabricating false evidence. It seems to me that even under that section the correction of a mistake in a document cannot be taken to be "a false entry" or "false statement," nor can it be said that the intention was to cause any person "to entertain an *erroneous* opinion touching any point *material* to the result" of a proceeding. In the present case the alteration of the number [221] brought the deed in accordance with the fact: it did not (in the face of the specification of the four boundaries) alter the identity of the property sold, and the point, *viz.*, the correct number at which the property stood in the *khasra*, was not material to the result of the civil suit.

I find that the Magistrate had committed the case to the Sessions Court on two charges, the first relating to the alteration in the sale-deed, and the second charge under s. 193 relating to making false entries in the *khasra abadi*. The learned Sessions Judge has hardly noticed the second charge in his judgment, beyond a remark that it was uncertain what the original entries in the *khasra* were. The prosecution do not appear to have insisted upon the second charge, or to have supported it by evidence. The learned Sessions Judge appears to have taken all the evidence produced by the prosecution, and that evidence is wholly inadequate to sustain a conviction on the second charge. Nor is it pointed out what further evidence would be forthcoming against the prisoners appellants. When persons accused of an offence are committed to the Court of Session under distinctly framed charges, and that Court takes all the evidence produced by the prosecution, and that evidence fails to sustain the charge, this Court will not, except in very exceptional circumstances, direct that further inquiry should be made or that additional evidence should be taken. The powers conferred on s. 282, Criminal Procedure Code, are not, in my opinion, intended to be exercised in cases like the present, in which the prosecution having had ample opportunities to produce evidence have done so, and that entire evidence

falls short of sustaining the charge. It was for the prosecution to have made out their case, but they have failed in doing so. For these reasons I quash the convictions and direct that the prisoners appellants Fateh and Harbhuj be immediately released.

Convictions quashed.

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5 A. 221=2 A.W.N. (1882) 236=7 Ind. Jur. 541.

APPELLATE CRIMINAL.

Before Mr. Justice Mahmood.

EMPRESS OF INDIA *v.* JIWANAND. [5th October, 1882.]

Forgery—Making false entries in account-book with the intention of concealing criminal breach of trust—Act XLV of 1860 (*Penal Code*), *ss.* 24, 25, 465.

Where a clerk, who had committed criminal breach of trust, subsequently made false entries in an account-book, with the intention of concealing such **[222]** offence, *held* that the making of such entries did not constitute the offence of forgery, and he had therefore been improperly convicted under s. 465 of the Indian Penal Code.

Queen v. *Jageshur Pershad* (1) and *Queen* v. *Lal Gumul* (2), followed.

[**Diss.**, 22 C. 313 (321) ; 36 C. 450 (453)=12 C.W.N. 581=7 Cr.L.J. 378 ; 15 Bom. L.R. 708=2 Bom. Cr. Cas. 115=14 Cr. L.J. 518=20 Ind. Cas. 998=37 B. 666 ; **R.**, 8 P.L.R. 1904 ; U.B.R. (1892—1896) 279 ; **D.**, 11 M. 411=1 Weir 549.]

THIS was an appeal from a judgment of conviction of Lieutenant-General the Hon'ble Sir H. Ramsay, C.B., K.C.S.I., Commissioner of Kumaun, dated the 28th July 1882. The appellant had been convicted and sentenced for two offences, *viz.*, criminal breach of trust as a clerk (s. 408 of the Indian Penal Code) and forgery (s. 465, *id.*). It appeared that he had been intrusted as a clerk with certain moneys ; that it was his duty to pay such moneys into the Government treasury ; that he had not done so, but had misappropriated them ; and that shortly before the misappropriations were discovered, he had entered the misappropriated items in the "chalan-book" or "pass-book," and had signed the name of the treasury Tahvildar to such items, thereby making it appear that such items had been paid into the treasury.

Mr. *Spankie*, for the appellant, contended that the falsification of the "chalan-book" and the fabrication of the Tahvildar's signature were not acts constituting the offence of forgery, inasmuch as they were not done "dishonestly" or "fraudulently" within the meaning of ss. 24 and 25 of the Indian Penal Code, but with the intention of concealing the fact that the appellant had been guilty of criminal misappropriation. He cited *Queen* v. *Jageshur Pershad* (1) and *Queen* v. *Lal Gumul* (2).

The *Junior Government Pleader* (Babu *Dwarka Nath Banerji*), for the Crown, contended that, assuming that the prisoner had acted with the intention of evading detection yet his acts were "dishonest" and "fraudulent," within the meaning of the Code.

JUDGMENT.

MAHMOOD, J.—In a recent case (3) I have fully stated my view that to constitute the offence of "forgery" under s. 465, which must be read with ss. 463 and 464, Indian Penal Code, a "dishonest" or "fraudulent"

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(1) N.W.P.H.C.R. (1874) 56. (2) N.W.P.H.C.R. (1870) 11.
(3) *Empress* v. *Fateh*, 5 A. 217.

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intent is absolutely essential. And these two words must not be understood in the vague and indefinite sense in which they are ordinarily used in English parlance. The [223] words have been clearly defined in ss. 24 and 25 of the Penal Code, and the former of those sections must be read with the preceding s. 23. The question then arises whether the alterations, interpolations, or false entries made by the prisoner in the "chalan-book" were made with such an intent as would bring them within the definition of forgery. In other words, did the prisoner intend to cause wrongful loss or wrongful gain to any person, or did he intend to defraud any one.

It is clear that intention, *ex necessitate rei*, relates to some future occurrence and not to the past. It cannot be said when wrongful loss or wrongful gain has already been caused, or a person has already defrauded, anything can be subsequently done which could be dictated with the intention to cause that which has already occurred. In the present case it is not even asserted by the prosecution that the object of the prisoner in making the interpolations was to cause any loss or to defraud any one in the future. Even if such were the case for the prosecution, I should hold that there is no evidence to warrant such a hypothesis. All that the circumstances of the case warrant, and, indeed, all that can be said against the prisoner in regard to the alterations and interpolations, is that he intended by those falsifications to escape the punishment and disgrace which the expected discovery of the deficit would involve. Such an intention does not, in the eye of the law, render the case one of forgery. The law has been clearly explained by Pearson, J., in the case of *Queen* v. *Jageshur Pershad* (1), in which that learned Judge held that falsifications of office records, made in order to conceal previous acts of fraud or negligence, do not amount to forgery, as no one would be defrauded or injured by them. A similar rule was adopted by Turner and Spankie, JJ., in case of *Queen* v. *Lal Gumul* (2). Adhering to these rulings, I hold that the falsification of the "chalan-book" made by the prisoner in this case, however blameable it may be, did not constitute the offence of forgery, and that this conviction under s. 465, Indian Penal Code, was therefore illegal. Confirming the conviction and sentence of the prisoner-appellant, Jiwanand, under s. 408, Indian Penal Code, I quash the convictions and sentence passed by the Sessions Judge under s. 465.

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5 A. 224 = 2 A.W.N. (1882) 240.

[224] CRIMINAL REVISIONAL.

Before Mr. Justice Mahmood.

Laraiti *v.* Ram Dial. [1st November, 1882.]

Act X of 1872 (Criminal Procedure Code), s. 536—Maintenance of wife—Adultery of wife subsequent to order for maintenance—Res judicata.

A husband upon whom an order to make an allowance for the maintenance of his wife had been made, under s. 536 of Act X of 1872, objected to the payment of the allowance on the ground that his wife was living in adultery. The Magistrate entertaining this objection disallowed it, on the ground that the charge of adultery against the wife was not established. The husband subsequently again objected to the payment of the allowance on the same ground. The Magistrate entertaining the second objection allowed it, and directed the

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(1) N.W.P.H.C.R. (1874) 56. (2) N.W.P.H.C.R. (1870) 11.

husband to discontinue paying the allowance. His order was based on proof of adultery by the wife before the date of the order of the former Magistrate. *Held*, on the general principles of the rule of *res judicata*, that the second Magistrate was wrong in law in re-opening matters already adjudicated upon, and his order directing the discontinuance of the allowance on the ground of facts antecedent to the former Magistrate's order must be held to be illegal.

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CRIMINAL REVISIONAL.

5 A. 224=2 A.W.N. (1882) 240.

[Diss., 14 Bur. L.R. 259=4 L.B.R. 337 (338); R., 23 B. 50 (53); 24 P.R. 1916 (Cr.); 17 Cr. L.J. 106=32 Ind. Cas. 842.]

THIS was a case reported for orders under s. 296 of Act X of 1872 (Criminal Procedure Code) by Mr. J. L. Denniston, Officiating Sessions Judge of Farukhabad. The facts of the case are stated in the judgment of the High Court.

JUDGMENT.

MAHMOOD, J.—The facts of the case are briefly these :—On the 9th November 1877, Laraiti obtained an order for maintenance against her husband Ram Dial. Subsequently the husband objected to pay the allowance on the ground that his wife was living in adultery. Thereupon an inquiry was held by the District Magistrate into the matter, and on the 2nd March 1880, Ram Dial's objection was disallowed on the ground that the charge of adultery against Laraiti was not established, and he was directed to continue to pay maintenance under the terms of the order of the 9th November 1877. In the present year Ram Dial appears to have again objected to the payment of maintenance on the same ground; and the Deputy Magistrate, after holding an inquiry, held that the allegation of adultery made against Laraiti was established, and by an order, dated the 4th August 1882, directed the discontinuance of the maintenance. Thereupon Laraiti applied to the Sessions Judge for interference, under s. 296, Criminal Procedure Code, and the learned Sessions Judge has made this refer-[225]ence under that section, on the ground that the witnesses on whose evidence the Deputy Magistrate has relied stated facts relating to a period antecedent to the 2nd March 1880, and that those facts must therefore be taken to have been adjudicated upon by the District Magistrate in his order of the 2nd March 1880, whereby he disallowed Ram Dial's objections. It seems that the District Magistrate's order above referred to was never brought to the notice of the Deputy Magistrate, and his proceedings were therefore held in ignorance of the existence of that order.

Some doubt seems to have been raised in this case before the learned Sessions Judge, as to whether the order of the Deputy Magistrate was illegal, for the particular reason that there is no provision in the present Criminal Procedure Code (Act X of 1872) empowering the Magistrate to cancel an order of maintenance (passed under s. 436) on the ground of the wife's subsequent adultery.

Reference also seems to have been made to the provisions of s. 537 as conferring the requisite power, but I have no hesitation in holding that that section has no application to the case. And I agree with the learned Sessions Judge in the view that the Legislature in employing the words "no wife shall be entitled to receive an allowance from her husband..............if she is living in adultery," used in the last part of s. 536, relate not only to the original order for maintenance, but also to the continuance of the receipt of an allowance subsequent to the original order. The section therefore implies the necessity and legality of an inquiry such as the one held by the Deputy Magistrate, and on this ground his proceedings were not open to the objection of illegality. Such

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was the view taken by the High Court of Bombay in the case of *Chaku* (1) and has since been explicitly adopted by the Legislature in the penultimate paragraph of the corresponding s. 488 of the new Criminal Procedure Code (Act X of 1882) which will come into force in a few weeks.

In dealing with the main question raised by this reference, I am of opinion that the order of the District Magistrate, dated the 2nd March 1880, must be taken to have adjudicated upon all the facts [226] antecedent thereto and connected with the objection of Ram Dial as to his wife's leading an adulterous life. Upon the general principles of the rule of *res judicata*, I am of opinion that the Deputy Magistrate was wrong in law in re-opening matters already adjudicated upon, and his order directing the discontinuance of maintenance on the ground of facts antecedent to the District Magistrate's order must be held to be illegal.

I therefore set aside the order of the Deputy Magistrate dated the 4th August 1882, and direct that he should hold an inquiry *de novo* in regard to the adulterous conduct of Laraiti, alleged by her husband Ram Dial, with reference to the period subsequent to the District Magistrate's order of the 2nd March 1880.

In conclusion, I wish to observe that the record shows that the notes of evidence recorded by the Deputy Magistrate are very inadequate and vague, and the order recorded by him proceeds upon no distinct findings of facts, but upon a vague finding that "Laraiti is a bad character." The proceedings under Chapter XLI of the Criminal Procedure Code are judicial proceedings in their nature and must not be conducted as if they were merely ministerial matters.

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5 A. 226=2 A.W.N. (1882) 237=7 Ind. Jur. 544.

CRIMINAL REVISIONAL.

Before Mr. Justice Mahmood.

In the Matter of the Petition of DIN MUHAMMAD.
[1st November, 1882.]

Maintenance of wife—Act X of 1872 (*Criminal Procedure Code*), s. 536—*Muhammadan Law—Divorce—"Iddat."*

An order for the maintenance of a wife, passed under Chapter XLI of Act X of 1872, becomes inoperative, in the case of a Muhammadan, by reason of his lawfully divorcing his wife, and thus putting an end to the conjugal relation, but it does not become so before the expiration of the divorced wife's "*iddat.*"

Abdur Rohoman v. *Sakhina* (2); In re *Kasam Pirbhai* (3); and *Luddun Sahiba* v. *Mirza Kamar Kudar* (4); Madras High Court Proceedings, 2nd December 1879; referred to and followed.

The Muhammadan law of divorce relating to the maintenance of a divorced wife during her "*iddat*" referred to.

[F., 2 Cr. L.J. 40=5 P.R. 1905=85 P.L.R. 1905; R., 15 A. 143 (145); 19 A. 50=A.W.N. (1896) 173; 11 C.P.L.R. 72 (73); 16 Cr. L.J. 531=29 Ind. Cas. 659=U.B.R. (1915), 1st Qr., 53; 14 A.L.J. 853=36 Ind. Cas. 307; Comm., 20 M.L.J. 12=7 M.L.T. 33 (34).]

THIS was a reference under s. 296 of Act X of 1872 (Criminal Procedure Code) by Mr. T. Benson, Officiating Magistrate of the Allahabad District, of a case under s. 536 of that Act decided [227] by

(1) 8 B.H. C.R.Cr. Cas. 124.
(2) 5 C. 558.
(3) 8 B.H.C.R. Cr. Cas. 95.
(4) 8 C. 736.

Mr. C. D. Steel, Magistrate of the first class in that district. The facts of the case are stated in the judgment of the High Court. The parties did not appear.

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CRIMINAL REVISIONAL.

5 A. 226=2 A.W.N. (1882) 237=7 Ind. Jur. 544.

JUDGMENT.

MAHMOOD, J.—Upon the application of Nasiban (a Muhammadan) the Assistant Magistrate made an order on the 10th June 1882, under s. 536, Criminal Procedure Code (Act X of 1872), directing her husband, Din Muhammad, to make a monthly allowance of Rs. 5 for her maintenance. On the 26th July 1882 Din Muhammad made an application praying that the order of the 10th June might be set aside on the ground that he had divorced his wife according to the Muhammadan law. The Assistant Magistrate, however, summarily rejected the application without inquiry, expressing a doubt whether "a divorce made with a view to getting rid of an order of maintenance would be valid." He also expressed his opinion that "until a Musalman husband pays his wife's dower, his liability to maintain her in accordance with the marriage contract continues," and he declined to interfere with his former order "until the parties have either agreed among themselves as to the amount of dower or have had the question settled in the Civil Court, and until the dower has been paid." Upon an application being made by Din Muhammad, the District Magistrate directed the Assistant Magistrate to inquire into and adjudge upon Din Muhammad's application, by an order which purports to have been passed under s. 298, Criminal Procedure Code, and is dated the 1st September 1882. The Assistant Magistrate thereupon examined Din Muhammad and Nasiban on oath, and their evidence contradicted each other, both as to the fact of the divorce and the amount of dower. It appears from the record that upon the conclusion of Nasiban's evidence, Din Muhammad in the presence of the Assistant Magistrate addressed the words "I divorce you" to the woman three times. The Assistant Magistrate, without determining the facts of the case, refused to interfere, referring as grounds of his order to the opinion expressed by him in another case to the effect that "a Magistrate would be justified in passing an order of maintenance from the time of divorce till the time when the question of dower had been settled," and that "s. 536 clearly gives a Magistrate discretionary power to order maintenance against a [228] man until he has completed his divorce by giving his wife her dower."

The case having again come to the notice of the District Magistrate, he has arrived at the conclusion that the Assistant Magistrate's last order was illegal, and has referred this case under s. 296, Criminal Procedure Code, for the orders of the Code.

Both the Magistrates seem to have regarded the proceedings initiated by Din Muhammad's application as falling under the purview of s. 537 of the Criminal Procedure Code. But it seems to me clear that cases of this nature are not contemplated by that section at all.

The words "the Magistrate may make such alteration in the allowance ordered as he deems fit," preceded as they are by the word "wife," and followed as they are by a limitation as to the amount of the monthly allowance, clearly indicate that "the alteration in the allowance" contemplated by that section only refers to a power to alter that amount, and not to a total discontinuance thereof. This view is supported by the ruling of the Calcutta High Court in the case of *Abdur Rohoman*(1), in

(1) 5 C. 558.

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which the learned Judges placed a similar interpretation upon s. 235 of the Presidency Magistrates' Act (IV of 1877), the words of which are *ipsissima verba* with the wording of s. 537 of the Criminal Procedure Code. Nor is there any other explicit rule to be found in the Criminal Procedure Code which empowers the Magistrate to direct cessation of a wife's maintenance on the ground of her having been divorced since the order of maintenance was passed. It is only by analogies furnished by the express provisions of Chapter XLI of the Criminal Procedure Code that a rule upon the subject now under consideration can be evolved. The learned Judge of the Calcutta High Court, in the case above cited, seems to have adopted such a course in placing a liberal construction upon the wording of s. 234, Act IV of 1877, which corresponds to s. 536 of the Criminal Procedure Code, and in holding that it is "as essential to the continued operation, as to the original making of an order of maintenance, that the recipient of the allowance should be a wife at the time for which maintenance is claimed, and consequently.........[229] Magistrate must, when a question of divorce arises, determine on such evidence as may be before him, whether there has or has not been a legally valid divorce. If he finds that there has been a valid dissolution of the marriage tie, he should refrain from taking any steps to enforce the order of maintenance from the date of such dissolution." This view of the law is consistent with the opinion expressed by WESTROPP, C.J., in the case of *Kasam Pirbhai*(1), in which the learned Chief Justice, referring to the order of maintenance and to the subsequent divorce, observed :—" That was a proper order at the time it was made, but we think the groundwork of that order has now been removed, and we cannot consider it any longer a continuing binding order upon the applicant. The enactment under which that order was made does not relate more especially to Muhammadans than to Hindus, Buddhists, Indo-Britons, Europeans, or any other branch of the general community, and the Legislature could never have intended by it to interfere with or restrict the Muhammadan law of divorce. We do not think that the Magistrate ought to issue an attachment upon or otherwise to execute the order, it being in fact *functus officio*. We do not, however, quash or set aside the order, it having been a valid order when made."

I fully concur in the views above cited, and though I am of opinion that there is no express provision in the Criminal Procedure Code to meet a case like the present, the interpretation is warranted by the general principles of liberal construction. The construction, perhaps, goes beyond the letter of the statute, but extension by equity of the language of statutes has been recognized to be allowable in cases where such extension clearly gives effect to the intention of the Legislature. The whole of Chapter XLI, Criminal Procedure Code, so far as it relates to the maintenance of wives, contemplates the existence of the conjugal relation as a condition precedent to an order of maintenance and, on general principles, it follows that as soon as the conjugal relation ceases, the order of maintenance must also cease to have any enforceable effect. When and in what manner a cessation of the conjugal relation takes place is a question which, *ex necessitate rei*, must be determined according to the [230] personal law to which the parties concerned are subject. In the present case, the parties being Muhammadans, the rules as to divorce provided by that system must be held to govern the decision of the point.

(1) 8 B.H.C.R. Cr. Cas. 95.

But beyond the question of continuance or cessation of the conjugal relation, that law can have no further effect upon the exercise of the power of the Magistrate in regard to maintenance. The right to maintenance conferred by s. 536 of the Criminal Procedure Code is a statutory right, which the Legislature has framed irrespective of the nationality or creed of the parties, the only condition precedent to the possession of that right, in the case of a wife, being the existence of the conjugal relation. This principle has been fully recognized by the Calcutta High Court in the recent case of *Luddun Sahiba* (1) which was a case between Muhammadans.

In the present case the Assistant Magistrate was entirely wrong in holding that a magisterial order for maintenance could in any manner operate as an impediment in the way of a Muhammadan to exercise the power conferred on him by his personal law to divorce his wife. He is also in error in thinking that the payment of dower is a condition precedent to the completion of a divorce, or that "a Magistrate would be justified in passing an order of maintenance from the time of divorce till the time when the question of dower has been settled." Such is not the rule of the Muhammadan law. Under that law divorce is in no way dependent upon the payment of dower, though the ordinary form of dower-debt becomes payable on the cessation of the conjugal relation, whether such cessation takes place by divorce or death. But these are matters which are entirely beyond the scope of Chapter XLI, and with which Magistrates, in exercising their powers as to maintenance, are in no way concerned. All that the Magistrate has to determine in a case of this kind is, whether the woman claiming maintenance is still the wife of the person against whom she advances such a claim. If the question is determined in the affirmative, the order of maintenance must continue to be operative. On the other hand, if it is found that by the effect of some rule of the personal law of the parties concerned, the conjugal relation has absolutely ceased to exist, the [231] order of maintenance, *ipso facto*, becomes *functus officio*, and can no longer be enforced.

I might end my observations here, had not the District Magistrate, referring to the opinion of the Assistant Magistrate, made the observation that a divorced wife "may possibly be entitled to maintenance for the period of '*iddat*,' three months and thirteen days." Upon this point there is a note (under s. 488) in Mr. Justice PRINSEP'S edition of the new Criminal Procedure Code (Act X of 1882) and also in the edition by Messrs. Agnew and Henderson which refers to the Madras High Court Proceedings, dated 2nd December 1879, laying down the rule that "a divorced Muhammadan wife is entitled to maintenance during the *iddat* or period of probation; but an order for maintenance for a period subsequent to the expiration of the *iddat* is illegal. If she be pregnant, she will be entitled to maintenance during gestation." I have unfortunately not had access to those proceedings, but as the note stands, the latter sentence must be regarded as only explanatory of the former, as in the case contemplated the period of gestation and *iddat* is identical. In connection with the exercise of the powers conferred by s. 536, Criminal Procedure Code, I am of opinion that the rule adopted by the Madras High Court is a salutary one, and consistent with the principles of the Muhammadan law. *Iddat* is defined in the Hedaya to be "the term of

(1) 8 C. 736.

1882 Nov. 1. — CRIMINAL REVISIONAL. — 5 A. 226=2 A.W.N. (1882) 237=7 Ind. Jur. 544.

probation incumbent upon a woman in consequence of the dissolution of marriage after carnal connexion; the most approved definition of *iddat* is the term by the completion of which a new marriage is rendered lawful." Moreover, an ordinary divorce under the Muhammadan law is revocable within the period of *iddat*, and to use the words of the Hedaya, "a marriage is accounted still to subsist during the *iddat* with respect to various of its effects, such as the obligation of alimony, residence, and so forth, and hence it may lawfully be accounted to continue in force with respect to the woman's inheritance, but, as soon as the *iddat* is accomplished, a further procrastination is impossible, because the marriage does not then continue in any shape whatever."

As a general rule, therefore, it may be laid down that the disseverance of the conjugal tie, caused by divorce, does not become [232] absolute till the termination of the period of the *iddat*, the length whereof, in the case of a divorced woman, not pregnant, extends over a period of three months, reckoned from the divorce, and not three months and thirteen days as the Magistrate seems to think.

The rule of Muhammadan law in regard to maintenance of a divorced woman during her *iddat* is clearly stated in the Hedaya. "Where a man divorces his wife, her subsistence and lodging are incumbent upon him during the term of her *iddat* whether the divorce be of the reversible or irreversible kind. The argument of our doctors is, that maintenance is a return for custody, and custody still continues on account of that which is the chief end of marriage, namely offspring (as the intent of *iddat* is to ascertain whether the woman be pregnant or not), wherefore subsistence is due to her, as well as lodging, which last is admitted by all to be her right."

Therefore, whilst I am of opinion that an order for maintenance of a wife passed under Chapter XLI becomes inoperative, in the case of a Muhammadan, by reason of his lawfully divorcing his wife and thus putting an end to the conjugal relation, I hold that that relation does not cease to exist so absolutely as to render the wife free to marry again, or to look to any other means of support during her *iddat*. And this being so, it would be putting an inequitable and unreasonable construction upon the law to hold that the Magistrate's order for maintenance of the wife ceases to be operative before the expiration of the divorced wife's *iddat*.

Under this view of the law the application by Din Muhammad to set aside the order of maintenance was rightly rejected by the Assistant Magistrate, though on erroneous grounds. The legality of the order for maintenance has not been impugned; and there is no reason to interfere with it, and it must be held to have operative force till the expiration of the *iddat*. But the case has not been gone into by the Magistrate from this point of view, and the circumstances of the case do not require any further inquiry at this stage. The proper occasion for the inquiry will arise when the enforcement of the order of maintenance becomes necessary, and Din Muhammad objects to such enforcement on any of the grounds which may be lawfully available to him. It will then be the duty [233] of the Magistrate to consider the case with reference to the above observations, and after trying the issues of fact as to divorce, &c., to enforce the order, or stay the operation thereof, as the case may be.

In view of these observations, I see no reason to interfere in the order to which this reference relates.

5 A. 233=3 A.W.N. (1883) 1=7 Ind. Jur. 543.

1882 DEC. 8. APPELLATE CRIMINAL. 5 A. 233=3 A.W.N. (1883) 1=7 Ind. Jur. 543.

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

EMPRESS OF INDIA *v.* KALLU. [8th December, 1882.]

Adultery—Act XLV of 1860 (*Penal Code*), s. 497—*Evidence of marriage—Act I of* 1872 (*Evidence Act*), s 50—*Prosecution for adultery—Act X of* 1872 (*Criminal Procedure Code*), s. 478.

K was accused by *D* and *P*, alleged to be *D's* wife of raping *P*, and was committed for trial charged in the alternative with rape or adultery. The evidence of marriage between *D* and *P* consisted of their statements that they were married to each other, and of a statement by *K* that *P* was *D's* wife. *K* was convicted on the charge of adultery.

Held, that such evidence, having regard not only to s. 50 of the Evidence Act, 1872, but to the principle that strict proof should be required in all criminal cases, was not sufficient to establish the vital incident to the charge of adultery, namely, the marital relation of *D* and *P*. *Empress* v. *Pitambur Singh* (1), concurred in.

Also that, as no complaint had ever been actually instituted by *D* against *K* for the offence of adultery, as contemplated by s. 478 of Act X of 1872 (Criminal Procedure Code), (the circumstance of *D's* appearing as a witness for the prosecution for the offence of rape not amounting to the institution of a complaint within the meaning of that section), *K's* conviction for adultery must be quashed.

[N.F., 5 P.R. 1894 (Cr.); F., 29 C. 415 ; 27 M. 61=2 Weir 236 ; Rat. Un. Cr. C. 190 ; **Appr.**, A.W N. (1898) 7 ; R., 10 A. 39 (42)=A.W.N. (1887) 264 ; 31 B. 218=5 Cr. L.J. 164=9 Bom. L.R. 148 ; 30 C. 910 (913)=8 C.W.N. 17 (F B.) ; 11 A.L.J. 994 ; A.W.N. (1898) 186 ; 3 O.C. 342 (345) ; 107 P.W.R. 1915 ; U.B.R. (1912), 4th Qr., 155=14 Cr. L.J. 284=19 Ind. Cas. 716 ; **Disc.**, 9 M. 9=1 Weir 572.]

APPEAL from a judgment of conviction of Mr. J. C. Leupolt, Officiating Sessions Judge of Allahabad, dated the 26th October 1882. The facts of the case are stated in the judgment of the Court.

Mr. *Howard*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENT.

STRAIGHT, J.—This is an appeal from a decision of the Officiating Sessions Judge of Allahabad, dated the 26th of October last, convicting the appellant of adultery with the wife of one Dubri, *kachi*, **[234]** and sentencing him to one year's rigorous imprisonment. The charge originally preferred was one of rape, but the Magistrate made an alternative committal, and the Judge tried the case in the shape it was sent up to him. It is unnecessary to discuss the facts of the case, as they are not referred to in the petition of appeal; and for the purpose of deciding the legal points involved, I may take it that the fact of the appellant's having had connection with the woman Parbattia is established.

The two questions raised by the learned counsel for the appellant are:—(i) That there is no sufficient evidence on the record to prove the marriage of Dubri and Parbattia ; (ii) that no complaint for an offence under s. 497 of the Penal Code was ever instituted by Dubri within the meaning of s. 478 of the Criminal Procedure Code.

As to the former of these, it may be convenient to state what the evidence really is. Parbattia herself says: "I am the lawful wife of

(1) 5 C. 566.

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Dubri, *kachi* : don't know when I was married : I live with my husband the last three or four years." Dubri says : " Parbattia is my wife : I was married to her eight years ago : she was never married before : she lives with me for the last four years : no children yet." In addition to these statements the Junior Government Pleader, in meeting the objection, pointed out that the appellant before the committing Magistrate said : "Parbattia is the wife of Dubri." Such is the whole evidence of the marriage upon the record. I am very clearly of opinion that it is altogether insufficient, and that not only having regard to the distinct provisions of s. 50 of the Evidence Act, but to the principle that strict proof should be required in all criminal cases, it fails to establish the vital incident to the charge, namely the marital relation of Dubri and Parbattia. The admission of the appellant in no way strengthens the position, because if, as a matter of fact, there had been no marriage, no conviction could stand against him under s. 497. The Judge should have required some satisfactory proof, independent of the very vague assertions of Dubri and Parbattia, to show that the ceremony of marriage, as recognized among *kachis*, had taken place between them, and his remark that " the evidence clearly establishes that Parbattia is the lawful wife of Dubri, *kachi*," was [235] obviously made without sufficient care or reflection. I entirely concur in the Full Bench ruling of the Calcutta High Court in *Empress* v. *Pitambar Singh* (1), and the Judge would had done well to accept it as an authority when it was quoted to him. Holding the view I do upon this first question, I should have thought it right to send the case back to the present Judge of Allahabad, for him to take further evidence as to the marriage of Dubri and Parbattia ; but entertaining the opinion I do with regard to the second point, it would be superfluous to do so. As a matter of fact, no complaint ever was instituted by Dubri against Kallu for an offence under s. 497 of the Penal Code, as contemplated by s. 478 of the Code of Criminal Procedure ; on the contrary, the case put forward by Parbattia and himself was one of rape, pure and simple. I do not think that the circumstance of his appearing as a witness in the prosecution for that offence, can be regarded as amounting to the institution of a complaint for adultery in the sense of s. 478. The expression " complaint" is a perfectly well-understood one, and s. 142 of the Criminal Procedure Code in terms prohibits Magistrates from taking cognizance of a case *without complaint* when it falls under Chapter XX of the Penal Code, within which is included s. 497. It by no means follows as a necessary consequence, that because a husband may wish to punish a person who has committed a rape upon his wife, that is, who has had connection with her against her consent, he will desire to continue proceedings when it turns out she has been a willing and consenting party to the act. At any rate, if a criminal charge of adultery is to be preferred, a formal complaint of that offence must be instituted in the manner provided by law, and if it is not, s. 478 will not have been satisfied. I may mention here that s. 238 of the new Criminal Procedure Code leaves no doubt as to the course the Courts should adopt in cases of the kind now before me. In reference to the opinion I have expressed the appeal must be allowed, and the conviction of Kallu will be quashed. I further order that he at once be released.

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(1) 5 C. 566.

5 A. 236=3 A.W.N. (1883) 5.

[236] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

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APPELLATE CIVIL.

5 A. 236=3 A.W.N. (1883) 5.

HULASI (*Judgment-debtor*) *v.* MAIKU AND OTHERS (*Decree-holders*).* [18th December, 1882.]

Execution of decree—Appellate order in execution—Act XV of 1877 (*Limitation Act*), *sch. ii, No.* 179 (3).

The holder of a decree for possession and partition of a share of certain immoveable property, dated the 19th January 1878, applied for execution on the 2nd February 1878. An order was made by the Court of first instance, from which the decree-holder appealed. The appellate Court, on the 18th September 1878, reversed the order of the first Court and directed that the partition of the property should be effected by lots, and remanded the case for that purpose. The first Court proceeded to carry out the order of the appellate Court, but eventually struck off the case, on the 15th February 1879, as the decree-holder failed to appear personally when ordered to do so. On the 13th September 1881, the legal representative of the deceased decree-holder, who had meantime died, applied, with reference to the order of the appellate Court dated the 18th September 1878, to have lots drawn in accordance with that order.

Held, on the question whether this application was barred by limitation, that, if it were regarded as nothing more than an application for execution of the original decree, it might be barred, inasmuch as it had been made more than three years after the date of the last application, and it was doubtful whether the 2nd clause in the 3rd column of No. 179, sch. ii of Act XV of 1877 would apply, since the appeal there referred to is probably an appeal from the decree or order of which execution is being taken, referred to in the 1st clause of that article, and not an appeal in course of execution of that decree or order; that, however, the order of the appellate Court dated the 18th September 1878 was itself of the nature of a decree and capable of execution, and for the execution of which an application could be made to which that article would apply; that the application in question should be regarded as one for execution of that order and that, therefore, so regarding it, it was within time.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Munshi *Sukh Ram*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

The Court (OLDFIELD, J., and TYRRELL, J.) delivered the following judgment :—

JUDGMENT.

OLDFIELD, J.—The facts of this case are that the decree-holder obtained his decree on the 19th January 1878, for possession and [237] partition of a third part of an enclosure. The first application for execution was made on the 2nd February 1878, and the partition was effected by the amin of the Court and possession given on the 15th August 1878, and the case struck off as completely executed on the 13th September 1878. The decree-holder appealed to the Judge's Court, and the Judge, on the 18th September 1878, reversed the Munsif's order and remanded the case to the Munsif, and directed that the distribution of the shares into which the property was to be divided should be made by lots to be drawn by the parties. The case was restored to the file and on the 31st October 1878, the amin was directed to carry out the Judge's directions; and on the 30th November he reported that he

* Second Appeal No. 35 of 1882, from an order of H. A. Harrison, Esq., Judge of Farukhabad, dated the 25th March 1882, affirming an order of Maulvi Muhammad Abdul Basit, Munsif of Chibraman, dated the 23rd January 1882.

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had prepared the lots, but the decree-holder insisted on their being drawn in the Munsif's Court. The Munsif, on the 2nd December 1878, ordered the decree-holder to attend, and as he failed to appear the case was struck off on the 15th February 1879. The representative of the decree-holder, the latter having died, filed the application which is the subject of this appeal on the 13th September 1881, and in this he refers to the former proceedings and the order of the appellate Court dated the 18th September 1878, and asks that the lots be drawn in accordance with it, alleging the illness resulting in the death of the decree-holder as the cause of his failing to appear on the former occasion. The question before us is whether this application is barred by limitation; and if it is to be regarded as nothing more than an application for execution of the original decree of the 19th January 1878, under art. 179, it would probably be barred; for it has been filed more than three years from the date of the last application of the 2nd February 1878, and it is doubtful if the 2nd clause in the 3rd column of art. 179 would apply, since the appeal there referred to is probably an appeal from the decree or order of which execution is being taken, referred to in the first clause of the article, and not an appeal in course of execution of that decree or order. But the order of the appellate Court in execution of the decree is itself of the nature of a decree and capable of being executed, and for the execution of which an application can be made to which art. 179 will apply; and we regard the application dated the 13th September 1881, as an application to execute the appellate Court's order dated the 18th September 1878, and in consequence not barred by [238] limitation. No doubt the execution of the original decree will be the result of allowing the application, but it is none the less an application for execution of the order of the appellate Court, that being its essential object and intention, and it should be so treated. We therefore dismiss the appeal with costs.

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5 A. 238 = 3 A.W.N. (1883) 2.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

NAIT RAM (*Plaintiff*) *v.* SHIB DAT AND OTHERS (*Defendants*).*
[15th December, 1882.]

Breach of contract—Liquidated damages—Penalty—Measure of damages—Act IX of 1872 (Contract Act), s. 74.

Under s. 74 of the Contract Act, 1872, the Courts are not bound, even in cases where the parties to a contract have, in anticipation of a breach, expressly determined by agreement what shall be the sum payable as damages for the breach, to award such sum for a breach, but may award for the same "reasonable compensation" not exceeding such sum.

As a general principle, compensation must be commensurate with the injury sustained. Acting upon this principle, when the injury consists of a breach of contract, the Court would assess damages with a view of restoring to the injured party such advantage as he might reasonably be expected to have derived from the contract, had the breach not occurred.

Held, therefore, where the parties to a contract to deliver a certain quantity of raw indigo on a certain day agreed that a certain sum should be paid as compensation in case such indigo was not delivered as agreed, that the method of

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* Second Appeal No. 309 of 1882, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Shahjahanpur, dated the 15th December 1881, modifying a decree of Lala Ganga Prasad, Munsif of Birsauli, dated the 25th August 1881.

assessing damages in case of a breach of the contract would be to ascertain the quantity of indigo which could have been pressed out of the stipulated amount of indigo plant, to ascertain the price at which the indigo might have been fairly sold in the market during the season to which the contract related, and to deduct from such price the ordinary charges of producing and selling the quantity of indigo in question; and that more than the amount so ascertained ought not equitably to be awarded, such amount being "reasonable compensation" for a breach of the contract.

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[Appr., U.B.R. (1897—1901) 333 (334); D., 3 C.W.N. 43.]

ON the 5th January 1878, the defendant Shib Dat and one Chedi Lal, represented in this suit by his heirs, gave the plaintiff a bond in which they agreed, as the consideration for an advance of Rs. 200, to deliver to the plaintiff on a certain day 1,334 maunds of indigo plant. They further agreed that, if they failed to deliver the indigo plant, they should pay as damages twice the amount of the sum advanced. They hypothecated as colla-[239]teral security for the performance of the obligation certain immoveable property described in the bond. The plaintiff, alleging that the executants had wholly failed to perform their contract, sued Shib Dat and the heirs of Chedi Lal, and Sewa Ram, who had become the owner of the hypothecated property, to recover the sum advanced by him, *viz.*, Rs. 200, and Rs. 400, as damages for the breach of contract. Upon the question whether the plaintiff should be allowed to recover Rs. 400 as damages the Court of first instance observed as follows:—"The damages claimed by the plaintiff are liquidated damages or such as have been amicably estimated by the parties to the bond in anticipation of the breach of contract. These damages, being double the principal, are verily excessive; especially as the plaintiff has not shown that they are the approximate damages he has incurred from non-delivery of the promised indigo plant. This he could have done, by comparing the rate at which he contracted to purchase the plant from the promisors or obligors of the bond, with the rate which prevailed for it in the market on the date specified for delivery. The failure on his part to prove the probable damages incurred by him raises the presumption that he has not had to lose so much as he claims. Accordingly, with regard to the provisions of s. 74 of the Contract Act, 1872, I consider it equitable and reasonable to award him damages at one rupee per cent. monthly by way of interest, and by this measure of damages he gets Rs. 83-5-8 as per memorandum prepared by the Munsarim at my advice." The Court accordingly gave the plaintiff a decree for Rs. 283-5-8 and dismissed the rest of his claim. On appeal by the plaintiff the lower appellate Court held that the plaintiff should recover the sum advanced by him and Rs. 100 by way of penalty for breach of contract, or in all Rs 300, and modified the decree of the first Court accordingly. It observed as follows:—"The bond sued on provides for damages to the amount of twice the sum advanced in case of failure to supply the indigo plant; and it is lawful under Regulation VI of 1823 to award damages to that extent, but it is not necessary to do so in every case. In this case one of the obligors is dead, and it is not proved to the satisfaction of the Court that the obligors intentionally made default in delivering the indigo plant. Under these [240] circumstances justice does not warrant that the plaintiff should recover the full penalty of Rs. 400. No doubt the Munsif was not right in awarding damages to the amount of Rs. 83-5-8, being interest at one rupee per cent. per mensem, as this is contrary to the object of the indigo law, and the provisions of the bond. If the plaintiff is entitled to get

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anything, he should get it by way of damages and penalty and not by way of interest. Considering the peculiar circumstances of the case, the Court thinks that it is proper and just that the plaintiff should recover Rs. 200 as the principal and Rs. 100, total Rs. 300, as penalty from the defendant-obligor, from the heirs of the deceased obligor, and from the hypothecated property."

In second appeal the plaintiff contended that he should recover the damages stipulated for in the bond; that the decision of the lower appellate Court awarding Rs. 100 was based on conjecture; and that the measure of damages was the loss sustained by him in consequence of his inability to manufacture indigo.

Pandits *Ajudhia Nath* and *Nand Lal*, for the appellant.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the respondents.

The Court (STUART, C.J., and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

On the 5th January 1878, Chedi Lal and Shib Dat executed a bond for Rs. 200, which they received from the plaintiff as an advance for cultivating indigo. Under the terms of the bond the obligors undertook to supply 1,334 maunds of indigo plant at a price of Rs. 15 per 100 maunds, and it was stipulated in the bond, that on failure of such delivery the obligors would be liable to payment of damages calculated at twice the sum advanced as consideration of the bond. As a collateral security for due performance of the obligation, the obligors hypothecated their immoveable property described in the bond. That property has since been purchased by Sewa Ram. On the allegation that the executants of the bond had wholly failed to perform the contract, the present suit was instituted by the plaintiff against Shib Dat and the heirs of Chedi Lal, who has since died.

[241] Sewa Ram, the purchaser of the hypothecated property, has also been impleaded as a defendant in the suit. The object of the suit was the recovery of Rs. 200, the consideration of the bond, and Rs. 400 as liquidated damages for breach of contract, by enforcement of lien against the hypothecated property.

No evidence was produced by the plaintiff to prove any actual loss. The Munsif regarded the damages claimed as excessive, and, proceeding under s. 74 of the Contract Act, calculated damages at one rupee per cent. per mensem on the principal sum advanced, and decreed the claim to the extent of Rs. 283-5-8.

The lower appellate Court regarded the method of assessing damages adopted by the Munsif as erroneous, and, taking into consideration the provisions of the fourth clause of s. 5, Regulation VI of 1823, held that, under the circumstances of the case, Rs. 100 was the reasonable amount of damages to be awarded to the plaintiff, and modified the Munsif's decree accordingly.

The present second appeal has been preferred by the plaintiff, who contends that the defendants were bound to pay the whole amount of the stipulated damages; that the assessment of damages by the lower appellate Court at only Rs. 100 was conjectural and unsound; and that in any case damages should have been equal to the loss actually sustained by the plaintiff on account of the breach of contract committed by the defendants.

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The learned pleader who appeared in support of the appeal admitted that his contention could receive no support from the provisions of the fourth clause of s. 5, Regulation VI of 1823, and he confined his argument to the general principles of law relating to the assessment of damages. Whatever the distinction between liquidated damages and penalty may be, the terms of s. 74 of the Contract Act are broad enough to include both classes of cases, and the words of the section clearly give a wide discretion to the Courts in the assessment of damages, even in cases where the parties to the contract have in anticipation of the breach expressly determined by agreement what shall be the sum payable as damages for the breach. The section appears to have been introduced to obviate the difficulties which exist in distinguishing liquidated damages from penalty under the English law, and the effect of it [242] is, that the Courts are not bound to award the entire amount of damages agreed upon by the parties in anticipation of the breach of contract. The only restriction is that the Court cannot decree damages exceeding the amount previously agreed upon by the parties. The discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitations, though of course the expression "reasonable compensation" used in the section necessarily implies that the discretion so vested must be exercised with care, caution, and on sound principles.

With reference to the particular circumstances of this case the question is, what amount should be regarded as "reasonable compensation" for the breach of contract complained of? The fundamental ground of law, on which damages are awarded, is to place the injured party in the same position in which he would have been had he not sustained the injury of which he complains. As a general principle, therefore, the damages decreed must be commensurate with the injury sustained. When the injury consists of the breach of a contract, the Court, acting upon the principle above enunciated, would assess damages with a view of restoring to the plaintiff such advantage as he might reasonably be expected to have derived from the contract had the breach never occurred.

There are of course cases in which, *ex necessitate rei*, it is impossible to fix the exact amount of damages actually resulting from a breach of contract, and it is principally, if not exclusively, in such cases that the Courts of Equity do not interfere with the contract of the parties, who, in anticipation of the breach of contract, have stipulated that a fixed sum shall be regarded as the measure of compensation to be paid by the person who violates the contract. But the present is not a case in which it would be impracticable or impossible to ascertain the actual damages sustained by the plaintiff. It is easy to determine the amount of pecuniary advantage which the plaintiff might have derived if the defendant had performed his contract and supplied 1,334 maunds of indigo plant at the stipulated period. It is consequently practicable to fix the extent of the loss which the plaintiff has sustained, and this in our opinion must be the measure of damages in this [243] case, so long as the amount so ascertained does not exceed the sum agreed upon.

The method of assessing damages would be to ascertain the quantity of indigo which would have been pressed out of the stipulated amount of indigo plant, to ascertain the price at which indigo might have been fairly sold in the market during the season to which the contract relates, and to deduct from such price the ordinary charges of producing and selling the quantity of indigo in question. More than the amount so ascertained the plaintiff in our opinion is not entitled in equity to recover, and if that

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amount is decreed to him it would be a "reasonable compensation" for the breach of contract on which the suit is based.

With reference to these observations we decree this appeal, and setting aside the decree of the lower appellate Court remand the case to that Court under s. 562, Civil Procedure Code, the costs of this appeal to abide the result.

Cause remanded.

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5 A. 243 = 3 A.W.N. (1883) 8.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

RAGHUBANS GIR (*Judgment-debtor*) v. SHEOSARAN GIR (*Decree-holder*).*
[20th December, 1882.]

Execution of decree—Application for execution—Intermediate suit—Fresh application—Revival of application—Act XV of 1887 (*Limitation Act*), *sch. ii, Nos.* 178, 179.

On the 27th March, 1878, the holder of a decree applied for execution. On the 27th May, 1878, the Court made an order directing that the application should be struck off, as the record of the former execution-proceedings was in the appellate Court, and that the decree-holder should make a fresh application when such record was returned. On the 28th May, 1881, the decree-holder renewed the application in accordance with such order.

Held, on the question whether this application was barred by limitation, that it was not an application within the meaning of No. 179, sch. ii of Act XV of 1877, but one to which No. 178 would apply; that limitation began to run when the record was returned; and that, therefore (three years not having elapsed from that time), the application in question was within time.

Kalyanbhai Dipchand v. *Ghanashamlal Jadunathji* (1) and *Paras Ram* v. *Gardner* (2), referred to.

[F., 5 A. 459 (461); Appl., 5 A. 596 (598); R., 18 A. 9 (11); Expl., 23 A. 13 (18).]

[244] THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath* and Maulvi *Mehdi Hasan*, for the respondent.

The Court (OLDFIELD, J., and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—The respondent obtained a decree against the appellant on 6th February 1877. He applied for the execution of this decree on 17th February 1877. The judgment-debtor preferred objections, which were disallowed on 16th April 1877. He then appealed, and the order was upheld on 17th February 1878, and again upheld by the High Court on 31st May 1878. He subsequently instituted a regular suit to contest the order in execution and was unsuccessful. In the meantime the decree-holder filed another application for execution by attachment and sale of property on the 27th March 1878, and the Munsif passed an order on this application on 27th May 1878, that it should be struck off the file, as it was impossible to proceed with it in the absence of the record

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* Second Appeal No. 18 of 1882, from an order of R. J. Leeds, Esq., Judge of Gorakpur, dated the 9th January 1882, affirming an order of Rai Izzat Rai, Munsif of Bansi, dated the 20th August 1881.

(1) 5 B. 29. (2) 1 A. 355.

which was in the appellate Court; and the Munsif directed the decree-holder to file a fresh application when the record should be returned from the High Court.

The decree-holder filed the present application on the 28th May 1881, and he refers in it to his previous application and to the Munsif's order upon it, and asks that the case may be proceeded with according to his previous application.

The question before us is whether, as has been urged by the appellant, this application is barred by limitation under art. 179, Act XV of 1877. We are of opinion that this is not strictly speaking an application under art. 179 for the execution of a decree or order of any Civil Court, so as to make the time run from the date of the former application of 27th March 1878. It no doubt seeks as a result the execution of the decree, but it is primarily and essentially an application made in conformance with the direction of the Court given in its order dated 27th May 1878, with the object of moving the Court to proceed in the matter of the former [245] application which had been postponed; and we think a distinction may certainly be drawn between an application of this nature and one of the nature of a fresh application for the execution of the decree, and that art. 178 will apply and the limitation will run from the time when the right to apply accrues—in this case from the date when the record was returned to the Munsif's Court, on disposal of the proceedings in the appellate Court. The order of the Munsif, dated 27th May 1878, was in fact an order for postponement; and whether or not it was a proper order to make, under the circumstances it gave a right to the decree-holder to make the application which he has now made.

Our attention has been drawn to a case decided by the Bombay High Court—*Kalyanbhai Dipchand* v. *Ghanashamlal Jadunathji* (1), which is similar to the one before us, and decided on analogous grounds, and the principle of our decision has already been recognised by this Court in the case of *Paras Ram* v. *Gardner* (2). We dismiss the appea with costs.

Appeal dismissed.

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5 A. 245=3 A.W.N. (1883) 10.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

RADHA PRASAD SINGH (*Defendant*) *v.* SALIK RAI (*Plaintiff*).*
[3rd January, 1883.]

Landholder and tenant—Ejectment of tenant—Suit by tenant for declaration of right—Jurisdiction—Res judicata—*Act XVIII of* 1873 (*N.-W.P. Rent Act*), s. 93 (*b*) —*Civil Procedure Code*, s. 13.

An occupancy-tenant, who had been ejected, under ss. 34 and 93 (*b*) of the North-Western Provinces Rent Act, on the ground that he had committed an act mentioned in those sections, which rendered him liable to ejectment, sued in the Civil Court for a declaration of his right of occupancy and to have the decree of the Revenue Court directing his ejectment declared of no effect, on the ground that his act was not one of those rendering him liable to ejectment, being authorised by local custom.

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* Second Appeal No. 584 of 1882, from a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 13th March 1882, affirming a decree of Maulvi Mahmud Bakhsh, Subordinate Judge of Ghazipur, dated the 10th November 1881.

(1) 5 B. 29. (2) 1 A. 355.

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5 A. 245 = 3 A.W.N. (1883) 10.

Held, that the question of the plaintiff's liability to ejectment on account of the act in question, being a matter the cognizance of which was limited to the Revenue Courts, and the decision of the Revenue Court against him having become final, the plaintiff's suit was barred by s. 13 of the Civil Procedure Code. *Raj Bahadur* v. *Birmha Singh* (1), distinguished.

[246] THE plaintiff in this case was an occupancy-tenant of 15 bighas 17 biswas of land situate in pargana Doaba, zila Balia, which lies between the two rivers Gogra and Ganges, and which is annually affected by the rising of the waters of those rivers. In 1879 the waters rose and swept away the plaintiff's house, and he thereupon built himself on the land in question a temporary hut consisting of a "*chhappar*" (thatched roof) and wattled sides. The defendant in this suit, the zamindar, on this account sued him in the Revenue Court, under ss. 34 and 93 (*b*) of the North-Western Provinces Rent Act, 1873, claiming his ejectment on the ground that his act was detrimental to the land. On the 29th July 1880, the Assistant Collector trying this suit gave the zamindar a decree for the tenant's ejectment. The plaintiff thereupon brought the present suit against the defendant for a declaration of his cultivatory right in respect of the land, and to have the decree of the Assistant Collector declared of no effect, on the ground that the plaintiff's act was not detrimental to the land, and there was a custom prevailing in the pargana in which it was situated, which entitled an occupancy tenant when driven from his home by the action of the two rivers to build himself a temporary hut on his land. The suit was instituted in the Court of the Subordinate Judge of Ghazipur. The principal defence to the suit was that it was not cognizable in the Civil Courts, regard being had to the provisions of s. 93 of the North-Western Provinces Rent Act, 1873. The Subordinate Judge held that the suit was cognizable in the Civil Courts, since the question at issue was whether a tenant was according to village-custom entitled to build a temporary hut on his cultivatory land or not, and further that such question was not *res judicata*, with reference to the Assistant Collector's decision, as it had not been raised before him. In support of his decision on the question of jurisdiction the Subordinate Judge referred to *Raj Bahadur* v. *Birmha Singh* (1). On appeal the District Judge of Ghazipur affirmed the decision of the Subordinate Judge with reference to the same case, observing that in his opinion the Assistant Collector had exceeded his power or at all events strained the law, and the Civil Courts were not bound by his decision.

[247] In second appeal it was again contended on the defendant's behalf that the Civil Courts were debarred from taking cognizance of the suit by s. 93 of the North-Western Provinces Rent Act, 1873.

Mr. *Conlan* and Lala *Lalta Prasad*, for the appellant.

Mr. *Howard*, for the respondent.

The Court (OLDFIELD, J., and TYRRELL, J.) delivered the following udgment :—

JUDGMENT.

TYRRELL, J.—This is a suit for a decree designed to "recognize the plaintiff's right of cultivation in respect of 15 bighas and 17 biswas of land, and to cancel the decision of the Revenue Court made on the 29th July 1880," whereby the plaintiff was ejected from the land in question under the provisions of s. 34 and of s. 93 (*b*) of the North-Western Provinces

(1) 3 A. 85.

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Rent Act. The question at issue, and determined in that suit by a competent Revenue Court, was in respect of the competence of a tenant, the respondent before us, to erect or permit the erection of houses for human habitation on the area of his cultivatory holding by virtue of an alleged local custom in Ghazipur on the subject. This matter was decided against the tenant, who seeks now to obtain relief against the order of the Revenue Court by this civil action. He succeeded in both the Courts below, the District Judge holding, on the authority of this Court's Full Bench ruling in *Raj Bahadur* v. *Birmha Singh* (1), that the respondent's suit was cognizable by the Civil Court. This decision is questioned in the present appeal, which must be allowed.

It is provided by the mandatory terms of s. 93 of the Rent (North-Western Provinces) Act, that "except in the way of appeal as hereinafter provided, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought, and such suits shall be heard and determined in the said Courts of Revenue in the manner provided in this Act, and not otherwise." Now the question at issue between the appellant and respondent in the suit in the Revenue Court was actually brought to trial, and it formed the direct subject-matter of the class of suits covered [248] by cl. (*b*) of s. 93, *supra*; and the cognizance of such a "dispute or matter" is definitively limited to the Revenue Courts. The decision of the Revenue Court against the respondent became final; and by the rule of s. 13 of the Civil Procedure Code the present action is barred. The present suit is not one in which the question arises as to which of two alternative Courts, one admittedly having jurisdiction, should entertain the case. The point is whether such a suit is maintainable in any Court. The Full Bench ruling mentioned above has no application to this case. It was there held that a dispute regarding a landlord's power to demolish a tenant's well is cognizable by a Civil Court; and that a decision by a Revenue Court to the effect that compensation should be given to a tenant ejected for building a well is not a determination of the landholder's right to demolish the well as having been constructed by a person not entitled to do so, and is consequently not a bar to a suit by the landholder in the Civil Court for the demolition of the well on this ground. The distinction between that case and the circumstances of the litigation with which we have to deal in this appeal is obvious. We must set aside the decrees of the Courts below, and decree this appeal with costs.

Appeal allowed.

(1) 3 A. 85.

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5 A. 248 = 3 A.W.N. (1883) 12.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

AMARNATH, GUARDIAN OF LACHMI NARAIN, MINOR (*Plaintiff*) *v.* THAKUR DAS AND OTHERS (*Defendants*).* [3rd January, 1883.]

Guardian and minor—Security-bond—Suit on minor's behalf against guardian's sureties—Assignment of security-bond—Act XL of 1858—*Act IX of* 1861—*Act X of* 1865, *s.* 257.

B, having been granted by a District Court a certificate under Act XL of 1858 in respect of the estate of a minor, the Judge of such Court called on her to furnish security, and certain persons accordingly gave security-bonds to the Judge on her behalf. Subsequently *B*'s certificate was taken from her, and was granted to *A*, who brought a suit on the minor's behalf against *B*'s sureties for the value of the property intrusted to *B*. The security-bonds in question were not assigned by the Judge to *A*.

Held, that, inasmuch as the plaintiff was seeking to enforce contracts which were never made with him or any other person in the character of legal representative of the minor, he had no legal *status* to maintain the suit.

[249] Also, that no equitable rights were created in the minor by the bonds, which would render the suit maintainable.

Quære.—Whether the Judge of a District Court is competent to call upon a person to whom he grants a certificate under Act XL of 1858 to furnish security; and whether, where he has done so, and security-bonds have been given to him, he can assign them in the manner provided in s. 257 of the Succession Act, 1865.

THE material facts of this case were as follows:—One Lachmi Chand died, leaving him surviving three sons—Nidhi Mal, Saudagar Mal, and Beni Ram. Saudagar Mal died childless. Nidhi Mal, at his death in 1862, left a widow, Balkuar. Beni Ram, who survived until May 1875, had one son, Bhola Nath, who died in his father's lifetime, leaving a widow, Muso, daughter of one Shibbi, and a son, Lachmi Narain, the minor plaintiff in this suit. After the death of Muso questions arose as to the guardianship of the minor Lachmi Narain; Shibbi, his maternal grandmother, applying, on the one hand, for a certificate under Act IX of 1861, and being opposed by Balkuar, widow of Nidhi Mal, on the other. In the result a compromise was arrived at, by which it was arranged that Shibbi should have the guardianship of the person of the minor and an allowance of Rs. 50 per mensem, while Balkuar was to have the custody of his property. With regard to the latter, the District Judge of Saharanpur, under what power or authority did not appear, required Balkuar to find security, and on the 3rd September 1875, the defendants-respondents (Ganga Rai excepted) executed a bond for Rs. 50,000, hypothecating certain property as security for the same. This was given by the sureties to the then District Judge of Saharanpur, who had called upon Balkuar to find security, and the main undertaking was as follows:—"We the sureties and our representatives shall be responsible to the extent of the security in case of Balkuar failing to give up or hesitating to make over the goods and rents, &c., when called upon by the Court to do so; that whatever order will be passed by the Court to us, we the sureties will carry out the same." This bond was duly registered. On the 24th September 1875, another bond for Rs. 20,000 was executed by Hardial Singh, represented in this appeal by the respondent Ganga Rai, as surety for Balkuar to that amount, in which after reciting that Balkuar "had been called upon by the Zila Court of

* First Appeal No. 51 of 1881, from a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Saharanpur, dated the 1st March 1881.

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Saharanpur to furnish security," the obligor declared [250] as follows :—" I agree and write that I, the surety, will make good the money out of my own hypothecated property if Balkuar in any way damages the goods intrusted to her." As a matter of fact, property to the value in round figures of some Rs. 60,000, belonging to the minor Lachmi Narain, was made over to Balkuar and acknowledged by her to have come into her possession by two receipts, dated respectively the 5th December 1875, and the 15th January 1876. It further appeared that on the 16th March 1876, a certificate was given to Balkuar under Act XL of 1858. On the 20th February 1878, application was made by one Amar Nath for revocation of the certificate to Balkuar, and grant of a certificate to himself under Act XL of 1858. Both Shibbi and Balkuar were cited to appear and show cause, and ultimately, on the 20th March 1878, Balkuar's certificate was taken away, and one for the custody of the person and property of the minor was granted to Amar Nath. There was an appeal from this decision to the High Court, which, however, confirmed the order on the 15th November 1878. At this time a suit had been instituted by Balkuar against the minor by his guardian Amar Nath, in which, alleging her cause of action to have accrued at the date of the revocation of her certificate, and claiming that half the property which had been intrusted to her belonged to her husband Nidhi Mal, and that Beni Ram, the grandfather of the minor, had only been in possession of it as manager for her, and that some of it had been purchased by him on her account, she first asked for maintenance of possession as to one-half, but subsequently altered her prayer to relief to one for declaration of her right to, and possession of, such one-half. Balkuar died while an appeal in this suit was pending in the High Court, which, by an order of a Division Bench of the 7th June 1880, was declared to have abated. The present suit, when this took place and when Balkuar died, was pending, having been instituted on the 2nd October 1879, in the Court of the Subordinate Judge of Saharanpur. In it Amar Nath claimed, on behalf of the minor appellant, to recover from Balkuar and her sureties the property of the minor or its value. Nothing was done on Balkuar's death to substitute any representative in her place. On the 30th January 1880, the plaint was rejected for inadequacy in the Court-fees paid. There was an appeal to the [251] High Court, which, on the 3rd August 1880, reversed the Subordinate Judge's decision, and directed the restoration of the case to the file, and its disposal on the merits. This having been done, the matter came to trial, and was determined on the 1st March 1881, the plaintiff's claim being dismissed. For the respondents the objection was taken, for the first time, in support of the Subordinate Judge's decision, that the plaintiff was not competent to maintain a suit at all, he not being the obligee, or representative of the obligee, or assignee of the obligee of either of the bonds of the 3rd and 24th September 1875. It was urged for the appellant that the Court should not allow a point of this kind to be raised at so late a stage, especially when no objections had been filed by the respondents under s. 561 of the Procedure Code.

Pandits *Bishambhar Nath* and *Ajudhia Nath*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), Babu *Oprokash Chandar*, and Babu *Baroda Prasad*, for the respondents.

JUDGMENT.

STRAIGHT, J. (after stating the facts of the case continued)—I am of opinion that we are bound to entertain the objection taken on behalf of

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the respondents, going as it does to the very root of the litigation and the capacity of the plaintiff to figure in it at all. I have already remarked, that it does not appear under what authority the Judge of Saharanpur originally called upon Balkuar to provide security, when she was appointed guardian. Certainly no such power as that mentioned in s. 257 of the Indian Succession Act is to be found either in Act XL of 1858 or Act IX of 1861. But while I am by no means prepared to hold that the Judge was incompetent to take the bonds of the 3rd and the 24th September, I entertain the very gravest doubts as to his capacity by assignment to entitle another person to sue upon them, in the absence of any distinct provision of law to the effect of the kind I have already referred to, as contained in s. 257 of the Indian Succession Act. That enactment seems to have been framed on ss. 81 and 83 of 20 and 21 Vic., c. 77, which, with s. 15 of 21 and 22 Vic., c. 95, now regulates the procedure of the Probate Court in England in such matters. In the case now before us, however, no assignment of the bonds to the plaintiff, as a matter of fact, has ever been [252] made, and I am at a loss to find any authority ever conferred upon him by any person entitled to give it to put them in suit. It therefore comes to this, that the plaintiff, of course always as representing the minor, is seeking to enforce a contract which was never made with him or any other person in the character of legal representative of the minor. It seems to me that, under such circumstances and upon the most ordinary principles of law, he has no legal *status* to maintain an action. The two instruments of September the 3rd and the 24th were obviously bonds given by the sureties to the Judge of Saharanpur as security for the due and honest performance of her duty by Balkuar in her character of guardian to the minor, and as the person accountable *to the Court* for the proper administration of his estate. The following passage from *Pollock on Contracts*, page 196, has direct bearing under this head :—"The rule is now distinctly established, so far as any common law right of action is concerned, that a third person cannot sue on a contract made by others for his benefit, even if the contracting parties have agreed that he may, and that near relationship makes no difference." In the course of the argument I pointed out to the pleader for the respondents that perhaps in equity, the bonds having been given to the Judge, virtually in the interest and for the benefit of the minor, he was entitled to take advantage of them, and, by his guardian, to enforce them. But upon consideration I find it impossible to hold that any equitable rights were created in the minor by the bonds, which would render the present suit maintainable. The only other question that seems to arise is, whether those instruments can be construed as creating a trust as between the minor and the respondents. Perhaps it is sufficient to say that this is not the basis upon which the plaintiff comes into Court, and he neither alleges a trust nor seeks to have it declared, though I feel bound to add that, in my opinion, no trust, either express or implied, is shown to exist. It is true that the plaint does not specifically claim upon the contracts contained in the two bonds, but asks for damages. This does not alter the position, for any right to sue, whether for the enforcement of the contracts or for damages for their breach, arises within the four corners and out of the contracts themselves. Entertaining the views I have expressed, I am constrained to come to the con-[253]clusion that the objection urged for the respondents is fatal to the suit, and that the plaintiff has no legal *status* to maintain it. I do so with much regret, but plain principles of law seem to preclude me from

arriving at any other result. I am therefore of opinion that, on the grounds I have stated, the decision of the Subordinate Judge must be sustained, and this appeal dismissed with costs.

1883 JAN. 3.

APPELLATE CIVIL.

5 A. 248 = 3 A.W.N. (1883) 12.

OLDFIELD, J.—I concur with my colleague, Mr. Justice STRAIGHT, in holding that the suit cannot be maintained.

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5 A. 253 = 3 A.W.N. (1883) 25.

APPELLATE CRIMINAL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

EMPRESS OF INDIA *v.* YAKUB KHAN. [18th January, 1883.]

Confession—Code of Criminal Procedure (Act X of 1872), *ss.* 122, 193, 346—*Code of Criminal Procedure (Act X of* 1882), *ss.* 342, 364.

On a certain day a confession by an accused person was recorded by a Magistrate, and on the next day the same Magistrate, having jurisdiction to do so, examined the witnesses for the prosecution and eventually committed the accused. *Held*, following *Empress* v. *Anantram Singh* (1), that such confession, having been made to a Magistrate competent to hold, and who actually then was holding, an inquiry preliminary to committal, must be regarded as falling within s. 193 of Act X of 1872 or s. 342 of Act X of 1882, and as such governed by the reservations contained in s. 346 of the former Act, or s. 364 of the latter.

Observations on ss. 342 and 364 of Act X of 1882 (Criminal Procedure Code).

[R., 37 C. 467 = 14 C.W.N. 1114; 16 Cr.L.J. 257 (F.B.) = 28 Ind. Cas. 145 = 44 P.W.R. 1914 (Cr.).]

THIS was an appeal by the Local Government from a judgment of Mr. E. B. Thornhill, Sessions Judge of Aligarh, dated the 29th June 1882, acquitting one Yakub Khan of rape. The evidence against the accused consisted of a confession made by him to the committing Magistrate, and of the statement of the girl, aged seven years, on whom the offence was committed, who was examined without being affirmed. The Sessions Judge refused to receive the accused's confession in evidence, and, being of opinion that the accused ought not to be convicted on the statement merely of the girl, acquitted him. The Sessions Judge's reasons for refusing to receive the confession in evidence were as follows:—

"The accused, on the 12th May, made a statement before the committing Magistrate, and the record shows that the accused was brought up by the police before the Magistrate on the 12th May, to have his statement recorded, and no witnesses were examined till the [254] 13th May, although the statement of the accused was recorded on the 12th May; so that the statement is shown to have been made before the preliminary inquiry commenced, and should have had the certificate required by s. 122 of the Code of Criminal Procedure (Act X of 1872) that the Magistrate believed the confession or statement was voluntarily made. Had the statement or confession, for such it was, been made during the course of the preliminary inquiry, the certificate as to the Magistrate's belief that the confession or statement was voluntarily made would not have been required; and the provisions of s. 346, Criminal Procedure Code (Act X of 1872), which had not been complied with, such as the statement not having been signed by the accused, nor having had his mark attached to it, and the statement not having been recorded in the form of question and answer, might have been

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(1) 5 C. 954.

1883 JAN. 18. — APPELLATE CRIMINAL. — 5 A. 253 = 3 A.W.N. (1883) 25.

rectified, and the evidence of the committing Magistrate with respect to the statement might have been taken to prove that the statement had been made by the accused. But it has been ruled that errors and omissions in procedure in recording statements made under s. 122 cannot afterwards be rectified by taking further evidence, that the statement was made before the Magistrate, so that the statement made by the accused before the Magistrate cannot now be rectified by evidence being taken that it was made. The statement could not therefore be placed on the record in this Court, or read to the assessors, or taken into consideration against the accused."

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

The respondent did not appear.

The Court (STUART, C J., and STRAIGHT, J.) delivered the following judgment :—

JUDGMENT.

We observe, with some surprise, that the petition of appeal was not presented until the 4th of October, or more than three months from the date of the order complained of ; and we are constrained to express our regret that, with whomsoever the fault may be, there should have been so much delay in steps being taken to impeach the judgment. The circumstance is not of so much importance in the present instance, as there is evidence sufficient on the record to enable us, supposing we admit the legal objections to the [255] accuracy of the Judge's decision, to deal with the matter upon the merits. But there are cases in which the contingency arises that we have to order a new trial, or further evidence to be taken, and the longer the interval that has elapsed since the first investigation and trial, the greater is the inconvenience and difficulty, not only to get witnesses together again, but to obtain from them accurate or reliable testimony. It is true that a period of six months is the limitation allowed by law for appeal from acquittals, but we would earnestly commend to the attention of Government the policy of, and necessity for, such appeals, when made, being preferred with all reasonable expedition possible, not only in the public interest, but in justice to the persons whose acquittal it is sought to reverse. So far as this Court is concerned, the present case would have been disposed of some time since but for postponements granted at the request of the respondent's counsel, and at last, he having failed to appear on the date peremptorily fixed for the hearing, we felt ourselves compelled to proceed with and dispose of it in his absence.

No questions of a complicated nature are involved in this appeal, and it may easily be disposed of.

The decision of the Judge is impeached upon two grounds : *first*, that he should not have rejected the statement of the respondent before the committing Magistrate, as amounting to a confession under s. 122 of the Criminal Procedure Code of 1872 ; *secondly*, that without his statement there was sufficient evidence to warrant a conviction.

As to the first of these points, we think the contention is a sound one, and must prevail. On the 12th of May, when the respondent made the statement in question, he was before a Magistrate competent to hold, and who actually then was holding, the preliminary inquiry into the charge under s. 375 of the Penal Code, with a view to committing the accused for trial to the Sessions Court. Section 122, upon which the Judge relies, relates to statements or confessions made to a Magistrate other than the

1883 JAN. 18. — APPELLATE CRIMINAL. — 5 A. 253 = 3 A.W.N. (1883) 25.

Magistrate investigating a case for committal; and adopting and approving the decision of a Full Bench of the Calcutta Court in *Empress* v. *Anuntram Singh* (1), we are clearly of opinion that the statement [256] of the respondent, made on the 12th of May, must be regarded as falling within s. 193 of the old, or 342 of the present, Code, and, as such, governed by the reservations contained in s. 346 of the old, or 364 of the present, Criminal Procedure Code. Although the statement was not recorded by question and answer, as it should have been, we find a certificate signed by the Magistrate to the effect that such statement was taken in his presence and hearing, and contains accurately the whole of the statement made by the accused. We may here remark that Magistrates, as a rule, do not as strictly follow the provisions relating to the taking the examination of accused persons in this respect as they should. We think it well to point out, in reference to ss. 342 and 364 of the new Code, that, while it is not intended to empower them to cross-examine persons charged before them, they are nevertheless authorized to put any questions which appear necessary at any stage of an inquiry or trial, and particularly when all the witnesses for the prosecution have been examined, "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him." Such questions, with the answers given, should be recorded in full, and when completed, should be read over to the accused, who is to be permitted to explain or add to his answers, and such explanation or additions must be taken down. After this has been done, the examination must be signed at the foot by the accused and by the Magistrate, who should further certify that it was read over to the accused and signed by him, after being taken in the presence and hearing of him (the Magistrate), and that it is a full and true account of the statement made by the accused. As in the present case there appears from the vernacular record to have been a substantial compliance with s. 346 of the old Code, we hold the statement of the respondent as admissible evidence, and taken in conjunction with the other proofs, as fully establishing his guilt of the crime with which he was charged. We therefore allow this appeal, and convicting Yakub Khan, son of Jamal Khan, Musalman, of Bonai, of an offence under s. 376 of the Penal Code, namely of rape, we direct that he be rigorously imprisoned for the period of five years, to be computed from the date of his committal to jail. The necessary orders will issue for his immediate arrest.

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5 A. 257 = 3 A.W.N. (1883) 10 = 7 Ind. Jur. 617.

[257] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

BISHESHAR SINGH AND ANOTHER (*Defendants*) v. LAIK SINGH AND OTHERS (*Plaintiffs*).* [3rd January, 1883.]

Joint mortgage by conditional sale of two villages—Sale of the equity of redemption—Foreclosure in respect of one village.

B mortgaged by conditional sale two villages to *L* for a certain sum. He subsequently sold one village to *L* and the other to *S*. *L* having foreclosed the mortgage in respect of the village sold to *S*, for a proportionate amount of

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* First Appeal No. 93 of 1882, from an order of Rai Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 2nd June 1882, reversing an order of Rai Izzat Rai, Munsif of Bansi, dated the 17th March 1882.

(1) 5 C. 954.

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5 A. 257 = 3 A.W.N. (1883) 10 = 7 Ind. Jur. 617.

the mortgage-money, sued *S* for possession of that village. *Held* that the suit was maintainable. *Chandika Singh* v. *Pokhar Singh* (1), distinguished.

[R., 20 A. 23 (30) (F.B.); 6 C.L.J. 46.]

ONE Bhajan mortgaged by conditional sale two villages to persons represented by the plaintiffs in this case. He subsequently sold the equity of redemption of one village to the plaintiffs and of the other to the defendants. The plaintiffs, having taken the necessary steps to foreclose the mortgage of the village held by the defendants, for a proportionate amount of the total mortgage-money, brought this suit against the defendants to have the conditional sale made absolute and to be put in possession. The Court of first instance dismissed the suit on the preliminary ground that the plaintiffs were not entitled to foreclose the mortgage in respect of one village only, citing *Chandika Singh* v. *Pokhar Singh* (1). The lower appellate Court held otherwise, and remanded the case for trial.

In second appeal the defendants contended that the suit was not maintainable, as the plaintiffs were not entitled to foreclose the mortgage in respect of one village only.

Munshi *Kashi Prasad*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Babu *Jogindro Nath Chaudhri*, for the respondents.

The Court (OLDFIELD and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the lower appellate Court has rightly held that the plaintiffs may maintain a suit to foreclose [258] in respect of the property held by the appellants and that the appeal fails. It is true that there were no separate mortgages of these two mauzas, both having been mortgaged together for a certain sum of money; but when the mortgagor sold the equity of redemption of one mauza to plaintiffs and of the other to defendants, the mortgage was split up; that in respect of the mauza bought by plaintiffs merged in their purchase, but that in respect of the other mauza remained a debt redeemable by defendants at a proportionate valuation, and in consequence one which the plaintiffs could foreclose on similar terms. In fact the mauza in suit remained mortgaged to plaintiffs for such amount of the original mortgage-debt as is proportionate to its value.

The case of *Chandika Singh* v. *Pokhar Singh* (1) cited by the first Court and referred to before us, was decided on quite different grounds. In that case there had been no division of the equity of redemption in respect of the mortgaged property, and in other respects it differed from the one before us. The mortgagee had treated a payment by one mortgagor as redeeming his share, and he sought to foreclose the shares of the other mortgagors. The Court held that the payment could only be properly treated as made for the whole of the mortgagors, and ought to have been carried to the credit of all in reduction of the principal sum jointly due, and he was not justified in exempting the share from the foreclosure proceedings and directing his claim against the property of the other mortgagors alone. We dismiss the appeal with costs.

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(1) 2 A. 906.

5 A. 258=3 A.W.N. (1883) 11.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

1883 JAN. 4.

APPEL-LATE CIVIL.

5 A. 258= 3 A.W.N. (1883) 11.

DOWNES (*Insolvent*) v. RICHMOND AND OTHERS (*Creditors*).*
[4th January, 1883.]

Insolvent—Discharge from liability—Agreement to satisfy debts in full—Civil Procedure Code, s. 358.

An insolvent, who had procured, and taken, and acted on an insolvency order, which had been granted to him, because of the withdrawal of the opposition of his creditors, by reason solely of his engagement to pay a certain sum monthly until the whole of his debts should be discharged, after his scheduled debts had been satisfied to the extent of one-third, applied under s. 358 of the Civil Procedure Code, to be declared discharged from further liability in respect of his debts. *Held* that, under the circumstances, his application had been properly refused.

[R., 43 P.R. 1894.]

[259] THIS was an appeal from an order under s. 358 of the Civil Procedure Code refusing to declare the appellant, an insolvent, discharged from liability in respect of his debts. It appeared that on the 14th July 1881, the appellant, who had applied to be declared an insolvent under the Civil Procedure Code, presented a petition stating that some of his creditors agreed that he should pay Rs. 80 a month till their claims were fully satisfied, and asking for an adjournment to settle with his other creditors. On this the case was adjourned till the 11th August 1881. On the 10th August the appellant applied for a further adjournment, stating that his creditors had agreed to the terms stated in the petition of the 14th July, whereby he was to pay Rs. 80 per month to be equally divided among them in full liquidation of all claims set out in his schedule, commencing from the 5th September. The prayer for adjournment was not granted, and the petition was put upon the 11th August with the case. On that date, in accordance with the statements of the appellant and the opposing creditors, the following order by consent of parties was made :—"The opposition is withdrawn on the condition that the applicant pays up Rs. 80 a month to a receiver to be appointed by the Court till all the claims are satisfied in full, and the applicant by petition agrees to the same." On the 21st August 1882, the appellant applied, under s. 358 of the Civil Procedure Code, to be declared discharged from further liability in respect of his debts, on the ground that he had paid into the hands of the receiver more than one-third of the amount of the debts. The Court rejected this application, holding that the matter having been adjusted by consent of parties, the appellant could not claim the benefit of s. 358, which related to cases, decided "*suo motu*" by the Court, and not to cases where by consent of parties an applicant has been declared an insolvent.

For the appellant it was contended that he had been unconditionally declared an insolvent under s. 351 of the Civil Procedure Code, and that the Court could not go behind that declaration and hold that it had been made subject to a condition.

Pandit *Nand Lal* and Babu *Ram Das Chakarbati*, for the appellant.
The respondents did not appear.

* First Appeal No. 152 of 1882, from an order of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, dated the 23rd August 1882.

1883 JAN. 4. — APPELLATE CIVIL. — 5 A. 258 = 3 A.W.N. (1883) 11.

[260] The Court (BRODHURST and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—The appellant procured, and took, and acted on an insolvency order which was granted to him, because of the withdrawal of the opposition of his creditors, by reason solely of the appellant's engagement to pay Rs. 80 a month until the whole of his debts should be discharged. Under these circumstances the order of the Court below, against which this appeal is made, was proper, and should not be disturbed. We dismiss this appeal.

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5 A. 260 = 3 A.W.N. (1883) 14.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

KUPIL RAI AND OTHERS (*Defendants*) v. RADHA PRASAD SINGH (*Plaintiff*).* [8th January, 1883.]

Landholder and tenant—Submergence of occupancy-tenant's land—Diluvion—Liability for rent—Resumption by landholder—Custom—Jurisdiction—Act XII of 1881 *(N.-W.P. Rent Act)*, ss. 18, 31, 34 (*b*), 95 (*n*).

A landholder, alleging that by local custom when land was submerged, and the tenant ceased to pay rent for the same, his right to it abated, and when the land re-appeared the landholder was entitled to possession thereof; that certain land belonging to him had been submerged and the occupancy-tenant thereof had ceased to pay rent for it; and that such land had re-appeared and had come into his possession under such custom; sued such tenant in the Civil Court for a declaration of his right to the possession of it.

Held, that, inasmuch as ss. 18 and 31 of the N.-W.P. Rent Act, 1881, showed that, notwithstanding the submergence of the land, the tenancy still subsisted; and as the tenant could not lose his right to the land except by relinquishment or ejectment under the provisions of that Act; and as the custom set up by the landholder was opposed to the provisions of s. 34 (*b*) of that Act; the suit was not maintainable. Further that, with reference to the provisions of s. 95 (*n*) of that Act, the suit was not cognizable in the Civil Courts.

THE plaintiff in this suit, the zamindar of a certain village, sued the defendants to set aside an order made under s. 530 of Act X of 1872 (Criminal Procedure Code), declaring the latter to be in possession of certain land in the village as tenants, and to have it declared that he was in proprietary possession of the land. It appeared that the land in question had been submerged by the river Ganges, the defendants being at the time of such submer-[261]gence the occupancy-tenants of the land. The plaintiff based his claim on the allegations that the defendants ceased to pay rent for the land when it was submerged, and that by local custom, if a tenant ceased to pay rent for land which was submerged, when it re-appeared the zamindar was entitled to possession, the tenant's right abating; and that the land in question had come into his possession by virtue of that custom. The defendants contended that they had paid rent for the land continuously, and that, even if they had not paid rent for it while it was submerged, they had not thereby lost their occupancy-right in it. The lower Courts gave the plaintiff a decree, holding that he was

* Second Appeal No. 1354 of 1881, from a decree of Maulvi Muhammad Bakhsh, Subordinate Judge of Ghazipur, dated the 12th August 1881, modifying a decree of Munshi Kulwant Prasad, Munsif of Balia, dated the 25th March 1881.

entitled, by custom, as zamindar, to resume the land, as no rent had been paid for it while it was submerged, and finding that he was in possession. 1883 JAN. 8.

In second appeal the defendants contended that no custom would authorize the plaintiff to eject them in contravention of the provisions of the N.-W.P. Rent Act, 1881. APPELLATE CIVIL.

Mr. *Howard*, for the appellants.

Mr. *Conlan* and Lala *Lalta Prasad*, for the respondent.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment :— 5 A. 260 = 3 A.W.N. (1883) 14.

JUDGMENT.

OLDFIELD, J.—In our opinion this plea has force, and the suit is not maintainable. Admittedly defendants were tenants with rights of occupancy in respect of the land in dispute prior to its diluvion. Now the provisions of the Rent Act show that the tenant-right is not lost merely in consequence of diluvion. Section 18 of the Act enables a tenant to obtain abatement of his rent on the ground that the area of the land in his holding has been diminished by diluvion; and, with reference to the provisions of s. 31, he continues liable for the rent of the land in his holding for the ensuing year, unless he gives due notice, in the manner prescribed, that he desires to relinquish it, or unless it is let to any other person by the landlord or his agent; and it is explained that no notice can be given in respect of a portion only of any land held under the same lease or engagement. These sections show that the tenancy may continue to subsist, notwithstanding diluvion, with all its obligations and liabilities: the landlord is entitled to demand rent and the tenant [262] is liable to pay it, unless he has obtained abatement of rent or relinquished the holding. The right of an occupancy-tenant also determines by relinquishment of the holding or by his ejectment by the landlord; but ejectment can only take place in execution of a decree or order under the provisions of the Rent Act (ss. 34, 35) and in the absence of such ejectment or relinquishment, the tenant-right must be held to subsist; and this rule will hold good in respect of lands submerged, the tenant's right in the site not being lost; he is entitled to entry on the land on its re-appearance; and any entry by the landlord under such circumstances will amount to the ejectment of the tenant, and be illegal with reference to s. 34 (*b*), Rent Act.

This is the position in which the plaintiff has placed himself, if, as he asserts, he is now in possession, for there has been no relinquishment of the holding on the part of the defendants or ejectment of them in due course of law.

We cannot entertain the question of custom set up by the plaintiff, for no custom would be a justification for ejectment of the defendants in contravention of the express provisions of s. 34 (*b*), Rent Act. These are the considerations which necessarily preclude us from giving a decree declaratory of plaintiff's right to the possession of the lands in suit. He can have no right until he shows that the defendants' tenancy has legally determined under the provisions of the Rent Act. Moreover, the Civil Court cannot take cognizance of this claim with reference to the provisions of s. 95, Rent Act, as the facts show that it is a dispute or matter in which an application of the nature mentioned in cl. (*n*) of s. 95 might be made. We decree the appeal, and modify the decrees of the lower Courts, and dismiss the claim against the defendants-appellants in respect of the land, the subject of this appeal, with proportionate costs in all Courts.

1883
JAN. 9.

APPELLATE CIVIL.

5 A. 263 = 3 A.W N. (1883) 16 = 7 Ind. Jur. 618.

5 A. 263 = 3 A.W N. (1883) 16 = 7 Ind. Jur. 618.

[263] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

SUKHO BIBI AND OTHERS (*Plaintiffs*) *v.* RAM SUKH DAS (*Defendant*).*
[9th January, 1883.]

Suit for specific performance of contract—Suit on award—Act XV of 1877 (*Limitation Act*), *sch. ii, No.* 113—*Act I of* 1877 (*Specific Relief Act*), *s.* 30.

A suit for money, based on an award, which directs its payment by the defendant to the plaintiff, is virtually a suit to have the award specifically enforced; and, as by s. 30 of the Specific Relief Act, 1877, awards are placed on the same footing as contracts, No. 113, sch. ii of the Limitation Act, 1877, is applicable to such a suit.

[F., 16 A. 3 (4); R., 33 C. 881 (886) = 4 C.L.J. 162; 23 M. 593 (596); 70 P.R. 1903 = 160 P.L.R. 1903; 32 P.R. 1913; 6 S.L R. 148; D., 23 A. 285 (288); A.W.N. (1897) 144.]

THE plaintiffs in this suit claimed Rs. 365 and certain interest on that amount, under a registered award, dated the 1st April 1877. It appeared that there had been a dispute between the parties to the suit in respect of the estates of certain deceased persons, and that they had referred this dispute to arbitration. The arbitrators, by an award, dated the 1st April 1877, directed, *inter alia*, that the defendant should pay the plaintiffs Rs. 365. The present suit was instituted by the plaintiffs on the 27th July 1881. The defendants set up as a defence to it that it was barred by limitation. The Court of first instance held that the suit was within time, No. 120, sch. ii of the Limitation Act, 1877, being applicable to it. On appeal by the defendant, the lower appellate Court held that the suit was barred by limitation. It observed as follows:—"If the suit be regarded as one for the recovery of a debt, the limitation would certainly be three years. But I think the suit is one for the specific performance or enforcement of an award, and the question is, what is the period of limitation for such a suit, and the answer to it must, in my opinion, be three years, for in s. 30 of the Specific Relief Act contracts and awards are placed on the same footing *quoad* specific performance, and therefore I consider that art. 113 of the Indian Limitation Act, which prescribes a period of three years for the specific performance of a contract, applicable to this case; and I may remark that, as there is no proof in the record that the plaintiff demanded payment of the amount on the 1st April 1879, we must fall back on the date of the award, *viz.*, the 1st April 1877, as the date on which the cause of action arose, and as that is more than three years prior to the institution of the suit, the plaintiffs' claim is, in my opinion, barred."

[264] In second appeal the plaintiffs contended that the suit, being based on a registered award, was governed by No. 116 or 120 of sch. ii of the Limitation Act, and not by No. 113.

Munshi *Sukh Ram*, for the appellants.

Mr. *Howard*, for the respondent.

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* Second Appeal No. 689 of 1882, from a decree of J. Alone, Esq., Subordinate Judge of Agra, dated the 29th March 1882, reversing a decree of Maulvi Fida Husain, Munsif of Agra, dated the 6th September 1881.

1883 JAN. 9. — APPELLATE CIVIL. — 5 A. 263 = 3 A.W.N. (1883) 16 = 7 Ind. Jur. 618.

The Court (STRAIGHT and BRODHURST, JJ.) made the following order of remand :—

ORDER OF REMAND.

STRAIGHT, J.—The only title under which the plaintiffs, appellants, could claim the Rs. 365 was on the basis of the award of 1st April 1877, and what is virtually asked in this suit is to have the award specifically enforced. As by s. 30 of the Specific Relief Act it is distinctly provided that awards are to be on the same footing as contracts for the purposes of Chapter II of that Statute, we are of opinion that the lower appellate Court was right in holding that art. 113 of the Limitation Act of 1877 is applicable to the present suit. But as no date is fixed by the award for the payment of the money, and there is nothing on the findings to show when there was a demand for performance by the plaintiff and a refusal to do so by the defendant, or when the plaintiff had notice that the defendant refused performance, we must remand the case under s. 566 of the Procedure Code for a finding on the following issues :—(i) Did the plaintiff call upon the defendant to carry out the terms of the award ; if so, when ; and did the defendant refuse ? (ii) If no actual demand was made by the plaintiff, had he notice that the defendant refused to perform ; and if so, at what date had he such notice ?

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5 A. 264 = 3 A.W.N. (1883) 17.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

SHEO DIAL CHAUBEY AND ANOTHER (*Defendants*) *v.* THE COLLECTOR OF GORAKHPUR, AS MANAGER OF THE ESTATE OF NANDAN CHAUBEY AND ANOTHER (*Plaintiff*).* [10th January, 1883.]

Disqualified proprietor, suit by, and against—Act XIX of 1873 (*N.-W.P. Land-Revenue Act*), s. 205—*Act VIII of* 1879, *s.* 23.

Under s. 205 of Act XIX of 1873, as amended by s. 23 of Act VIII of 1879, a disqualified proprietor, whose property is in charge of the Court of Wards must [265] sue and be sued in the Civil Courts by and in the name of his guardian, where a guardian has been appointed, or by and in the name of the Collector of the District in which the suit is brought, where a guardian has not been appointed, whether or not the suit has for its object to set aside an act done by the ward before the date when his property came under the charge of the Court of Wards.

THIS was a suit by the Collector of Gorakhpur, as manager, under the Court of Wards, of the estates of Nandan Chaubey and Sahibzada Chaubey, minors, to set aside a transfer by sale of a one anna share in a certain village belonging to the minors. This transfer had been made by the defendants Sheo Dial and Srinath to the defendant Prag Dat before the estate of the minors had been taken under the superintendence of the Court of Wards. Subsequently to the transfer the estates of the defendants Sheo Dial and Srinath were taken under the superintendence of the Court of Wards, and were under its superintendence at the time of the institution of the suit. The suit was brought against the latter defendants

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* Second Appeal No. 683 of 1882, from a decree of R. J. Leeds, Esq., Judge of Gorakhpur, dated the 9th February 1882, affirming a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 20th August 1881.

1883 JAN. 10. — APPELLATE CIVIL. — 5 A. 264= 3 A.W.N. (1883) 17.

personally. The lower Courts gave the plaintiff a decree against all the defendants. In second appeal the defendants Sheo Dial and Srinath contended that the suit was not maintainable against them in person, as they were disqualified proprietors, and their estates were under the superintendence of the Court of Wards.

Lala *Lalta Prasad* and Babu *Jogindro Nath Chaudhri*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We consider the objection valid. The appellants are disqualified proprietors, whose property is in charge of the Court of Wards, and by s. 205 of Act XIX of 1873, as amended by s. 23 of Act VIII of 1879, disqualified proprietors, whose property is in charge of the Court of Wards, must sue and be sued in the Civil Courts by and in the name of their guardians, where guardians have been appointed, or by and in the name of the Collector of the district in which the suit is brought, where guardians have not been appointed. The language of the section is plain and comprehensive, and it makes no difference that the suit may have [266] for its object to set aside acts done by the Ward before the date when his property came under the charge of the Court of Wards, as the Judge considers. The Collector of Gorakhpur, exercising the powers of the Court of Wards, is in the peculiar position of bringing a suit on behalf of some of his wards against other wards of his, whom he has made defendants in their own persons. The suit against them cannot be maintained. We decree the appeal, and set aside the decree against the appellants.

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5 A. 266=3 A.W.N. (1883) 24.

CIVIL REVISIONAL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

ATMA RAM (*Petitioner*) *v.* BALKISHEN AND OTHERS (*Opposite Parties*).*
[16th January, 1883.]

Appeal—Addition of respondent—Civil Procedure Code, s. 559.

The Court of first instance gave the plaintiff in a suit for money a decree against the defendant *B*, exempting the defendants *A* and *H*. *B* appealed, making the plaintiff the respondent to the appeal The plaintiff did not appeal from the decree of the Court of first instance in respect of the exemption of *A* and *H*. The appellate Court made *A* a respondent to the appeal, under s. 559 of the Civil Procedure Code, and, exempting *B*, gave the plaintiff a decree against *A*. *Held*, that, inasmuch as s. 559 does not empower an appellate Court virtually to make an appeal for an appellant, who has refrained from availing himself of his privileges under the law, by introducing for him other respondents than those he has included in his petition of appeal, and it could not be said that *A* was "interested in the result of the appeal," as, having the unappealed decree of the Court of first instance behind him, his position was

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* Application No. 147 of 1882, for revision under s. 622 of the Civil Procedure Code of a decree of W. Kaye, Esq., Officiating Commissioner of Jhansi, dated the 20th January 1882, reversing a decree of J. V. Stuart, Esq., Assistant Commissioner of Jhansi, dated the 22nd September 1881.

secure, the appellate Court had improperly made *A* a respondent to the appeal and given a decree against him.

[Diss., 25 C. 565 (568); 26 C. 109 (112); N.F., 31 C. 643 (645) (F.B.) = 8 C.W.N. 496; F., 27 A. 23 (24) = 1 A.L.J. 358 = A.W.N. (1904) 155; 31 M. 442 (444) = 18 M.L.J. 452 = 4 M.L.T. 104; D., 18 B. 520 (522); 3 Bom. L R. 172 (175); R., 13 A. 78 (87); 26 C. 114 (119); 6 O.C. 159 (165); 11 K.L.R. 107.]

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THE plaintiffs in this case sued the defendants, Balkishen, Atma Ram, and Hira Lal for Rs. 480. The Court of first instance (Assistant Commissioner of Jhansi) gave the plaintiffs a decree for the sum claimed by them with costs against Balkishen, "exempting from the claim" the other defendants. The defendant Balkishen appealed from the decree, making the plaintiffs respondents to the appeal. The plaintiffs did not appeal from the decree. The appellate Court (Commissioner of Jhansi) made the defendant Atma Ram a respondent to the appeal, under s. 559 [267] of the Civil Procedure Code; and gave the defendant Balkishen a decree absolving him from liability, and made a decree for the sum claimed by the plaintiffs against the defendant Atma Ram.

The defendant Atma Ram applied to the High Court for revision of the decree of the appellate Court, contending that it had acted erroneously in making him a party to the appeal after time, and passing a decree against him; and that it had improperly exercised its discretion under s. 559 of the Civil Procedure Code in making him a party to the appeal.

Lala *Lalta Prasad*, for the petitioner.

Babu *Jogindro Nath Chaudhri* and Munshi *Sukh Ram*, for the opposite parties.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—The first Court decreed the plaintiff-respondent's claim against Balkishen and exempted Atma Ram the applicant and his other co-defendants from it, which we must treat as a dismissal of the suit to that extent. Balkishen alone appealed to the Judge, and the plaintiff preferred no appeal against the exemption of the two defendants, so that the sole question for the Judge to determine was as to whether the liability of Balkishen had been established or not. Atma Ram, the applicant, had the decree of the Assistant Commissioner in his favour, and so long as the plaintiff did not impeach it, it must have been a complete answer to any further suit. We do not think that s. 559 of the Code empowers an appellate Court virtually to make an appeal for an appellant, who has refrained from availing himself of his privileges under the law, by introducing for him other respondents than those he has included in his petition of appeal. Moreover, we do not think that it can be said that Atma Ram was interested in the result of the appeal, as having the unappealed decree of the Assistant Commissioner behind him, his position was secure. This application is allowed, and the decision of the Judge will be reversed in so far as it affects Atma Ram. We make no order as to costs.

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APPELLATE CIVIL

5 A. 268= 3 A.W.N. (1883) 15.

5 A. 268=3 A.W.N. (1883) 15.

[268] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

MADHO PRASAD (*Creditor*) *v.* BHOLA NATH (*Insolvent*).*
[11th January, 1883.]

Insolvent—Creditor when to prove debt—Application by "unscheduled" creditor—Civil Procedure Code, ss. 352, 353—Meaning of "then" in s. 352.

A judgment-debtor was declared an insolvent, and a receiver of his property appointed, under s. 351 of the Civil Procedure Code, and his creditors were ordered to come forward and prove their claims within a certain time. No creditor came forward for that purpose within such time, and in consequence the case was struck off the file, and the order appointing a receiver cancelled, and no schedule was framed under s. 352. Subsequently a creditor applied to have his name entered in such schedule. *Held*, that the applicant, notwithstanding no schedule had been framed, was an "unscheduled" creditor, and was therefore entitled, under s. 353 of the Civil Procedure Code, to make the application.

ON the 2nd March 1882, Bhola Nath, the respondent in this case, was declared an insolvent under s. 351 of the Civil Procedure Code, and his creditors were given fifteen days to come forward and prove their claims under s. 352. No creditor came forward for that purpose. On the 1st April 1882, the case was struck off, and the order stating that a receiver would be appointed was cancelled. In consequence no schedule of creditors whose debts had been proved was framed as required under s. 352. Subsequently Madho Das, the appellant, one of the creditors, applied to have his name inserted in the schedule of creditors whose debts had been proved. The lower Court refused this application, on the ground that no schedule of creditors whose debts had been proved had been framed as required by s. 352, owing to the laches of the appellant and the other creditors, and therefore the appellant was asking for an impossibility.

On appeal to the High Court the appellant contended that the lower Court should have entertained his application under s. 353, and the fact that it had not framed a schedule under s. 352 was not a bar to its entertaining the application under s. 353; and that the lower Court should have framed a schedule of the debts which were admitted by the insolvent himself in his application to be declared an insolvent, and the appellant's name should have [269] been entered in such schedule, as he did not claim more than the insolvent admitted to be due to him.

Babu *Ram Das Chakarbati*, for the appellant.

The respondent did not appear.

The Court (STUART, C.J., and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

The appellant is clearly an unscheduled creditor, and is not the less so because no schedule had been framed. He is therefore entitled, under s. 353 of the Civil Procedure Code, to apply to the Court, which had exercised insolvency jurisdiction in favour of his debtor, to receive evidence of the amount and particulars of his pecuniary claim against the said debtor, who had been declared an insolvent under s. 351 *supra*, and to seek for the insertion of his name in a schedule to be framed by the

* First Appeal No. 102 of 1882, from an order of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, dated the 27th May 1882.

Court, as a creditor for the debt he may succeed in proving. The limitation of ninety days provided by law for making such an application (see art. 174 of the Limitation Act) had not expired when the appellant made his application, and it was therefore wrongly rejected by the Court below, which has misapplied s. 352 to the case, and has misunderstood the word "then" as contained in that section. This word refers to sequence of procedure, and not to periods of time or dates. In other words, it is logical, as distinguished from chronological, in its import. We set aside that order, and direct the Court now to entertain the application, and to dispose of it according to law.

1883 JAN. 11. — APPELLATE CIVIL. — 5 A. 268 = 3 A.W.N. (1883) 15.

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5 A. 269 = 3 A.W.N. (1883) 18.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

TEGH SINGH (*Plaintiff*) v. AMIN CHAND AND ANOTHER (*Defendants*).* [12th January, 1883.]

Uncertified adjustment of decree—Civil Procedure Code, s. 258—Question as to adjustment between decree holder and third party.

Certain immoveable property having been attached in execution of a decree for money, dated in 1879, directing the sale of such property, *T*, who had purchased such property in 1880, objected to the attachment His objection having been disallowed, he sued to establish his right to the property and for the removal of the attachment. He claimed on the ground, amongst others, that the decree of 1879 had been wholly adjusted. The alleged adjustment had not been certified under s. 258 of the Civil Procedure Code. *Held*, that the provisions of that sec-[270]tion did not debar the Courts trying the suit from determining, as between *T* and the decree-holder, whether the decree of 1879 had been adjusted or not. *Sita Ram* v. *Mahipal* (1) and *Shadi* v. *Ganga Sahai* (2), followed.

[R., 10 B. 155 (163).]

THE facts of this case were as follows:—On the 11th September 1876, Daulat Singh, defendant, mortgaged to Amin Chand and Kashmiri, defendants, his interest in, among other fields, Nos. 382, 394 and 402. Subsequently Amin Chand and Kashmiri brought a suit on their mortgage, and by virtue of a compromise obtained in 1879 a decree for the recovery of Rs. 183-2-6 by enforcement of lien against the properties charged. No execution of this decree was taken out, and an arrangement was come to between Daulat Singh and his judgment-creditors, that for the satisfaction of the decree he should transfer to them his right and interests in two villages, not included in the original mortgage, named Dhawa and Gujrara. Daulat Singh, however, failed to carry out his undertaking, and the judgment-creditors thereupon instituted a suit against him, asking, alternatively, that the agreement to transfer should be enforced or rescinded. This suit was by consent referred to arbitration, and an award was passed, subsequently embodied in a decree dated in 1880, by which it was declared that Daulat Singh should do all things necessary to complete the transfer of the two villages upon payment of the sum of Rs. 24-8, less the costs of the suit, by Amin Chand and Kashmiri, or failing to making such transfer, that he should pay

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* Second Appeal No. 708 of 1882, from a decree of H. G. Keene, Esq., Judge of Saharanpur, dated the 30th March 1882, reversing a decree of R. Scott, Esq., Subordinate Judge of Dehra Dun, dated the 13th February 1882.

(1) 3 A. 533. (2) 3 A. 538.

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Rs. 255-8 with costs. On the 25th January 1880 Daulat Singh, having done nothing in obedience to the decree, Amin Chand, in execution of it, attached, among others, the fields Nos. 382, 394 and 402. Thereupon the plaintiff in this suit intervened on the strength of a sale-deed of the 13th January 1880, by Daulat Singh to him of these very fields with others, and prayed that the attachment might be removed and the property released. The application was refused, and hence the present suit against Daulat Singh, Amin Chand, and Kashmiri, which was instituted on the 9th November 1881. The relief sought was for a declaration of the plaintiff's title and an order directing the withdrawal of the attachment. The Court of first instance decreed the claim, but this decision was reversed by the District Judge on appeal, on the ground that the adjustment of the [271] decree of 1879, not having been certified to the Court executing it, could not, under the provisions of s. 258 of the Civil Procedure Code, be recognized in Court.

The plaintiff appealed to the High Court upon two grounds, *viz.*, that the defendants Amin Chand and Kashmiri could not revert to the decree obtained by them in 1879 for enforcement of lien, when it was superseded or rather satisfied by the subsequent agreement for the transfer of Dhawa and Gujrara, and the decree passed on the award in 1880; (ii) that the District Judge was wrong in holding that s. 258 of the Procedure Code prohibited him from recognizing the subsequent agreement or adjustment of the decree of 1879, such adjustment not having been certified to the Court executing that decree.

Pandit *Nand Lal*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

The Court (STRAIGHT and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—It is obvious that this latter plea must be dealt with first, and in reference to it we may remark that there are two decisions of this Court—*Sita Ram* v. *Mahipal* (1), *Shadi* v. *Ganga Sahai* (2)—directly in point, which lay down that the expression "any Court" in s. 558 has reference to Courts executing decrees, and not to a Court entertaining a separate suit. In the present instance the plaintiff, on the basis of his sale-deed, asserts his title to the fields, and is met by the defendants Amin Chand and Kashmiri with the allegation that they have a lien upon such fields by virtue of the decree of 1879. As between Daulat Singh and them, the adjustment subsequently made could not of course be recognized in any execution proceedings under s. 244 of the Code, but as between themselves and the plaintiff it is impossible to understand how or why the latter should be debarred from showing that the lien the former assert has either been abandoned, or has been discharged as effectually as if it had been satisfied by a cash payment of the judgment-debt. We think, therefore, that the Judge took an erroneous view in holding himself prohibited by s. 258 from con-[272]sidering the question as to the alleged adjustment of the decree of 1879, and the case must go back under s. 566 for a finding on the following issue:—At the time the agreement was entered into between Daulat Singh and the defendants Amin Chand and Kashmiri, as to the transfer of the villages of Dhawa and Gujrara, was it the intention of the parties that the decree of 1879 should be superseded by such new arrangement;

(1) 3 A. 533. (2) 3 A. 538.

and was such agreement regarded by them at that time as an adjustment of that decree?

In determining this issue the Judge may advantageously peruse some remarks of this Court at page 696 of the third volume of the Allahabad Series, Indian Law Reports, as showing the principle to be applied in the matter of mortgage, which may guide him in determining the question of intention in this case.

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5 A. 272 = 3 A.W.N. (1883) 20 = 7 Ind. Jur. 619.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

KALKA PRASAD (*Judgment-debtor*) v. RAM DIN AND ANOTHER (*Decree-holders*).* [17th January, 1883.]

Execution of decree—Cross-decrees—Simple money-decree—Decree enforcing mortgage—Civil Procedure Code, ss. 246, 247.

Section 246 of the Civil Procedure Code is applicable to cross-decrees and not to cross-claims under one decree. To make s. 247 of the Code applicable in the case of cross-claims under one decree, the parties entitled thereunder to recover from each other must hold the same character and possess identical rights of enforcing execution, and enforcement of the decree can only be refused, or satisfaction entered up, when this is the case.

Held, therefore, where a decree for money of a Court of first instance directed that the money should be realizable from certain specific property of the defendant, and exempted his person and other property, and the lower appellate Court modified this decree by extending it to the person of the defendant, and in second appeal the High Court set aside the lower appellate Court's decree and restored that of the first Court, directing that the costs of the defendant in the lower appellate Court and in the High Court should be paid by the plaintiff, that, inasmuch as the plaintiff was only entitled to recover the judgment-debt due to him from the defendant from such specific property, whereas the defendant was entitled to recover the judgment-debt due to him from the plaintiff from his person and property, the provisions of s. 247 were not applicable.

[Diss., 16 A. 395 (396); N.F., 23 M. 121 (122); R., 16 C.P.L.R. 73 (74).]

THE respondents obtained a decree against the appellant for the principal and interest due on a bond, costs of the suit, and [273] Rs. 6-13-0 interest on the amount claimed for the period the suit was pending, such decree being enforceable only against certain property belonging to the appellant, hypothecated in the bond, the person of the appellant and his other property being exempted. The respondents appealed, and the lower appellate Court modified the decree of the first Court, by extending it to the person of the appellant. The appellant preferred a second appeal, and the High Court reversed the decree of the lower appellate Court, and restored that of the first Court. The High Court's decree directed that the respondents should pay the appellant the costs incurred by him in the High Court and the lower appellate Court. The question in this case was, whether the appellant should be allowed to realize the amount of these costs from the respondents or whether such amount should be deducted from the sum due to the respondents. The lower appellate Court held that the amount should be deducted from the sum due to the respondents. It observed:—"The terms of ss. 246 and

* Second Appeal No. 33 of 1882, from an order of H.A. Harrison, Esq., Judge of Farukhabad, dated the 13th May 1882, reversing an order of Pandit Jagat Narain, Subordinate Judge of Farukhabad, dated the 29th March 1882.

1883 JAN. 17. — APPELLATE CIVIL. — 5 A. 272 = 3 A.W.N. (1883) 20 = 7 Ind. Jur. 619.

247 are general, and this Court holds that both, in equity and law, execution for costs should not be taken out, but that the amount due should be deducted from the decree for the larger sum." For the appellant it was contended that ss. 246 and 247 of the Civil Procedure Code were not applicable in this case.

Pandit *Bishambhar Nath*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Kashi Prashad*, for the respondents.

The Court (STRAIGHT and BRODHURST, JJ.) delivered the following judgment :—

JUDGMENT.

STRAIGHT, J.—In our opinion the decision of the Judge cannot be sustained. Section 246 of the Code, dealing as it does with cross-decrees, has no application to the present case, which relates to cross-claims under one decree. The right of the respondents under their decree were limited to the realization of their judgment-debt solely against the property hypothecated in the bond on which the suit was brought, whereas the appellant was entitled to recover his costs, not only from the property, but the person of the respondents. To make s. 247 of the Code applicable, we think that the parties entitled under one decree to recover from [274] each other must hold the same character and possess identical rights of enforcing execution, and that enforcement of the decree shall only be refused, or satisfaction entered up, when this is the case. We come to this conclusion in the present instance with extreme regret, having regard to all the circumstances, but it appears to us we have no alternative but to decree the appeal with costs.

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5 A. 274=3 A.W.N. (1883) 49.

CIVIL REVISIONAL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

KAULESHAR BAI AND OTHERS (*Defendants*) *v.* DOST MUHAMMAD KHAN (*Plaintiff*).* [15th January, 1883.]

Small Cause Court suit—Institution in Court of Subordinate Judge invested with powers of a Court of Small Causes—Trial by Subordinate Judge not so invested—Transfer of suit—Appeal—Jurisdiction—Civil Procedure Code, s. 25.

A suit of the nature cognizable in a Court of Small Causes was instituted in the Court of a Subordinate Judge, the Judge of which at the time of the institution of the suit was personally invested with Small Cause Court jurisdiction. That Judge retired from office without trying the suit, and the District Judge directed his successor, who was not invested with Small Cause Court jurisdiction, to try it, and he did so. *Held*, that it must be taken that the suit was transferred under s. 25 of the Civil Procedure Code to the Court of the Subordinate Judge; and that, therefore, regard being had to the provisions of that section, that the Court trying any suit withdrawn thereunder from a Court of Small Causes shall, for the purposes of such suit, be deemed a Court of Small Causes, no appeal would lie in the case to the District Judge.

[**Diss.**, 31 C. 1057 (1061); **F.**, 83 P.R. 1903=154 P.L.R. 1903; **R.**, 13 A. 324 (225).]

THIS was an application by the defendants in a suit for revision under s. 622 of the Civil Procedure Code. It appeared that the suit had

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* Application No. 28 of 1882, for revision under s. 622 of the Civil Procedure Code of a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 11th September 1882, reversing a decree of Maulvi Mahmud Bakhsh, Subordinate Judge of Ghazipur, dated the 10th August 1881.

been instituted in the Court of the Subordinate Judge of Ghazipur, it being a suit of the nature cognizable in a Court of Small Causes, and the Judge at the time of its institution of that Court being invested with the powers of a Court of Small Causes. Before the suit could be tried that Judge retired from service, and a new Subordinate Judge was appointed. The new Subordinate Judge was not invested with the powers of a Court of Small Causes. Under the orders of the District Judge the new Subordinate Judge entertained the suit, and dismissed it. The [275] plaintiff appealed to the District Judge, who reversed the first Court's decision and gave the plaintiff a decree.

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CIVIL REVISIONAL.

5 A. 274 = 3 A.W.N. (1883) 49.

The grounds on which the defendants applied for revision were that the District Judge was not competent to entertain an appeal from the first Court's decree, as the suit had been originally instituted in a Court of Small Causes, and the District Judge's order could only be regarded as one for transfer under s. 25 of the Civil Procedure Code.

Mr. *Hill* and Munshi *Kashi Prasad*, for the defendants.

Mr. *Conlan*, for the plaintiff.

The Court (OLDFIELD and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—We must give effect to the first and second pleas of this application. It is unquestionable that the respondent's suit had been instituted in the Court of the late Subordinate Judge of Ghazipur, in the exercise of his Small Cause Court jurisdiction, and that on his retirement from office the District Judge directed his successor, who is not invested with Small Cause Court jurisdiction, to try the case. This action of the Judge must be held to have taken place under the terms of s. 25 of the Civil Procedure Code, which provides that "the Court trying any suit withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes." It was contended for the plaintiff that the suit was not withdrawn from a Court of Small Causes, as that Court had gone out of existence at the time of the Judge's order. But this argument is without force. The suit was on the register of a competent Small Cause Court, which was in existence when the suit was lawfully instituted therein. If the suit was not withdrawn from that Court, from what Court was it withdrawn? Not from that of the late Subordinate Judge, on whose register the suit, as a matter of fact, had never been entered, and could not legally have been entered, as an original suit, under the mandatory provisions of s. 15 of the Procedure Code. We allow the first and second pleas; and, setting aside the decree of the lower appellate Court, we restore that of the Subordinate Judge.

1883
JAN. 24.

APPELLATE CIVIL.

5 A. 276= 3 A.W.N. (1883) 31= 7 Ind. Jur. 620.

5 A. 276=3 A.W.N. (1883) 31=7 Ind. Jur. 620.

[276] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

MAHTAB RAI AND OTHERS (*Defendants*) *v.* SANT LAL (*Plaintiff*).*
[24th January, 1883].

Mortgage—Purchase by one of several mortgagees of a share of the mortgaged property—Redemption by one of the mortgagors of his own share.

The fact that one of several mortgagees has acquired the equity of redemption of the share of one of the mortgagors in the mortgaged property does not give another of the mortgagors the right to redeem his share in the mortgaged property. *Sobha Shah* v. *Indarjit* (1), distinguished. *Kuray Mal* v. *Puran Mal* (2) and *Nawab Azimut Ali Khan* v. *Jawahir Singh* (3), referred to.

[R., 20 A. 23 (27) (F.B.)=A.W.N. (1897) 163 ; 21 B. 619 (626).]

THE material facts of this case were as follows:—Certain persons, named Baldeo Sahai and Muthra Das, mortgaged their shares in mauza Sadawalla, together with shares in other mauzas, by deed dated the 11th January 1867, to certain persons, named Jawahir Singh and Khyrati, for Rs. 20,000. By arrangement between the mortgagees, Khyrati became entitled to the sole interest in this mortgage. He executed a deed, dated the 31st March, 1876, in favour of Sawai Singh and Kirparam, defendants in this suit, by which he assigned or sub-mortgaged (on this point the parties were not agreed) his interest as mortgagee to them for Rs. 20,000. Then Sawai Singh and Kirparam, by deed dated the 30th March 1879, assigned or sub-mortgaged a moiety of their interests as mortgagees to the defendant Mahtab Rai for Rs. 10,000. It appeared that the rights of the mortgagors in portions of the mortgaged property were sold in execution of decrees and purchased by different persons, one of whom, Balikram, on the 21st September 1874, in execution of a decree against one of the mortgagors, purchased his interests in mauza Sadawalla, and subsequently sold the same to Sant Lal, the plaintiff in this suit. Mahtab Rai also, subsequently to his obtaining an interest as mortgagee, purchased at auction-sale a share of one of the mortgagors in some of the mortgaged property, the sale being confirmed in April 1879. Thus, the original mortgagees came to be represented by Sawai Singh, Kirparam, and Mahtab Rai, and the last had purchased a [277] share of the mortgagors in the mortgaged property. The plaintiff, representing one of the mortgagors, brought the present suit to redeem his share, by paying a proportionate amount of the mortgage-debt; and the lower Courts gave him a decree. In second appeal the mortgagees, defendants, contended that the plaintiff was not entitled, under the circumstances of the case, to redeem a share of the mortgaged property.

Mr. *Conlan* and Pandits *Ajudhia Nath*, *Bishambhar Nath* and *Nand Lal*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarkanath Banarjee*), and Babu *Ratan Chand*, for the respondent.

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* Second Appeal No. 631 of 1882, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 11th March 1882, affirming a decree of Mir Akbar Husain, Munsif of Bijnor, dated the 28th July 1881.

(1) 5 A. 149. (2) 2 A. 565. (3) 13 M.I.A. 401.

1883 JAN. 24. APPELLATE CIVIL. 5 A. 276=3 A.W.N. (1883) 31=7 Ind. Jur. 620.

The judgment of the Court (OLDFIELD and BRODHURST, JJ.), after stating the facts, and the contention of the appellants, continued as follows:—

JUDGMENT.

OLDFIELD, J.—This contention is, in our opinion, correct. When the mortgagee has, or if there are more than one, all the mortgagees have, acquired the equity of redemption of a part of the mortgaged property, a mortgagor may redeem a share of the mortgaged property by payment of a proportionate part of the mortgage-debt—*Sobha Shah* v. *Indarjit* (1). But this is not such a case, for only one of several mortgagees has acquired a share of the mortgaged property. The case to which our attention was drawn—*Kuray Mal* v. *Puran Mal* (2) was one of the former description, and following the ruling of the Privy Council in *Nawab Azimut Ali Khan* v. *Jawahir Singh* (3), it was held that, when the mortgagees bought the share of a mortgagor, one of the mortgagors was entitled to redeem his own share, but not that of another mortgagor against the will of the mortgagees. We reverse the decrees of the lower Courts, and dismiss the suit with costs.

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5 A. 277=3 A.W.N. (1883) 34=7 Ind. Jur. 621.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

BISHUNATH (*Defendant*) v. ILAHI BAKHSH (*Plaintiff*).*
[23rd January, 1883.]

Civil Procedure Code, s. 17—Contract—Breach—"Cause of action"—Jurisdiction.

The expression "cause of action," as used in s. 17 of the Civil Procedure Code, does not mean *whole* cause of action, but includes *material part* of the cause of action.

[278] In a suit for compensation for breach of a contract, the making of the contract is a material part of the cause of action.

Held, therefore, where a contract was made at *C* and broken at *A*, that the Court at *C* had jurisdiction to try the suit for compensation for the breach of such contract.

Llewhellin v. *Chunni Lal* (4) and *Gopikrishnagossami* v. *Nilkomul Banerjee* (5), followed. *DeSouza* v. *Coles* (6) and *Jumoonah Pershad* v. *Zaibunnissa* (7), dissented from.

[R., 25 A. 48 (52); 15 B. 93 (102); D., 11 B. 649 (652).]

THE plaintiff in this case, to whom the defendants had leased the right of cutting timber on a certain estate, sued for damages for the breach of a covenant in the lease, whereby the defendants promised to preserve the timber from injury. It appeared that the estate in question was situated within the local jurisdiction of the Munsif of Akbarpur, Zila Cawnpore; that some of the defendants resided at Akbarpur and some at Cawnpore; and that the lease had been entered into at Cawnpore. The suit was instituted in the Court of the Munsif of

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* First Appeal No. 151 of 1882, from an order of A. Sells, Esq., Judge of Cawnpore, dated the 16th August 1882.

(1) 5 A. 149. (2) 2 A. 565. (3) 13 M. I. A. 404. (4) 4 A. 423. (5) 13 B.L.R. 461. (6) 3 M.H.C.R. 384. (7) 5 C.L.R. 268.

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Cawnpore, and was subsequently transferred to the Court of the Subordinate Judge of that place. The Subordinate Judge held that the suit should not have been instituted in the Court of the Cawnpore Munsif, but in that of the Akbarpur, as the cause of action had arisen within the local jurisdiction of the latter Court, the breach of the contract upon which the suit was based having taken place within that jurisdiction; and directed that the plaint should be returned to the plaintiff to be presented to the proper Court. The plaintiff appealed to the District Judge of Cawnpore, who held as follows on the question, whether the suit had been properly instituted in the Court of the Cawnpore Munsif:—

"The contract was undoubtedly entered into at Cawnpore, and the breach now complained of must clearly have occurred in the Akbarpur jurisdiction. Of the defendants, some live in Cawnpore and some in Akbarpur. The lower Court has held that the cause of action arose in the jurisdiction of the Court of Akbarpur, and that therefore the suit would not lie in the Court of the City Munsif, where it was actually filed. Undoubtedly the breach of contract occurred in Akbarpur, but the breach of contract was actually only [279] a portion of the cause of action. There could be no action without the contract, which therefore forms part of the cause of action; and it has been held that the term 'cause of action' comprehends 'material portion of the cause of action'—*Llewhellin* v. *Chunni Lall* (1) and the ruling is consonant with the view of the law taken by Macpherson in his edition of the Civil Procedure Code, where he says that 'the more convenient and liberal doctrine is that which permits an action to be brought either in the *forum* of the place where the contract was made, or in that where the performance was to have taken place. Either the contract may be considered as affording a cause of action, to enforce performance, or the non-performance as giving cause of action for damages therein incurred.' Under this view I hold that the present suit could have been brought either in the Cawnpore Court or the Akbarpur Court, looking at the cause of action alone.' The District Judge accordingly remanded the suit for re-trial.

Bishunath, one of the defendants, appealed to the High Court, contending that no part of the cause of action arose within the jurisdiction of the Munsif of Cawnpore, and he could not therefore entertain the suit.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

Shaikh *Moula Bakhsh*, for the respondent.

The Court (STRAIGHT and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—It is admitted for the purpose of argument that the contract was made at Cawnpore, and that the breach of it occurred at Akbarpur. The obligation, therefore, under which the appellant was bound to the respondent, was created within the jurisdiction of the Cawnpore Court, while the failure to fulfil it happened outside in another jurisdiction. We have already ruled in *Llewhellin* v. *Chunni Lall* (1) that the expression "cause of action," as used in s. 17 of the Civil Procedure Code, does not mean *whole* cause of action, but includes *material part* of the cause of action. In the present case the right of the respondent to come into Court arises under a contract, whereby his legal *status* in [280] reference to the appellant, out of which sprung his title to sue, was created. It is impossible therefore to say that the contract itself

(1) 4 A 423.

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was not a material portion or part of his cause of action, for without it his right to relief against the appellant would not exist. It must be admitted that the decisions of the several High Courts upon this point have not been uniform, and that *DeSouza* v. *Coles* (1) and *Jumoonah Pershad* v. *Zaibunnissa* (2) are authorities against our view. In the former case, however, HOLLOWAY, J., seems to have proceeded under a misapprehension of a ruling of the Privy Council in *Luckmee Chund* v. *Zorawur Mull* (3) and his proposition, that "the making of the contract is a matter perfectly indifferent, and is in part of the cause of action," is one we should hesitate to adopt. We think, in accordance with the judgments of BIRCH and MARKBY, JJ., in *Gopikrishnagosami* v. *Nilkomul Banerjee*(4), that a suit like the present may be brought either at the place where the contract was made, and the defendant's obligation established, or where performance was to be had and breach took place. The respondent was therefore in his right in going to the Cawnpore Court, and the Judge's decision is correct.

Appeal dismissed.

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5 A. 280 = 3 A.W.N. (1883) 20.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Brodhurst.

BATESHAR NATH (*Defendant*) v. FAIZ-UL-HASAN (*Plaintiff*).*
[18th January, 1883.]

Partition—Objection raising question of title—Determination of question—Appeal— Res judicata—*Act XIX of* 1873 (*N.-W.P. Land-Revenue Act*), ss. 113, 114.

Where in proceedings for partition under Act XIX of 1873, a question of title to land is raised between the parties to the partition, and there is an adjudication of such question, such adjudication will operate as a bar to a suit between the same parties in the Civil Courts to contest the title to such land, notwithstanding that in some respects such adjudication may have been irregular or defective. *Har Sahai Mal* v. *Maharaj Singh* (5) and S. A. No. 129 of 1881, decided the 27th July 1881 (6), followed.

Held, in this case, on consideration of the partition proceedings, that the question of title raised therein had been adjudicated on and therefore the rule mentioned above applied.

[281] THIS was a suit in which the plaintiff claimed possession of a third share of 20 bighas and 17 biswas of land in a village called Shahpur. It appeared that there had been an imperfect partition of the village in question. Two pattis had been formed, one known as the patti of Ghulam Hamdani, the other as Mithu Lal's. The "*abadi*" (inhabited portion) of the village and 98 bighas 9 biswas of arable land were not partitioned. On the 30th July 1879, the plaintiff in this case, who had acquired by purchase the patti of Ghulam Hamdani, applied for partition of the "*abadi*" and the 98 bighas 9 biswas of undivided or "*shamilat*" land. The defendant in this case, Mithu Lal's brother and heir, the proprietor of Mithu Lal's patti, made an objection to the effect that possession of 20 bighas and 17 biswas of the "*shamilat*" land had been transferred to Mithu Lal,

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* First Appeal No. 90 of 1882, from an order of F. E. Elliot, Esq., Judge of Mainpuri, dated the 6th June 1882, reversing an order of Babu Anant Ram, Munsif of Mainpuri, dated the 15th February 1882.

(1) 3 M.H.C.R. 384. (2) 5 C.L.R. 268. (3) 8 M.I.A. 291.
(4) 13 B.L.R. 461. (5) 2 A. 294. (6) Not Reported.

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at the time of settlement, some ten years before, under a private arrangement between him and Ghulam Hamdani, certain land in another village being transferred to the latter, and consequently the plaintiff had no interest in these 20 bighas and 17 biswas, and partition should only be effected of the remaining 77 bighas and 12 biswas. The plaintiff replied to this objection that the land in dispute was recorded as included in the "*shamilat*" land, and that no such transaction as set up by the defendant had taken place in respect of such land. The Assistant Collector making the partition, by an order dated the 29th April 1879, decided, on oral and documentary evidence, "that the 20 bighas and 17 biswas of land, regarding which objection had been raised, was proved to be in the objector's possession; that the plea raised by Bateshar Nath, objector, was fit to be allowed; and that the land in question should be excluded from the partition." He therefore ordered "that the objector's objection be allowed; that the 20 bighas and 17 biswas of land, regarding which objection had been taken, and which was in the objector's possession, should be excluded from the partition; and that partition proceedings should be taken in regard to the remaining land." The plaintiff appealed from the Assistant Collector's order to the Collector. The latter dismissed the appeal, observing that the decision appealed related to the question as to whether the defendant was entitled to "*khas* (special) possession" of the 20 bighas and 17 biswas of land in question, and this question was virtually one of proprietary right, and under s. 114 of the North-[282]Western Provinces Land-Revenue Act, 1873, should be tried in the Civil Courts. The plaintiff subsequently brought the present suit against the defendant in the Civil Court, in which he claimed his share of the land in question, and the cancelment of the Assistant Collector's order excluding it from partition. The defendant set up as a defence to the suit that it was not maintainable, as the order in question had been made under s. 113 of Act XIX of 1873, and was equivalent to the decision of a Civil Court, and could be questioned only by appeal, as provided in s. 114 of that Act, and not by a separate suit. The Court of first instance allowed this defence, observing as follows:—"It is admitted by both parties that the application for partition presented to the Revenue Court on the 30th July 1879, was under s. 111, Act XIX of 1873, and the defendant's objection to it was made under s. 112 of the said Act. Now the only question in this case is, whether the Assistant Collector's order, excepting the 20 bighas 17 biswas of land, was under ss. 113 and 114, or any other section of the Act. Section 113 runs thus:—"If the objection raises any question of title or of proprietary right, which has not already been determined by a Court of competent jurisdiction, the Collector of the District or Assistant Collector may either decline to grant the application, until the question in dispute has been determined by a competent Court, or he may proceed to inquire into the merits of the objection." In the latter case, under s. 113, he ought to proceed like a Civil Court. Hence the Revenue Court has no alternative but the two aforesaid, in matters of objections under s. 112. Now it is to be seen in this case which of the two modes was adopted by the Assistant Collector, *viz.*, whether he refused to grant the application for partition until the question of title or proprietary right was decided, or proceeded himself to decide the question. The finding of the Assistant Collector, dated the 29th April 1880, distinctly shows that he did not refer the party praying for partition to the Civil Court. Hence he did not adopt the first course mentioned in s. 113. The Court cannot but

consider that the Assistant Collector adopted the second course, and excepted the disputed land from partition. Though the Assistant Collector did not exactly observe the procedure prescribed for a civil suit in deciding upon the defendant's objection, yet the object and result of the finding is the same, as it would have been in case that pro-[283]cedure had been observed. The defendant clearly raised the question of title and proprietary right by his objection, and it having been allowed, the land in dispute was excepted from partition. Hence I consider the decision of the Assistant Collector as the decision of a Civil Court within the meaning of s. 114, Act XIX of 1873. The plaintiff's appeal to the Collector against the order of the Assistant Collector, dated the 29th April 1880, was, in my opinion, altogether irregular: Act XIX does not probably allow that any such appeal should be preferred."

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On appeal by the plaintiff the lower appellate Court disallowed the defence, holding that the suit was maintainable. It observed as follows:—"The question whether the Revenue Court having before it a dispute involving proprietary right arising in the course of partition proceedings, and having disposed of the matter itself instead of referring the objector to the Civil Court, but having failed to observe the procedure enjoined by law for the trial of original civil suits, its order is only open to appeal to the District Court or may be set aside by regular suit, has been authoritatively settled—*Kishun Sahai* v. *Raghoo Singh* (1). If the Revenue Court has adjudicated on the question of title, its order is only open to revision on appeal, though its procedure may have been irregular, but if not, then a regular suit may still be instituted to establish the title in dispute. In the present instance it is admitted on both sides that there was a question of title, and that the Revenue Court disposed of the objection giving rise to it itself, but did not follow the prescribed procedure. It remains to be considered whether there was any definite adjudication upon the question of title or not. It is clear that there was not. The Revenue Court allowed the objection, but on the ground solely of possession. The objector claimed as his own a certain portion of the land of which partition was sought. The Revenue Court did not decide whether this portion was in fact the separate property of the objector, or whether the petitioner for partition had a share in it. It merely found summarily that the objector was in possession and therefore excluded it from partition. Under these circumstances the appellants' suit was admissible." The lower appellate Court accordingly remanded the suit for re-trial.

[284] On appeal from this order the defendant contended that the decision of the Revenue Court was a bar to a fresh adjudication of the question of title.

Pandits *Bishambhar Nath* and *Nand Lal*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Munshi *Hanuman Prasad*, for the respondent.

The Court (BRODHURST and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—Having carefully considered the proceedings of the Assistant Collector, terminating with his decision and order of the 29th April 1880, we must allow the pleas of this appeal. The Assistant Collector indubitably proceeded under the provisions of s. 113 of Act XIX

(1) N.W.P.H.C.R. (1870) 64.

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of 1873: he made an official inquiry, and took evidence on the issue as to the validity or invalidity of the objection that a portion of the land, partition whereof was claimed as being joint land, was the exclusive "share" of, and as such possessed as his property by, one of the parties to the partition case. The Assistant Collector determined this question on oral and documentary evidence in favour of the objector before him, finding that an equivalent for the land in question had been given to the other side in another village. The Assistant Collector found judicially that "the lands in question for ten years had been the *share* of Mithu Lal under a private partition, which took place between Ghulam Hamdani and Mithu Lal, *and* are still in the objector's separate possession." The other side had denied the consideration by way of exchange, had negatived the objector's title, and alleged his own title to have the land in question treated as *shamilat* land, and brought into partition in his favour. The Assistant Collector decided this question against the petitioner seeking for partition; and in doing so he did much more than merely find the objector to be in possession. It may be true that the Assistant Collector's proceedings were in some respects irregular or defective; but they must nevertheless be regarded as held under s. 113 of the Revenue Act; and they were therefore questionable under the following sections of the Act, and not by a separate suit. The cases of *Har Sahai Mal* v. *Maharaj Singh* (1) and S.A. No. 129 of 1881, decided **[285]** the 27th July 1881 (2) are in point, and are properly applicable to the case before us. We must restore the decree of the first Court, setting aside the order of remand. This appeal is decreed with costs.

Appeal allowed.

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5 A. 285 = 3 A.W.N. (1883) 31 = 7 Ind. Jur. 672.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

KASIM HUSAIN AND ANOTHER (*Defendants*) *v.* SHARIF-UN-NISSA (*Plaintiff*).* [24th January, 1883.]

Muhammadan Law—Gift—Reservation of income—Condition against alienation—Undivided property—Indivisible property.

B owned a one-twelfth share of a *muafi* estate and a dwelling-house. As owner of the dwelling-house, she owned a share in a stair-case, privy, and door, which were held by her jointly with the owners of adjoining dwelling-houses. She made a gift of her property, transferring the dominion over it to the donees, but reserving the income of the share of the *muafi* estate for life, and stipulating against its alienation.

Held, that the gift of the one-twelfth share of the *muafi* estate, being a gift of a specific share was not open to objection under Muhammadan Law, and such gift was not vitiated by the mere reservation of the income of the share, or by the condition against alienation. *Nawab Umjad Ali Khan* v. *Mohumdee Begum* (3), followed.

Held, also, that the gift was not invalid under Muhammadan Law, so far as it related to the stair-case, privy, and door, as these things, though undivided property, were incapable of division, and a gift of part of an indivisible thing was valid under that law.

[R., 13 B. 352 (356); D., 11 A. 1 (12).]

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* Second Appeal No. 693 of 1882, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 13th February 1882, modifying a decree of Maulvi Ahmad Hasan, Munsif of Amroha, dated the 31st October 1881.

(1) 2 A. 294. (2) Not Reported. (3) 11 M.I.A. 517.

1883 JAN. 24.

APPELLATE CIVIL.

5 A. 285 = 3 A.W.N. (1883) 31 = 7 Ind. Jur. 672.

THE plaintiff in this suit claimed, as an heir to one Bechi, deceased, possession of two-thirds of a one-twelfth share of a certain *muafi* estate, and two-thirds of a certain dwelling-house and appurtenances, by cancelment of an instrument, dated the 1st July 1879, executed by Bechi, transferring the property to the defendants. The material portion of this instrument, which was described in the proceedings as a "*tamlik-nama*," was as follows:—

"I, Bechi, ... do hereby declare that a one-twelfth *muafi* share . . . . and a dwelling-house containing a room facing north and east and five yards of land in front thereof, two halls (*dalan*) facing the east, a door, a privy, a court-yard, and a stair-case . . . . constitute my ancestral property and are held by me under a partition [286] deed . . . . I have made Kasim Husain and Nazim Husain (defendants) . . . . absolute owners of the above property . . . . together with all its boundaries, "*asli*" and "*dakhili*" rights, whether large or small and appertaining to it. The property is free from the right of any one else and unincumbered by hypothecation, charge, gift, sale, or mortgage. There is nothing to prevent the validity of the transfer, and the property is in my exclusive possession up to this day, and I have placed them in proprietary possession thereof. Neither I nor my heirs have any right or interest left in it: I have substituted (Kasim Husain and Nazim Husain) on the following terms:—During my lifetime the income of the property shall remain under my control; after my death they shall become absolute proprietors thereof in equal shares and apply its income to meet their necessary expenses: they shall not have power at any time to transfer or create a charge upon the property: should they directly or indirectly transfer the property such transfer shall be invalid in Court in face of this instrument."

The plaintiff contended that, on the proper construction of the instrument, the transfer of the property in dispute to the defendants was invalid under Muhammadan Law, except as to one-third, as the transfer was one by will, and had been made without the consent of the transferor's heirs. The Court of first instance held that the transfer was not by will but by gift *inter vivos*, and dismissed the suit. On appeal by the plaintiff the lower appellate Court remanded the case for the trial of the issues whether the property in dispute was joint or divided, and if joint, whether the gift was valid under Muhammadan Law; whether to give validity to a gift the Muhammadan Law required that possession should be given to the donees; and whether the defendants had obtained possession of the property on the execution of the instrument of gift. The first Court held that the gift of the one twelfth share of the *muafi* estate was invalid under Muhammadan Law, that property being joint; that the gift of the house itself, and the land and court-yard attached to it, was valid, the same being divided or separate property; but that the gift of the stair-case, privy, and door was invalid, as these things were not divided or separate property, but the undivided or common property of the donor and other persons. In respect of the question whe-[287]ther possession of the subject-matter of the gift had been delivered to the donees at the time it was made, the first Court found that possession of the house had been delivered to them, but not of the remainder of the property, observing, as regards the share of the *muafi* estate, that the donor had received the profits thereof as long as she had lived. It therefore held that the gift, except in so far as it related to the house, was invalid under Muhammadan Law, on the ground that possession had

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not been immediately delivered to the donees. On the return of these findings to the lower appellate Court, that Court accepted them, as well as the law laid down by the first Court with regard to the validity of the gift, and modified the first Court's decree accordingly; that is to say, it gave the plaintiff a decree for the share of the *muafi* estate, the door, the stair-case, and the privy, and dismissed the claim in respect of the house and court-yard.

The defendants appealed to the High Court on the ground that the reservation by the donor of the income of the share of the *muafi* estate for life did not invalidate the gift thereof to them, inasmuch as the share was transferred to them absolutely, and possession thereof surrendered to them by the instrument of gift. The plaintiff objected under s. 564 of the Civil Procedure Code that the gift was wholly invalid under Muhammadan Law, as it had been made while the donor was suffering from death-illness (*marz-ul-maut*); and that possession of the house had not been delivered, inasmuch as the donor lived in it until she died.

Maulvi *Obaidul Rahman*, for the appellants.

Shah *Asad Ali*, for the respondent.

The Court (STRAIGHT and OLDFIELD, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—The objections taken by the defendants are valid. The deed purports to transfer the title in the donor's share in the *muafi* estate to defendants and constitutes them proprietors, but reserves to the donor the income for life. A gift of specific shares is not open to objection under Muhammadan Law, and the gift is not otherwise void, by reason of the condition for reserving to the donor the profits, either for want of the seizin required [288] by Muhammadan Law of the property given, or in consequence of the condition vitiating the gift. It was held by the Privy Council in *Nawab Umjad Ally Khan* v. *Mohumdee Begum* (1) that though the transfer of a legal title will satisfy that provision of the Muhammadan Law which relates to the point of seizin in its legal and technical sense, yet that alone will not suffice when no intention exists to transfer the beneficial ownership, either present or future, but when there is a real transfer of property by a donor in his lifetime under the Muhammadan Law, reserving not the dominion over the *corpus* of the property, nor any share of dominion over the *corpus*, but simply stipulating for and obtaining a right to the recurring produce during his lifetime, there will be a complete gift by Muhammadan Law. Their Lordships observe:—"The text of the *Hedaya* seems to include the very proposition and to negative it. The thing to be returned is not identical, but something different. See *Hedaya*, tit. 'Gifts,' Vol. III, Book XXX, p. 294, where the objection being raised that a participation of property in the thing given invalidates the gift, the answer is, the donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use of the whole indivisible article, for his gift related to the substance of the article, not to the use of it." In that case the subject of the gift was Government Promissory Notes, the interest of which had been reserved by the donor; and their Lordships go on to say: "Again, if the agreement for the reservation of the interest to the father for his life be treated as a repugnant condition—repugnant to the whole

(1) 11 M.I.A. 517.

enjoyment by the donee—here the Muhammadan Law defeats, not the grant, but the condition. *Hedaya*, tit. 'Gifts,' Vol. III, Book XXX, p. 307." The mere reservation of the income of the estate will not therefore vitiate the gift, and the Subordinate Judge's finding in this respect is erroneous. The deed contained a condition against alienation, but that will not vitiate the gift by Muhammadan Law.

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The appellant's objection as to the finding, in respect of the staircase, door, and privy, is also valid. This portion of the gift has been disallowed because the above things are undivided.

[289] On this subject *Hedaya*, on "Gifts," Book XXX, Ch. I, is as follows:—"A gift of part of a thing which is capable of division is not valid unless the said part be divided off and separated from the property of the donor, but a gift of part of an indivisible thing is valid." The things referred to appear to be common to the occupants of the premises which in other respects were divided, and are incapable of division, and the donor gave all her interest in them to the donees; the gift is not in consequence invalid. It is obviously absurd to give effect to the gift in respect of a house, and disallow all means of ingress and egress.

The objections by the respondent are not valid. The Courts have found, as a fact, that the deed was executed when the donor was in a good state of health, and that possession was given in the house. The appeal is decreed, and the suit dismissed with costs.

Appeal allowed.

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5 A. 289=3 A.W.N. (1883) 33.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

RADHA PRASAD SINGH (*Decree-holder*) v. BHAGWAN RAI AND OTHERS (*Judgment-debtors*).* [30th January, 1883.]

Execution of decree—Decree payable by instalments—Default—Waiver—Estoppel—Application for execution as provided for in case of default—Application to recover instalments—Act XV of 1877 (*Limitation Act*), *sch. ii, No.* 179.

A decree for the payment of money directed that an amount less than the amount sued for should be paid by instalments, and that if default were made in payment of one instalment, the amount sued for should be payable. Default having been made the decree-holder, on the 7th May 1877, applied for execution of the decree for the larger amount. It appeared that at this time, although the instalments had not been paid regularly, the decree-holder had received in full all the instalments which had fallen due excepting the instalment falling due in the previous September, that is September 1876, of which he had received only a part. The application of the 7th May 1877, was struck off the file. The decree-holder subsequently accepted the remaining instalments, which were paid on due dates. On the 28th August 1878, the decree-holder applied for payment of an instalment which had been paid into Court. On the 8th September 1881, the decree-holder applied for execution of the decree for the larger amount payable thereunder in case of default, with reference to the default in respect of the instalment for September 1876. The Court refused to allow execution to issue for such amount but allowed it to issue for the balance of the instalment for September 1876.

[290] *Per* OLDFIELD, J.—That the acceptance by the decree-holder of the instalments falling due after September 1876, notwithstanding default had been made in respect of the instalment for September 1876, amounted to a

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* First Appeal No. 60 of 1882, from an order of Maulvi Mahmud Bakhsh, Subordinate Judge of Ghazipur, dated the 16th March 1881.

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5 A. 289 = 3 A.W.N. (1883) 33.

waiver of his right to execute the decree for the larger amount payable thereunder in case of default, and by such waiver he was estopped from recovering such larger amount in execution of the decree. *Mumford* v. *Peal* (1) and *Gyan Chund* v. *Jawahur* (2), referred to.

Per STRAIGHT, J.—That, having by his application of the 7th May 1877, sought to execute the decree for the larger amount payable thereunder in case of default in payment of the instalments of the smaller amount, the decree holder was not competent afterwards to seek to execute the decree in respect of such instalments; that therefore his application of the 28th August 1878, was not a step in aid of execution of the decree in the share in which he had previously sought execution, from the date of which limitation could be computed; and that consequently his application of the 8th September 1881, was barred by limitation.

Per Curiam.—That the decree-holder was not entitled to recover the balance of the instalment for September 1876, regard being had to the limitation prescribed by No. 179 (6), sch. ii of the Limitation Act, 1877.

[F., 28 A. 622 (624) = 3 A.L.J. 469 = A.W.N. (1906) 139.]

THE decree of which execution was sought in this case was dated the 30th May 1867, and directed, *inter alia*, that, according to a compromise made between the parties, Rs. 5,016-3-9 out of Rs. 27,777-12-6, principal and interest claimed by the decree-holder, should be paid by the judgment-debtors in the manner following, *viz.*, Rs. 1,004 on the 31st July 1874; Rs. 502-0-0 on the 25th September 1874; Rs. 502-0-0 on the 15th September 1875; Rs. 502-0-0 on the 3rd September 1876; Rs. 502-0-0 on the 22nd September 1877; Rs. 502-0-0 on the 26th September 1878; Rs. 502-0-0 on the 16th September 1879; Rs. 500-0-0 on the 18th September 1880; and Rs. 500-3-9 on the 8th September 1881; and that if default were made in the payment of any instalment, the decree-holder should be at liberty to recover the amount of the instalments, both due and not due, with interest at one per cent. per mensem, and the balance of the money claimed, Rs. 14,935-7-0, with interest as claimed in the plaint. On the 7th May 1877, the decree-holder, stating that the instalment of Rs. 1,004-0-0 payable on the 31st July 1874, had not been paid, applied for execution of the decree, claiming to recover Rs. 35,724-5-3, that is to say, the amount which the decree directed should be recoverable in case of default in the payment of an instalment. It [291] appeared that at this time the judgment-debtors, although they had not paid the instalments regularly, had paid a sum of Rs. 2,510 on account thereof, that is to say, they had paid the amount of the instalments including the one for 1876, with the exception of Rs. 201, which was still due by them on account of that instalment. They had paid the instalment of Rs. 1,004 payable on the 31st July 1874, in June 1875; the instalment of Rs. 502-0-0 payable on the 25th September 1874, in September 1875; the similar instalment for 1875 partly in 1875 and partly in 1876; and only Rs. 301 of the instalment for 1876, leaving a balance of Rs. 201. On the 16th July 1877, the Court struck the application off the file because the decree holder's account was not correct, observing that he might apply for execution of the decree after correcting his account. It further appeared that the instalments for 1877 and the following years were duly paid. On the 28th August 1879, the decree-holder applied for the payment of Rs. 502-0-0, the amount of an instalment paid into Court by the judgment-debtors. On the 8th September 1881, the decree-holder made the application for execution of the decree out of which this appeal arose. He sought thereby to recover the amount recoverable in case of default in payment of an instalment, doing

(1) 2 A. 857.

(2) N.W.P.H.C.R. (1870) 83.

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so with reference to the failure of the judgment-debtors to pay in full the instalment for 1876.

The Court of first instance found that the decree-holder had been paid Rs. 4,815-4-0 out of the sum of Rs. 5,016-3-9 primarily payable under the decree, that there was thus a balance of Rs. 200-15-9 due to him, and ordered execution to issue in respect of this balance, but refused to allow it to issue as if default had occurred in the payment of instalments, on the ground that after such default had occurred the decree-holder had accepted instalments.

The decree-holder appealed to the High Court, contending that as default had been made, he was entitled to recover the whole sum mentioned in the compromise. The judgment debtors objected under s. 561 of the Civil Procedure Code, that the lower Court had improperly allowed execution in respect of Rs. 200-0-0.

Mr. *Conlan* and Lala *Lalta Prasad*, for the appellant.

Mr. *Howard* and Munshi *Sukh Ram*, for the respondents.

[292] The Court (STRAIGHT and OLDFIELD, JJ.) delivered the following judgments:—

JUDGMENTS.

OLDFIELD, J.—In my opinion the appeal must fail. The admitted fact that the decree-holder has, after the alleged failure to pay the full amount of the instalment due for 1876, accepted payments of all subsequent instalments payable under the decree will, in my opinion, amount, under the circumstances of the case, to a waiver of the decree-holder's right to enforce the penalty which the compromise and decree allowed to him, in the event of failure to pay the instalments. He was well aware of his right to take the benefit of the provision on default taking place in 1876, and his refraining from doing so for so many years and accepting subsequent instalments as though no default had taken place, must, in the absence of proof to the contrary, be ascribed to intentional waiver of any right he may have had, and must have been so understood by the judgment-debtors when they paid their subsequent instalments, and the decree-holder is now estopped from enforcing the penalty. The facts in *Mumford* v. *Peal* (1) to which reference has been made, are somewhat different. The case of *Gyan Chund* v. *Jawahur* (2) is in point, and supports the view I take. It is unnecessary to enter into the question whether the application of the decree-holder is also barred by limitation. The particular ground on which the judgment-debtors object to the order of the Subordinate Judge, making them liable to pay the Rs. 201, may not be tenable, but the order cannot be maintained. The decree-holder never applied for recovery of the instalment not paid in 1876, and he cannot obtain it with reference to the limitation prescribed by art. 179 (6) of the Limitation Act. The order of the Subordinate Judge will be modified by disallowing the decree-holder's application, and this appeal is dismissed with all costs.

STRAIGHT, J.—The application for execution of the 7th May 1877, for the Rs 35,724-5-3 was struck off on the 16th of July 1877, owing to the incorrectness of the account supplied by the decree-holder, now appellant in this Court, and he was told to make the necessary corrections and apply again. At that time there no doubt was a deficiency of Rs. 201, due on the instalment **[293]** payable in September 1876, and it must be observed that the decree-holder was by his application seeking to enforce

(1) 2 A. 857. (2) N.W.P.H C.R. (1870) 88.

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his full rights under the forfeiture provided for by the decree and compromise of July 1874. Having once resorted to this alternative and applied to execute the decree for the maximum sum, I do not think it was competent for him in any subsequent application to revert to an enforcement of the instalments. In this view of the matter I am of opinion that the petition of the 28th August 1879, by which the decree-holder prayed leave to take out the Rs. 502 deposited in Court by the judgment-debtor, in liquidation of instalments, was not a step in aid of execution of the decree in the shape in which the decree-holder had sought to execute it by his application of the 7th May 1877. As the application, in respect of which this appeal has been preferred, was not made until the 8th September 1881, limitation, in my opinion, barred it, and on this ground I hold that the appeal fails, and must be dismissed with costs. In regard to the cross-objections, I am of the same opinion as my brother OLDFIELD.

Appeal dismissed.

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5 A. 293 = 3 A.W.N. (1883) 39.

CIVIL REVISIONAL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

CHATTAR SINGH, GUARDIAN OF GANGA SAHAI, MINOR (*Defendant*) v. LEKHRAJ SINGH (*Plaintiff*).* [1st February, 1883.]

Arbitration—Setting aside award for misconduct of arbitrator—High Court's powers of revision—Civil Procedure Code, ss. 521, 622.

An order under s. 521 of the Civil Procedure Code, setting aside an award, made on a reference to arbitration in the course of a suit, under Chapter XXXVII of the Code, on the ground of the arbitrator's misconduct, is not subject to revision by the High Court in the exercise of the powers conferred on it by s. 622 of the Code.

[**Diss.**, 14 C. 768 (779) ; **F.**, 31 M. 345 (346) = 18 M.L.J. 228 = 3 M.L.T. 315 ; **Appr.**, 18 B. 35 (37) ; 26 B. 551 (552) ; **R.**, 9 A. 253 (266) ; A.W.N. (1899) 210 ; 40 B. 86.]

THIS was an application by the defendant in this suit for revision under s. 622 of the Civil Procedure Code of an order under s. 521 of that Code, setting aside an award, made on a reference to arbitration, under Chapter XXXVII of the Code, of the matters in dispute in the suit, on the ground of the arbitrator's miscon-**[294]**duct. The grounds on which revision of this order was sought impugned the propriety of the decision of the Court of first instance that the arbitrator had been guilty of misconduct.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), Babu *Aprokash Chandar Mukarji*, and Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the defendant.

Messrs. *Hill* and *Ross*, and Babu *Jogindro Nath Chaudhri*, for the plaintiff.

The High Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment :—

JUDGMENT.

OLDFIELD, J.—We are of opinion that we have no power of revision under s. 622. The contention that the proceeding for arbitration is a

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* Application No. 129 of 1882, for revision under s. 622 of the Civil Procedure Code of an order of Maulvi Sami-ul-lah Khan, Subordinate Judge of Aligarh, dated the 24th April 1882.

decided case in which no appeal lies within the meaning of the section, and therefore open to revision under s. 622, is not tenable. The proceeding is of an interlocutory character only, made in the course of a suit; it is part of a case which is still undecided, and in which an appeal lies from the final decree. It was not the intention to allow of revision of interlocutory proceedings, in the course of a suit, which do not determine it. The order, which is the subject of this application, will be open to revision by appeal from the final decree in the suit, and even if s. 622 allowed of it, it would be highly inexpedient for us to interfere at this stage of the case. We dismiss the application with costs.

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5 A. 293= 3 A.W.N. (1883) 39.

Application dismissed.

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5 A. 294=3 A.W.N. (1883) 40.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MUHAMMAD BAKHSH AND OTHERS (*Defendants*) v. MUHAMMAD ALI AND ANOTHER (*Plaintiffs*).* [2nd February, 1883.]

Suit to set aside a decree obtained by fraud—Act XV of 1877 (*Limitation Act*), ss. 10, 18, *sch. ii, No.* 95—*Suit against express trustee.*

Certain of the grantees of lands, granted for the maintenance of the grantees and support of a mosque and other religious purposes, sued for the removal of the superintendent of the property from his office. The parties to [295] this suit entered into a compromise, which made certain arrangements for the management of the property, and a decree was made in accordance with the compromise. The grantees who were not parties to this suit then sued the grantees who were to set aside the compromise and decree on the ground of fraud.

Held that the suit fell within the terms of No. 95, sch. ii of the Limitation Act, 1877, and there was nothing about it which made the exemption of s. 10 of that Act applicable to it.

THE parties to this suit were the grantees of certain villages, which had been granted to them rent-free for their maintenance and for the support of a mosque and other religious purposes. The defendant Jawahir Ali was the superintendent of the property. The other defendants brought a suit against him to have him removed from the post of superintendent. The parties to that suit entered into a compromise, dated the 1st March 1875, which made certain arrangements for the management of the property, upon which a decree was given the same day. The plaintiffs brought the present suit against Jawahir Ali and the other defendants to have this compromise and decree set aside, alleging that it had been entered into fraudulently, and without their knowledge, with the object of diverting the income of the property from the purposes for which it had been granted; and that they had become aware of the compromise and decree on the 18th January 1878. The Court of first instance held that the suit was barred by limitation under No. 95, sch. ii of the Limitation Act, 1877, finding that the plaintiffs had become aware of the compromise and decree at the time the promise was entered into. On appeal by the plaintiffs the lower appellate Court held that the suit was not barred by limitation, the provisions of s. 10 of the Limitation Act being applicable to it; and it gave the plaintiffs a decree. It

* Second Appeal No. 566 of 1882, from a decree of R. J. Leeds, Esq., Judge of Gorakhpur, dated the 30th January 1882, reversing a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 17th June 1881.

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observed as follows:—"I am not satisfied that there is sufficient proof of any fraud on the part of the defendants which would entitle the plaintiffs to the relief contemplated by art. 95, sch. ii of Act XV of 1877; but then I am clearly of opinion that the three years' limitation prescribed by that article is not applicable to this suit, and that the object of the plaintiffs being the enforcement of a trust, the provisions of s. 10 of the Act must be followed. On the question of limitation, therefore, I hold that the suit is not barred." The defendants appealed to the High Court, contending, *inter alia*, that the suit was barred by limitation under No. 95, sch. ii of the Limitation Act.

[296] Mr. *Conlan* and the *Senior Government Pleader* (Lala *Juala Prasad*), for the appellants.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the respondents.

The High Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—For the purpose of determining this appeal, it appears to us sufficient to consider the second plea taken by the appellants, namely, that the suit is barred by limitation. Upon looking into the plaint we find that the relief sought is the cancellation of the compromise and decree of the 1st March 1875, and the ground upon which it is prayed is that of fraud. The suit therefore naturally falls within the terms of art. 95 of Act XV of 1877. It was held by the Judge, and argued before us on behalf of the respondents, that the claim of the plaintiffs is of the nature comprehended in s. 10, but this contention cannot be seriously entertained for a moment. The plaintiffs are in no sense seeking to follow specific trust property in the hands of the defendants and to recover it from them, and their suit has nothing about it which would make the exemption of s. 10 applicable. Such being the case it is only necessary to see which, if any, of the articles in the second schedule applies, and, as we have remarked, art. 95 exactly meets the circumstances. It was urged for the respondents, that in taking this view we are unreasonably limiting the period within which persons, against whom fraud has been practised, can bring suits. The argument is to our minds a fallacious one; and in taking the view we do, we are only giving effect to the very sound and reasonable principle recognized by the Limitation Law, that so long as a person, upon whom fraud has been practised, remains in ignorance of such fraud, no time shall run against him, but that when he has acquired knowledge of such fraud he shall, within three years from the date of obtaining such knowledge, come into Court for his relief. It was suggested by the respondents' pleader that the Judge has recorded no finding as to whether the statement of the plaintiffs, that they first became aware of the decree and compromise of the 1st March 1875, on the 18th January 1878, is true or not. He certainly does not [297] express any definite opinion upon this point, but in face of the statement made in his judgment, that no sufficient proof of any fraud on the part of the defendants had been given to entitle the plaintiffs to the relief contemplated in art. 95 of Act XV of 1877, it would only involve the parties in unnecessary expense and delay to remand an issue as to the date when the alleged fraud first became known to the plaintiffs. We must therefore decree the appeal with costs.

Appeal allowed.

5 A. 297 = 3 A.W.N. (1883) 41.

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APPELLATE CIVIL.

5 A. 297 = 3 A.W.N. (1883) 41.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

MUZAFFAR HUSAIN (*Defendant*) v. ALI HUSAIN (*Plaintiff*).*
[2nd February, 1883.]

Sale in execution of decree of Revenue Court—Sale-certificate—Delivery of possession—Title of purchaser—Act XVIII of 1873 (*N.-W.P. Rent Act*), *s.* 76—*Act XXII of* 1881 (*N.-W.P. Rent Act*), *s.* 172—*Act XV of* 1877 (*Limitation Act*), *sch. ii, Nos.* 144, 178.

Property sold in execution of a decree of a Revenue Court vests in the purchaser on the completion of the sale and payment of the full price. In order to perfect his title it is not necessary that he should obtain a sale-certificate or should be put into possession by the Collector.

Held, therefore, that a suit by a purchaser at a sale in execution of a decree of a Revenue Court for possession of the property was maintainable, although his sale-certificate might be an invalid document, and the Collector had not put him into possession.

THE plaintiff Ali Husain purchased at an auction-sale, held in execution of a decree for rent of a Revenue Court, the house which was the subject of this suit on the 15th September 1877. He applied on the 6th May 1881, for a sale-certificate, and obtained it, by order of the Assistant Collector, from the Amin who held the sale, on the 30th July, and it was registered. He then, on the 11th August, applied to have delivery of possession of the property, and on the 30th November obtained an order, for possession to be given, from the Assistant Collector. On appeal by the defendant to the Collector that officer set aside the order of the 30th November, on the ground that the Assistant Collector had no power, under s. 172, Act XII of 1881, to give possession, and that the plaintiff's application of the 11th August was made beyond the time allowed by No. 178, sch. ii of the Limitation [298] Act. The plaintiff thereupon brought this suit against the defendant to obtain possession of the property by right of his purchase. The defendant contended, *inter alia*, that the claim was not maintainable, by reason of the Collector having refused to put the plaintiff in possession of the property, and of the invalidity of the plaintiff's sale-certificate, in consequence of the application to obtain it having been made beyond time. The Court of first instance allowed the defendant's contention and dismissed the suit. The lower appellate Court reversed the decree of the first Court, and directed the suit to be tried on the merits, holding that the suit was not barred by limitation, and No. 178, sch. ii of the Limitation Act, had no bearing on it. The defendant appealed to the High Court.

Pandit *Nand Lal*, for the appellant.

Shah *Asad Ali*, for the respondent.

The High Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment :—

JUDGMENT.

OLDFIELD, J. (after stating the facts stated above, continued) :—In our opinion the appeal must fail. Article 178, which only refers to applications, can have no bearing on this suit, which, being a suit for possession

* First Appeal No. 94 of 1882, from an order of Maulvi Muhammad Nasi-ul-lah Khan, Subordinate Judge of Shahjahanpur, dated the 8th June 1882.

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(1883) 41.

of immoveable property, is governed by art. 144. But assuming that the plaintiff's applications to obtain a sale-certificate and possession of the property sold were made in the Revenue Court beyond the time allowed by art. 178, and that no proper sale-certificate has been obtained by him, and he has not been put in possession of the property sold at auction by the Revenue authorities, these circumstances can only affect the plaintiff's claim, if it can be shown that the property purchased at auction in execution of a Revenue Court decree does not vest in the plaintiff until he has obtained a sale-certificate from the proper officer and been put in possession by the Collector; in fact that those acts are necessary to perfect his title. This appears to us not to be the case.

The law applicable to the sale in question is the Rent Act XVIII of 1873, which contains its own provisions for the conduct of sales in execution of decrees, and there is no provision such as that contained in s. 316, Act X of 1877 (which Act was not in force [299] at the time of this sale), to the effect that the title to the property sold shall vest in the purchaser from the date of the certificate and not before, nor did the Civil Procedure Code, Act VIII of 1859, then in force, contain such a provision. The only provision for granting a sale-certificate, which Act XVIII of 1873 contains, is in s. 76, to the effect that when the purchase-money has been paid in full the officer holding the sale shall give the purchaser a certificate describing the property purchased by him and the price paid; and the Act is silent as to confirmation of sale by superior authority or as to delivery of possession, though the present Rent Act, s. 172, contains a provision that, in the event of the sale of the property being completed, possession shall be given to the auction-purchaser by the Collector of the District in which the property is situated. There is therefore nothing in the Act to prevent the property vesting in the purchaser on completion of the sale and payment of the full price. It is the duty of the officer holding the sale to give the certificate under s. 76 and of the Revenue authorities to give possession, and the fact that an application to move the Court may have been made beyond the time allowed for applications under art. 178 (assuming the article applies to such applications), or that the Revenue authorities have failed to do what the law directs for giving sale-certificates and possession of the property sold, cannot forfeit the title which the auction-purchaser has acquired by purchase. We dismiss the appeal with costs.

Appeal dismissed.

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5 A. 299=3 A.W.N. (1883) 45.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

ABUL HASAN AND OTHERS (*Defendants*) *v.* ZOHRA JAN (*Plaintiff*).*
[3rd February, 1883.]

Civil Procedure Code, s. 111—Set-off.

The heirs to *M*, deceased, appointed *A*, one of the heirs, manager of *M*'s estate with a view to the payment of the debts due by the deceased. A creditor of the deceased sued his heirs to recover his debt, and obtained a decree, in execution

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* Second Appeal No. 1467 of 1881, from a decree of R. D. Alexander, Esq., Judge of Allahabad, dated the 11th July 1881, modifying a decree of Pramoda Charan Banarji, Subordinate Judge of Allahabad, dated the 31st March 1881.

of which the share of *Z*, one of the heirs, in *M*'s landed estate was sold. The sale-proceeds exceeded *Z*'s share of such debt and she sued the other heirs for contribution in respect of the difference. The defendants claimed a set-off in [300] respect of *Z*'s share of the liabilities of *M*'s estate which had been satisfied by *A* as manager. *Held* that the set-off claimed could not be entertained in such suit.

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APPELLATE CIVIL.

[R., 16 C.P.L.R. 118 (121).]

5 A. 299 = 3 A.W.N. (1883) 45.

THE plaintiff in this suit, a daughter and one of the heirs of one Muzaffar Husain, deceased, sued the other heirs of that person for contribution in respect of a debt due by the estate of the deceased to one Manohar Das. It appeared that after the death of Muzaffar Husain, Manohar Das sued his heirs to recover this debt, and obtained a decree against them. He caused the plaintiff's one-thirteenth share of Muzaffar Husain's landed estate to be brought to sale in execution of this decree. The proceeds of the sale exceeded a one-thirteenth share of the judgment-debt; and the plaintiff brought the present suit against the other heirs of Muzaffar Husain to recover the difference, by way of contribution. It further appeared that by an agreement in writing, dated the 17th November 1875, the heirs of Muzaffar Husain constituted one of themselves, the defendant Abul Hasan, manager of the estate of Muzaffar Husain, with a view to the payment of his debts. Certain of the defendants including Abul Hasan produced the accounts of the manager. Account No. 1 purported to show "the amount of judgment-debts and costs due from the heirs of Muzaffar Husain," which had been paid by the manager. Account No. 2 purported to show "the amount expended by" the manager "on behalf of the plaintiff on account of her personal expenses, ancestral debts, funeral expenses of Muzaffar Husain, &c." With reference to these accounts the defendants claimed to set-off a sum of Rs. 3,822-14-2 against the plaintiff's claim. Both the lower Courts refused to entertain the set-off claimed by the defendants. The lower appellate Court observed on the point as follows:—"I have taken a note of the items claimed, which amount in all to Rs. 3,822-14-2. It must be recollected that all the charges, assuming them for the purposes of this argument to be correct, the share of the plaintiff in which is alleged to be Rs. 3,822-14-2, were incurred by the defendant Abul Hasan, who by the agreement of all the other heirs as evidenced by the document dated the 17th November 1875, was elected manager of the estate and empowered to pay the debts and collect the dues, and generally with full control over the entire property of the deceased, certain pittances till the property was cleared being reserved, which he was to pay monthly [301] to the members of the family. Under these circumstances these items cannot, in the language of s. 111 of Act X of 1877, be said to be ascertained sums of money legally recoverable by the defendant from the plaintiff, for no account has been taken to show what the assets, &c., of the estate were, against which these charges were properly debitable; nor can the defendants in this claim of theirs be said to fill the same character as they do in the plaintiff's suit. The fact is, only the defendants Abul Hasan in this claim fills any character at all. He as manager has made certain disbursements out of, and against the estate, and it will be his duty some day to file an account of his receipts and disbursements, but till that is done it will be impossible to say that there is any ascertained sum of money legally recoverable due from the plaintiff." On second appeal the defendants contended that the lower Courts were wrong in not allowing them to set-off against the plaintiff's

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claim the items due to them from her on the general account between the parties.

Messrs. *Hill* and *Conlan*, for the appellants.

Munshi *Hanuman Prasad* and Babus *Aprokash Chandar Mukarji* and *Ram Das Chakarbati*, for the respondents.

The High Court (STRAIGHT and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—We are of opinion that the lower Courts were right in holding that the set-off claimed to be taken into account by the defendants cannot be entertained in the present suit. The procedure provided for in s. 111 of the Code does not go the length of admitting the assertion of mere cross-demands; but in order to entitle a defendant to plead a set-off, the debt to which it relates must be for an ascertained sum of money due and owing to the defendant by the plaintiff, out of a transaction in which mutual credits are directly proper by reason of their being in respect of the same right. At present the law of procedure in India does not sanction set-off or counter-claim as contemplated by art. 3, Order XIX of the Judicature Act, 1875. The defendants in the present suit are in reality seeking to assert the accounts of Abul Hasan in his character of manager under the agreement of November 1875, and not individual debts due to them by the plaintiff person-[302]ally. Until those accounts have been rendered in full and accepted by all the parties, no ascertained sum can rightly be said to be due from the plaintiff, and when it does so become due, it will be payable to Abul Hasan in virtue of the position of manager, given him by the agreement in November 1875. Under these circumstances we think that this appeal should be dismissed with costs.

Appeal dismissed.

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5 A. 302 = 3 A.W.N. (1883) 50 = 7 Ind. Jur. 674.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

BISHEN CHAND (*Plaintiff*) *v.* RAJENDRO KISHORE SINGH AND OTHERS (*Defendants*).* [5th February, 1883.]

Hundi—Forged hundi—Fraudulent indorsement—Estoppel.

The *bona fide* holder for value of a forged hundi, to whom, after it had been dishonoured, it had been transferred by indorsement, by the payees, who at the time of indorsement knew that the hundi was forged, sued the payees on the hundi to recover the amount he had paid them for it. *Held* that the payees were estopped from setting up the forgery of the hundi as a bar to the suit.

THE plaintiff sued upon a hundi for Rs. 5,000, purporting to be drawn by defendant No. 1 in favour of defendants Nos. 2 and 3, at Benares, and dated the 19th March 1879. The title set up by the plaintiff to sue was acquired by an indorsement made to him by defendants Nos. 2 and 3 on the 26th November 1879. The hundi became due on the 17th June 1879, and was not paid. The plaintiff therefore claimed Rs. 5,000,

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* First Appeal No. 62 of 1880, from a decree of Babu Ram Kali Choudhri, Subordinate Judge of Benares, dated the 30th March 1880.

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APPELLATE CIVIL.

5 A. 302 = 3 A.W.N. (1883) 50 = 7 Ind. Jur. 674.

principal, and Rs. 343-5-3 interest from the 17th June 1879, to the 6th January 1880, the date of suit. Defendant No. 1 denied making the hundi, and declared his signature to it to be a forgery. He further disclaimed all knowledge of defendants Nos. 2 and 3, and of ever having had any transaction with them; and asserted that the indorsement of the hundi to the plaintiff was contrary to the mercantile custom recognized and allowed in reference to such instruments in the city of Benares. Defendants Nos. 2 and 3 affirmed the hundi to have been drawn by defendant No. 1 in their favour for good consideration. They also stated that, being in want of money, they had sold it to the plaintiff for Rs. 4,500; that be had only paid them Rs. 1,800 of that amount; and having thus failed to give the full consideration agreed, it was not competent for him to sue upon the hundi. They further urged **[303]** that as the transaction between them and the plaintiff had been one of sale, he could not claim upon the hundi. The Subordinate Judge of Benares, in whose Court the suit was brought, fixed three issues for determination:—

(i) Whether the transfer of the hundi in suit by indorsement in favour of the plaintiff after its acceptance is valid or not?

(ii) Whether the hundi in suit was drawn by the defendant No. 1 in favour of the other defendants?

(iii) Whether defendants Nos. 2 and 3 are liable to the plaintiff's claim, or has he no cause of action as against them and no right to claim the sum in suit?

On the first of these matters the Subordinate Judge found the indorsement to the plaintiff to be valid. On the second he held that defendant No. 1 did not sign the hundi. On the third he was of opinion that, as from his finding on the second issue it was obvious that the hundi was a forgery, it was incompetent for the plaintiff to come into Court upon it against defendants Nos. 2 and 3, "but he is at liberty to have his remedy otherwise as against them."

From this decision the plaintiff appealed to the High Court on three grounds: first, that the evidence showed the hundi to have been drawn on behalf of defendant No. 1 and signed by him; second, that it was accepted by defendant No. 1; third, that even if the hundi were a forgery, the plaintiff was entitled to a decree against defendants Nos. 2 and 3.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), Pandit *Ajudhia Nath*, and Mr. *Niblett*, for the appellant.

Mr. *Conlan*, the *Senior Government Pleader* (Lala *Juala Prasad*), and Pandit *Bishambhar Nath*, for defendant No. 1, respondent.

Mr. *Amiruddin*, for defendants Nos. 2 and 3, respondents.

The Divisional Bench before which the appeal came for hearing (STRAIGHT and OLDFIELD, JJ.) remanded the case, after certain proceedings had been taken, for the trial of the following issues:—

(i) What was the actual amount of cash consideration paid by the plaintiff to defendants Nos. 2 and 3?

[304] (ii) At the time of the payment of such consideration, had the plaintiff reason to believe that the hundi was a forgery, or that it had come into the hands of the said defendants under such circumstances as to lead them to infer that it was a fraudulent instrument?

The Subordinate Judge found that Rs. 3,275 was given to defendants Nos. 2 and 3 for the hundi by the plaintiff, and that the latter had no reason to suspect it to be other than genuine. On the return of these findings the Divisional Bench delivered the following judgment:—

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5 A. 302 = 3 A.W.N. (1883) 50 = 7 Ind. Jur. 674.

JUDGMENT.

STRAIGHT and OLDFIELD, JJ.—There are only two points to be dealt with : *first*, is the hundi established to be a forgery? *second* if it is, can the suit, in its present form, be maintained against defendants Nos. 2 and 3?

With regard to the issue of forgery, having carefully looked into all the evidence taken in the first instance and afterwards on remand before the Subordinate Judge, as also the examination of defendant No. 1 under commission, and the documents filed in the case, we are of opinion that the Subordinate Judge rightly found that the hundi was a false and fabricated instrument, and as such is in no way binding on defendant No. 1. Upon the second matter, we know of no rule of law to prohibit the plaintiff from recovering on the hundi from defendants Nos. 2 and 3 the consideration given to them by him. Certainly, in face of the evidence which goes to show that if they did not actually forge the instrument, they at least uttered it with full knowledge it was forged, they must be held estopped from setting up such forgery to defeat the plaintiff's suit. The case would have been a very different one if the plaintiff had been claiming under a forged indorsement against a prior innocent drawer or indorser. As between him and defendants Nos. 2 and 3 the latter cannot be allowed to take advantage of their own wrong and the objection urged on their behalf fails. The appeal is dismissed with costs as to defendant No. 1 and is decreed with costs as to defendants Nos. 2 and 3.

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5 A. 305 (F.B.) = 3 A.W.N. (1883) 48.

[305] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

JAGAN NATH (*Plaintiff*) v. BALDEO (*Defendant*).*
[9th February, 1883.]

Purchaser at execution-sale—Suit for possession of property—Proof of title—Sale certificate—Act VIII of 1859, ss. 257, 259.

Held, that it was not incumbent on a purchaser at an execution-sale under Act VIII of 1859, which was confirmed in his favour under that Act, when suing for possession of the property, to produce a sale-certificate, but it was competent for him to prove his purchase *aliunde* The confirmation of the sale in his favour was *prima facie* evidence of his title to the property, and was sufficient to pass such title to him, of which a certificate, if afterwards obtained by him, would merely be evidence that the property had so passed.

Doorga Narain Sen v. *Baney Madhub Mozoomdar* (1), referred to.

[F., A W.N. (1895) 54 ; 7 C.L.J. 284 ; **Appr.**, 12 C. 169 (172) ; 11 M. 296 (300).]

THIS was a reference to the Full Bench by BRODHURST and MAHMOOD, JJ. The facts of the case and the points of law referred are stated in the order of reference which was as follows :—

MAHMOOD, J.—The property in suit was owned by Badri, defendant No. 1, and in execution of a decree held against him by one Pragdat, it was sold by auction on the 1st September 1873, and purchased by Jagan

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* Second Appeal No. 190 of 1882, from a decree of Sayyid Farid-ud-din Ahmed, Subordinate Judge of Cawnpore, dated the 24th November 1881, reversing a decree of Maulvi Sakhawat Ali, Munsif of Akbarpur, dated the 13th August 1881.

(1) 7 C. 207.

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5 A. 305 (F.B.) = 3 A.W.N. (1883) 48.

Nath, plaintiff in the present litigation. The sale was confirmed on the 24th October 1873; but no certificate under s. 259 of the old Civil Procedure Code (Act VIII of 1859) was obtained by the purchaser. Moreover, it appears that Badri, defendant No. 1, continued in possession of the property, notwithstanding the sale above-mentioned. Bhaggi Lal, defendant No. 2, held another decree against Badri, defendant No. 1, and in execution thereof attached the same property, with the object of bringing it to sale. The plaintiff filed objections to the attachment on the 17th July 1880, but his objections were disallowed and the property was sold by auction on the 22nd July 1880, and purchased by Baldeo, defendant No. 3. The suit, from which this appeal has arisen, was instituted by Jagan Nath, on the 18th July 1881, having for its object recovery of possession of the property in suit, by avoidance of the auction-sale of the 22nd July 1880, on the ground [306] that the property having been previously sold on the 1st September 1873, Badri no longer had any right in the property, and that the sale in favour of defendant No. 3 was therefore of no avail. Badri, defendant No. 1, did not defend the suit, but the other two defendants resisted the claim by setting up various pleas which need not be noticed for the purposes of this appeal. The Court of first instance trying the suit on the merits decreed the plaintiff's claim. On appeal by the defendants, the lower appellate Court, holding that an auction-purchaser could not bring a suit for the possession of immoveable property, by proving his auction-purchase, without procuring and filing a registered sale-certificate, has dismissed the suit without going into the merits of the case.

The present second appeal has been preferred by the plaintiff, and the grounds of appeal raise only one main point for determination, *viz.*, whether an auction-purchaser, who has not obtained the sale-certificate, can maintain a suit for recovery of possession of the property purchased by him.

In considering this question, it must be borne in mind, that the sale whereupon the plaintiff bases his title was held on the 1st September and confirmed on the 24th October 1873, when the old Civil Procedure Code (Act VIII of 1859) was in force. On the other hand, the sale in which Baldeo, defendant No. 3, purchased the property, took place on the 22nd July 1880, and was governed by Act X of 1877. It has been contended by the learned pleader for the respondent, that the plaintiff never having taken out a certificate of sale, he could obtain that certificate now only under the provisions of the present Civil Procedure Code; that Act VIII of 1859 having been repealed, the provisions of the present Code must be held to govern the case; that s. 316 clearly shows that the title to the property sold cannot vest in the purchaser without a certificate of sale. It was further contended, that even if the case be taken to be governed by Act VIII of 1859, the plaintiff can have no better title to the property, as under the provisions of s. 259 of that Act, a certificate of sale was absolutely essential to complete the sale in favour of the plaintiff.

In regard to the first part of the contention, we have no hesitation in holding that the question, whether the plaintiff acquired [307] proprietary rights under the sale of 1873 is not to be decided under the provisions of the present Civil Procedure Code. It is a well-known rule of construction, that in the absence of express words to the contrary, a legislative enactment cannot have retrospective effect. The rule has passed into a maxim of law, and the Indian Legislature has expressly adopted it in s. 6 of the General Clauses Act (I of 1868). The question

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then is to be decided entirely with reference to the old Civil Procedure Code (Act VIII of 1859). Under that Act, there appear to have been many rulings, of the Bombay High Court principally, in which it has been held, that the mere confirmation of sale (under s. 256), does not invest the auction-purchaser with title to the property sold until and unless he obtains a certificate of sale and duly registers it under the Registration Law. Such seems to be the effect or tendency of the rulings noted—*Lalbhai Lakhmidas* v. *Naval Mir Kamaludin Husen Khan* (1), *Padu Malhari* v. *Vasudev Pandurang* (2), *Mulji Bechar* v. *Anupram Bechar* (3), *Basapa* v. *Marya* (4), *Harkisandas Narandas* v. *Bai Ichha* (5), *In re Khaja Patthanji* (6), 6 Mad. H.C. Rep. Rulings, XXXIX; *Bunda Ali Khan* v. *Bibee Ameerun* (7). But we are not, as at present advised, prepared to accept the rule so laid down, and in view of the circumstance, that whilst Act VIII of 1859 was in force, auction-purchasers in these provinces frequently omitted to obtain certificates of sale, and that it seldom happened, that such certificates were ever registered under the Registration Law, we think the question raised by this case is important enough to be settled by a ruling of a Full Bench of this Court.

Section 256 of Act VIII of 1859 provides that "no sale of immoveable property shall become absolute until the sale has been confirmed by the Court." The rest of the section relates to application for setting aside the sale. Section 257 provides that, "if no such application as is mentioned in the last preceding section be made, or if such application be made and the objection be disallowed, the Court *shall* pass an order *confirming* the sale." Section 259 provides, that "after a sale of immoveable property shall have become [308] *absolute* in manner aforesaid, the Court *shall grant* a certificate to the person who may have been declared the purchaser at such sale, to the effect that he has purchased the right, title and interest of the defendant in the property sold, and such certificate *shall be taken and deemed to be a valid transfer of such right, title and interest*." Sections 263 and 264 provide rules for delivery of possession of immoveable property to the auction-purchaser, and s. 268 relates to the question of resistance or obstruction offered to the auction-purchaser in obtaining possession of the immoveable property purchased by him. Thus, in Act VIII of 1859, there are clear provisions which enable the auction-purchaser to obtain possession of the property from the judgment-debtor without the necessity of a suit. And this circumstance complicates the question raised in the case, because Badri, defendant No. 1, whose rights were sold in 1873, and purchased by the plaintiff, is still in possession, though he does not resist the suit.

We refer the following questions to a Full Bench:—(i) Does the confirmation of sale, under Act VIII of 1859, invest the auction-purchaser (who has not obtained a registered or unregistered certificate of sale), with the right, title and interest of the judgment-debtor in immoveable property sold by auction in execution of a decree? (ii) Can such non-certificated auction-purchaser, having never obtained actual possession under s. 263 or 264, Act VIII of 1859, maintain a suit for recovery of possession of the property purchased by him, against the judgment-debtor, who, notwithstanding the sale of his rights, has continued in possession, and against a subsequent auction-purchaser who purchased the right, title

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(1) 12 Bom. H.C.R. 247. (2) 10 Bom. H.C.R. 435. (3) 7 Bom. H.C.R.A.C. 136. (4) 3 B. 433. (5) 4 B. 155. (6) 5 B. 202. (7) 25 W.R. 493.

and interest of the judgment-debtor in the same property at a sale held under Act X of 1877?

1883 FEB. 9. — FULL BENCH. — 5 A. 305 (F.B.) = 3 A.W.N. (1883) 48.

Lala *Lalta Prasad* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Munshi *Sukh Ram*, for the respondent (Baldeo, defendant No. 3).

The Full Bench delivered the following opinion:—

OPINION.

STUART, C.J., and STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ.—We do not think that it was incumbent on the [309] appellant to produce a certificate of the sale to him, and it was competent for him to prove his purchase *aliunde*. The confirmation of the sale to him under Act VIII of 1859 was *prima facie* evidence of his title, and —to use the words of PONTIFEX, J., in *Doorga Narain Sen* v. *Baney Madhub Mozoomdar* (1)—"was sufficient to pass such title to him, of which a certificate, if afterwards obtained by him, would merely be evidence that the property had so passed."

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5 A. 309 (F.B.) = 3 A.W.N. (1883) 47.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

JAI RAM (*Defendant*) v. DULARI CHAND AND ANOTHER (*Plaintiffs*).*
[16th February, 1883.]

Act XII of 1881 (N.-W.P. Rent Act), s. 191—Appeal—Appeal to High Court from appellate decree of District Judge passed in appeal from appellate decree of Collector—Jurisdiction.

An appeal lies to the High Court from a decree of a District Judge passed in appeal from an appellate decree of a Collector.

THIS was a reference to the Full Bench by STRAIGHT and TYRRELL, JJ. The facts of the case and the question referred are stated in the order of reference, which was as follows:—

TYRRELL, J.—In this case the Collector of the District heard an appeal from the decree of an Assistant Collector in a suit. The District Judge entertained and determined an appeal from the appellate decree of the Collector: and now the decree of the District Judge has been made the subject of what is described as a second appeal to this Court.

It is provided by the 191st section of the Rent Act, that "the decisions of District Judges passed in regular appeal under this Act shall be open to special appeal to the High Court in the same manner and subject to the same rules as the decisions of the District Judges passed on regular appeal are open to special appeal under the Code of Civil Procedure and the Indian Limitation Act, 1877."

We refer to the Full Bench the question, whether an appeal lies in this case, where the decree of the District Judge has not been passed in appeal from the decree or decision of a Court of first instance.

[310] Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

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* Second Appeal No. 265 of 1882, from a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 17th December 1881, reversing a decree of W. Irvine, Esq., Collector of Ballia, dated the 11th August 1881, reversing a decree of Munshi Ganpat Sahai, Assistant Collector, 2nd class, dated the 20th June 1881.

(1) 7 C. 207.

1883 FEB. 16. — FULL BENCH. 5 A. 309 (F.B.) = 3 A.W.N. (1883) 47.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondents.

The Full Bench delivered the following opinion :—

OPINION.

STUART, C. J., and STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ.—We are of opinion that an appeal does lie.

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5 A. 310 (F.B.) = 3 A.W.N. (1883) 47 = 7 Ind. Jur. 670.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

MUNIA AND ANOTHER (*Defendants*) *v.* PURAN (*Plaintiff*).*
[16th February, 1883.]

*Hindu Law—Hindu widow—Immoveable property acquired from deceased uterine brother—*Stridhan*—Alienation—Husband's heirs.*

Immoveable property acquired by a childless Hindu widow from her deceased uterine brother is her *stridhan* and *stridhan* with which the heirs to her husband have nothing to do. Over such property her control is absolute and unimpeachable, and the relations of her husband have no such reversionary *status* in respect of it as will entitle them to sue to set aside an alienation of it by her.

[R., 9 C.P.L.R. 95 (98) ; **D.**, 8 A. 393 (396).**]**

THE plaintiff in this suit claimed to set aside a transfer by gift of certain immoveable property by the defendant Munia to the defendant Janki, on the ground that, being a childless Hindu widow, the defendant Munia had only a life interest in the property, and he, plaintiff, was entitled to succeed thereto, as her deceased husband's heir. It appeared that the property had belonged to the defendant Munia's deceased husband and his brother. They had sold it to her brother, and on her brother's death it had come into her possession. The defendant Janki, to whom the transfer in dispute was made, was an heir to the defendant Munia's father. The defendants set up as a defence to the suit that, having regard to the fact that the defendant Munia has acquired the property from her brother, and not from her husband, the plaintiff was not competent to impeach the transfer. The Court of first instance allowed this defence and dismissed the suit. On appeal by the plaintiff the lower appellate Court held that, while an heir to her husband was living, the defendant Munia was not competent to alienate the property, and gave the plaintiff a decree setting aside the transfer in dispute.

[311] In second appeal the defendants contended that, with reference to the manner in which the property was acquired by Munia, the plaintiff was not legally competent to impugn its alienation by her, and the provisions of the Hindu Law relating to alienations by childless Hindu widows were not applicable in this case.

The Divisional Bench (BRODHURST and MAHMOOD, JJ.) before which the appeal came for hearing referred the following question raised by the appeal to the Full Bench :—

"Who is the reversioner to immoveable property acquired exclusively, either by inheritance or otherwise, by the childless widow of a

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*Second Appeal No. 179 of 1882, from a decree of J. M. C. Steinblet, Esq., Judge of Banda, dated the 23rd December 1881, reversing a decree of Kazi Wajeh-ul-lah Khan, Subordinate Judge of Banda, dated the 18th August 1881.

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5 A. 310 (F.B.) = 3 A.W.N. (1883) 47 = 7 Ind. Jur. 670.

member of divided Hindu family, *i.e.*, is the heir of the widow's late husband, or is the heir of the widow's father the reversioner to the property?"

Munshi *Sukh Ram*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

The Full Bench delivered the following opinion:—

OPINION.

STUART, C.J., and STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ.—On the understanding that the defendant donor obtained the property in suit from her deceased uterine brother—we are not informed how, although it is conceded she could not acquire it from him by inheritance—it necessarily follows that it is her *stridhan*, and it is *stridhan* with which her deceased husband's heirs have nothing to do. Over such property her control is now absolute and unimpeachable, and the relations of her husband have no such reversionary *status* in respect of it as is set up by the respondent in this case.

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5 A. 311 (F.B.) = 3 A.W.N. (1883) 51 = 7 Ind. Jur. 671.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield; Mr. Justice Brodhurst and Mr. Justice Tyrrell.

JAGATNARAIN, GUARDIAN OF JAGESRA KUARI, MINOR (*Plaintiff*) *v.* SHEO DAS AND ANOTHER (*Defendants*).* [23rd February, 1883.]

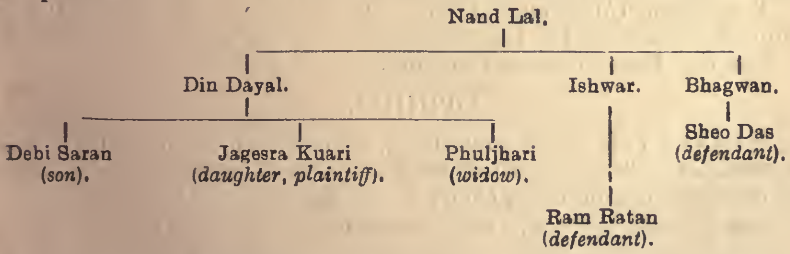
Hindu Law—Mitakshara—Inheritance—Sister.

According to the law of the Mitakshara none but females expressly named can inherit, and the sister of a deceased Hindu, not being so named, is therefore not entitled to succeed to his estate. *Gauri Sahai* v. *Rukko* (1), followed.

[F., 16 A. 221 (224); 28 A. 187 (190, 191) = 2 A.L.J. 654 = A.W.N. (1905) 242; 28 A. 307 (309) = 3 A.L.J. 87 = A.W.N. (1906) 13; R., 16 C. 367 (378); 47 P.W.R. 1916.]

[312] THIS was a reference to the Full Bench by TYRRELL and MAHMOOD, JJ. The facts of the case and the point of law referred are stated in the order of reference, which was as follows:—

MAHMOOD, J.—The following table shows the relative position of the parties:—



The family have been found to be a divided family. Din Dayal died leaving his son, Debi Saran, a minor, and his name was entered in the

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* Second Appeal No. 163 of 1882, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 25th November 1881, reversing a decree of Maulvi Hafiz Rahim, Munsif of Bansgaon, dated the 30th July 1881.

(1) 3 A. 45.

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Government revenue records in substitution for that of his father. Upon the death of Debi Saran, the name of his widowed mother, Phuljhari, was recorded in the revenue records; and she came into possession of the property in suit. Phuljhari died in 1288 fasli (1881), and the present claim has been brought by her daughter Jagesra Kuari, sister of Debi Saran, in respect of the property said to have been left by him. The claim relates both to moveable and immoveable property.

The defendants Ram Ratan and Sheo Das are the first cousins of Debi Saran, being the sons of the father Din Dayal's own brothers, Ishwar and Bhagwan. They resisted the claim on the ground, *inter alia*, that the plaintiff had no right of inheritance from her brother Debi Saran under the Hindu law according to the Mitakshara or the Benares school.

The Court of first instance decreed the claim. The lower appellate Court has held that "the plaintiff cannot inherit as against the defendants: the sisters are not included among the brothers: though some commentators of the Hindu law may have given various constructions, yet the principle in practice is that a sister cannot by any means inherit her brother's property as against her male cousins."

The present second appeal has been preferred by the plaintiff, who contends that the lower appellate Court is wrong in law in [313] holding that the sister of a member of a divided family is not entitled to succeed to his property under the circumstances of the case.

The learned pleader for the respondents has referred us to three cases decided by Division Benches of this Court—S. A. No. 235 of 1875, decided 4th May 1875; S. A. No. 404 of 1876, decided 28th August 1876; S. A. No. 157 of 1878, decided 9th April 1878—which he contends support the view of the law taken by the lower appellate Court. We are, however, of opinion that the question is not free from doubt, and is important enough to be settled by a Full Bench of this Court. Another Division Bench of this Court has already referred an analogous question of Hindu law to the Full Bench, and we think that the point raised in this case can be conveniently considered along with the question which has been referred in the other case.

We refer the following question to the Full Bench:—

"Upon the death of a Hindu mother, who succeeded to the divided property of her son, does the property devolve by inheritance upon his sister or upon his first cousins in the paternal line?"

Lala *Lalta Prasad* and Moulvi *Mehdi Hasan*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the respondents.

The Full Bench delivered the following opinion:—

OPINION.

STUART, C.J., and STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ.—The point raised in this reference is settled law, and has been correctly determined in *Gauri Sahai* v. *Rukko*(1). Our answer to this reference is in the sense of, and in conformity with, that ruling.

(1) 3 A. 45.

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5 A. 314 (F.B.) = 3 A.W.N. (1883) 59.

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[314] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

MADHO PRASAD (*Judgment-debtor*) v. HANSA KUAR (*Decree-holder*) AND KANHAI AND OTHERS (*Auction-purchasers*).*

MAN KUAR (*Judgment-debtor*) v. RAM KISHORI (*Decree-holder*).†
[24th February, 1883.]

Execution of decree—Transfer to Collector—Appeal to High Court from orders of Collector—Jurisdiction—Civil Procedure Code, s. 320.

Orders passed by a Collector in the exercise of the powers conferred on him under s. 320 and the following sections of the Civil Procedure Code, relating to the execution of a decree of a Civil Court, after transfer of the decree to him under s. 320 are not appealable to the High Court.

Held, therefore, that the order of a Collector disallowing an application by the judgment-debtor that the amount of the decree might be satisfied by the temporary transfer of his immoveable property, and ordering the sale of such property, and the order of a Collector confirming a sale, were not appealable to the High Court.

[F., 11 A. 94 (97); 18 A. 437 (440); A.W.N. (1886) 168; R., 9 A. 43 (44); 12 A. 564 (568); 8 B. 301 (302); **Disappr.**, 7 A. 407 (409); D., 9 A. 602 (604).]

THESE were two appeals in which the same question arose, *viz.*, whether an appeal would lie to the High Court from orders passed by a Collector under the operation of the rules prescribed by the Local Government under s. 320 of the Civil Procedure Code, contained in Notification No. 671 of 1880, dated the 30th August, 1880. In each case this question was referred to the Full Bench by the Divisional Bench before which the appeal came. In F. A. No. 22 of 1882 the appeal was from an order by a Collector made under those rules confirming a sale in execution of a decree. In F. A. No. 66 of 1882 the appeal was from an order of a Collector made under the same rules disallowing an application by a judgment-debtor, praying that the amount of the decree might be satisfied by a temporary transfer of the judgment-debtor's property, and ordering the sale of such property.

Babu *Ram Das Chakarbati* and Lala *Jokhu Lal*, for the appellant.

Mr. *Howell*, the *Senior Government Pleader* (Lala *Juala Prasad*), and Munshi *Hanuman Prasad*, for the respondents, in F. A. No. 22.

Babu *Ratan Chand*, for the appellant.

Munshi *Hanuman Prasad*, for the respondent, in F.A. No. 66.

[315] The Full Bench delivered the following opinion:—

OPINION.

STUART, C.J., and STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ.—These two references raise the same general question, and may be disposed of together. The question is whether an appeal will lie to the High Court from orders passed by a Collector in exercise of the

* First Appeal No. 22 of 1882, from an order of J. D. Latouche, Esq., Collector of Banda, dated the 19th October, 1881.

† First Appeal No. 66 of 1882, from an order of J. Smith, Esq., Collector of Etawah, dated the 5th May, 1882.

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powers conferred on him under s. 320 and the following sections of the Code of Civil Procedure relating to the execution of a decree of a Civil Court after transfer of the decree to him under s. 320. In F. A. No. 66 the Collector disallowed an application of the judgment-debtor asking that the amount of the decree might be satisfied by temporary transfer of the judgment-debtor's immoveable property, and he ordered the sale of the immoveable property, and an appeal has been preferred to the High Court from the Collector's order. In F. A. No. 22 an appeal has been filed against the Collector's order confirming the sale.

If we examine the provisions of the sections of the Code relating to the transfer of Civil Court decrees to the Collector for execution, we find no provision for an appeal to the Civil Court from the Collector's order: the only provision for an appeal is that given by s. 322-D but that is from the decisions by a Civil Court of disputes arising under ss. 322-B and 322-C.

There is no doubt an appeal from orders made under s. 244 of the Code, which are of the nature of decrees, with reference to s. 2; and from orders confirming or setting aside a sale under s. 312; but these sections do not apply to the proceedings of a Collector under s. 320 and the following sections of the Code.

Section 244 has reference to a Civil Court executing a decree, and only orders by a Civil Court under s. 244 are decrees within the meaning of the definition of decree in s. 2 so as to give a right of appeal from them. The Collector when executing a decree transferred to him is not a Civil Court within the meaning of the section, so that orders made by him in execution can be treated as governed by the provisions of s. 244.

In the same way the Collector's order confirming a sale cannot be held to be made under s. 312 so as to allow of an appeal under s. 588. The Local Government is empowered by s. 320 to prescribe rules for transmitting the decree from the Court to the Collector, and for regulating the procedure of the Collector and his sub-[316]ordinates in executing the same and for retransmitting the decree from the Collector to the Civil Court, and has prescribed rules accordingly which embrace rules for holding sales, and it is under these rules that the Collector's order confirming a sale is made and not under s. 312, which refers to orders by a Civil Court.

In fact there seems no doubt that it was the intention of the Legislature to exclude the jurisdiction of the Civil Courts in matters relating to the exercise by a Collector of the powers conferred on him for the execution of decrees transferred to him, under the sections of the Civil Procedure Code with which we are dealing. Section 325-A is to the effect that so long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property or any part thereof any of the powers or duties conferred or imposed on him by ss. 322 to 325, both inclusive, no Civil Court shall issue any process against such property or part in execution of a decree for money, nor during the same period shall a Civil Court issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under s. 323.

We only cite these provisions as in some measure indicating the policy of the Legislature. There are also provisions which show that the Collector is made subject to the Chief Controlling Revenue Authority in

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the execution of his duties in the matter of Civil Court decrees transferred to him for execution (s. 323).

Our answer to these references is therefore that an appeal will not lie to the High Court from the orders of the Collector in the cases referred.

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APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Tyrrell.

INTIZAM ALI KHAN AND ANOTHER (*Judgment-debtors*) *v.* NARAIN SINGH (*Purchaser*).* [31st January, 1883.]

Sale in execution of decree—Civil Procedure Code, s. 306—Failure to pay deposit of purchase-money required by that section.

The person declared to be the purchaser of property put up for sale in execution of a decree did not, as required by s. 306 of the Civil Procedure Code, pay [317] a deposit of twenty-five per centum on the amount of his purchase immediately after such declaration, but on a date subsequent to the date on which the property was put up for sale. *Held*, that there was no sale at all of the property.

[**Declared obsolete**, 28 A. 238 (239) = A.W.N. (1905) 263; **F.**, 30 A. 273 (278) = A.W.N. (1908) 107 = 5 A.L.J. 336; **Diss.**, 16 C. 33 (39); **Rel.**, 9 Ind. Cas. 66; **R.**, 3 L.B.R. 225 (226); 132 P.R. 1906 = 11 P.L R. 1907; **D.**, 12 M. 454 (457).]

THIS was an appeal from an order refusing to set aside a sale of certain immoveable property in execution of decree. The judgment-debtors had applied to have the sale set aside on the ground, amongst others, that the purchaser had not made the deposit required by s. 306 of the Civil Procedure Code on being declared to be the purchaser, and the property should therefore have been put up for sale again, instead of which the purchaser was allowed to make such deposit on a day subsequent to the day of the sale, and the sale was in consequence invalid. The Court of first instance held that the failure of the officer conducting the sale to carry out the provisions of s. 306 did not invalidate the sale, and rejected the application to set aside the sale. The judgment-debtors appealed to the High Court, again contending that the sale was bad, by reason that the provisions of s. 306 had not been carried out.

Mr. *Conlan* and Babu *Beni Prasad*, for the appellants.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the respondent.

The Court (STUART, C.J., and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

The sale impugned by this appeal was not bad by reason of an irregularity in publishing or conducting the sale. But it was no sale at all, inasmuch as the indispensable conditions of the law, as contained in s. 306 of the Civil Procedure Code, were not fulfilled by the person declared to be the purchaser. The sale took place early in the afternoon of the 20th April, 1882, and the respondent did not pay a deposit of twenty-five per centum on the amount of his purchase immediately after the declaration that he was the purchaser. On the contrary the deposit

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* First Appeal No. 104 of 1882 from an order of Pandit Jagat Narain, Subordinate Judge of Farukhabad, dated the 30th May, 1882.

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was not tendered on the 20th April, but on a subsequent date. In default of such deposit the property should have been forthwith put up again and sold. The order of the Court below confirming the sale was therefore wrong and must be set aside. We cancel that order and decree this appeal with costs.

Appeal allowed.

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5 A. 318 = 3 A.W.N. (1883) 54.

[318] CRIMINAL REVISIONAL.

Before Mr. Justice Tyrrell.

EMPRESS OF INDIA *v.* AMAR NATH AND ANOTHER.
[12th February, 1883.]

Arrest of judgment-debtor—Production of warrant—Escape from lawful custody—Civil Procedure Code, ss. 251, 336, 337, 588 (29), 651—*Criminal Procedure Code, ss.* 46, 80, 413, 423, 439—*High Court's powers of revision—Appeal.*

The apprehension of a judgment-debtor in execution of a decree without the officer making the apprehension having the warrant of the Court executing the decree in his possession at the time of making the apprehension is illegal ; and therefore in such a case the judgment-debtor does not render himself liable to punishment under s. 651 of the Civil Procedure Code, if he escapes from the custody of the officer making the apprehension.

Quære.—Whether a person convicted under s. 651 of the Civil Procedure Code, of escaping from lawful custody, who is sentenced to one month's imprisonment only, can under s. 588 (29) of that Code appeal?

[F., 27 A. 258 (259) = 1 A.L.J. 595 = A.W.N. (1904) 229.]

THIS was an application for revision under s. 439 of the Criminal Procedure Code (Act X of 1882) of an order of Mr. R. E. Hamblin, exercising the powers of an Assistant Magistrate of the first class at Agra, dated the 8th January, 1883. Of the two applicants, Amar Nath had been convicted by the Magistrate under s. 651 of the Civil Procedure Code (Act XIV of 1882), of resisting the lawful apprehension of himself by one Sita Ram, a Civil Court peon, under a civil warrant; while Rup Singh had been convicted under s. 186 of the Indian Penal Code of voluntarily obstructing Sita Ram, a public servant, in the discharge of his public functions. Both the applicants had been sentenced to simple imprisonment for one month.

Messrs. *Hill*, *Conlan* and *Ross*, and Pandit *Ajudhia Nath*, for the applicants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

Mr. *Hill* contended that there had been no resistance to "lawful" apprehension. In order to show that the apprehension was "lawful," it must be shown, firstly, that there was a warrant. This can be done only by the production of the warrant. Secondly, it must be shown that the warrant was directed to Sita Ram. Thirdly, it must be shown that the warrant was in force at the time of the resistance. Fourthly, it must be shown that Sita Ram had the [319] warrant in his possession at the time he attempted to arrest Amar Nath. In this case the warrant has not been produced, and the prosecution has not proved any of the requisite points.

Reference was made to the provisions in the Criminal Procedure Code and the Civil Procedure Code as to the mode of executing

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warrants: Archbold, 18th ed., p. 833; *Codd* v. *Cabe* (1) and *Galliard* v. *Laxton* (2).

The judgment of the Court, so far as it is material to the purposes of this report, was as follows:—

JUDGMENT.

TYRRELL, J.—It may be questioned whether Babu Amar Nath had not the right to appeal, notwithstanding that his sentence was for one month only; for he had been convicted and imprisoned explicitly "under s. 651 of Act XIV of 1882," and s. 588 of that Act (cl. 29) gives an appeal from "all orders under any of the provisions of this Code imposing fines, or for the arrest or imprisonment of any person, except when such imprisonment is in execution of a decree." It was suggested that this provision would not apply because the order was made by a Magistrate acting regularly in the exercise of his ordinary criminal jurisdiction; but it is only "on conviction before a Magistrate" that an order can be made under s. 651 of Act XIV of 1882. This consideration, however, is not material in the present case; for the proceedings and record, being before this Court, may be treated under the powers of a Court of Appeal as defined in s. 423 of Act X of 1882. This power is, of course, of a discretionary character; but the perusal of these proceedings satisfied me that the application before me is, in a peculiar degree, a case for the exercise of this discretion; and that indeed the record affords a remarkable exemplification of the circumstances which justify and necessitate the enlargement of the revisional jurisdiction and powers of the High Courts in this direction. The charges against the petitioners briefly were that Babu Amar Nath, on the night of the 26th September, 1882, in the Agra Cantonments, resisted his lawful apprehension under a civil warrant, and escaped from that arrest, and that his servant Rup Singh obstructed Sita Ram, the peon of the Civil Court who effected the arrest. The pleas of the petitioners are that (*a*) the **[320]** arrest of the petitioner Amar Nath without the exhibition of a warrant justifying his arrest was illegal, and he and his servant would be justified in adopting the course they are alleged to have taken; (*b*) that in the absence of a warrant the arrest of the petitioner was illegal, and there was no proof offered of the existence of such a warrant; (*c*) that the execution of a warrant of arrest within the limits of cantonments was, under the circumstances, illegal, and the petitioners cannot be held to have committed any offence in the matter of the illegal arrest; (*d*) that the petitioner Amar Nath was never properly arrested; and (*e*), on the merits, that the Assistant Magistrate's examination of the evidence on the record and his findings are perverse. It was of course essential to the success of the prosecution for an offence under s. 651 of the Civil Procedure Code to prove that the "apprehension" was "lawful," and that it was made "under that Code," or "under the warrant of a Civil Court." It is set out in s. 251 of Act XIV of 1882, that a good warrant must be dated the day on which it is issued, must be signed by the Judge or such officer as the Court appoints in this behalf, sealed with the seal of the Court, and delivered to the proper officer to be executed. Now, extraordinary as it may appear, it is a fact that the warrant alleged to have been made for the arrest of Babu Amar Nath was not put in evidence in this style, and is not on the record. The omission to put it in evidence and its absence is unexplained; and under these circumstances secondary

(1) L.R. 1 Ex. D. 352. (2) 31 L.J.M.C. 123.

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evidence of the warrant and of its character and contents is inadmissible. The warrant could not be proved *aliunde*; but indeed, beyond a vague phrase or two from the witness Sita Ram, no attempt was made to prove the issue of the warrant, or its contents and purport. There is absolutely no evidence on the record to show that the peon Sita Ram had any lawful authority under the warrant to make an arrest, or that he had a warrant in his possession when he arrested the man in the carriage on the night in question. And as he deposed that another chaprasi also, named Hira Singh, had been joined with him in the commission to execute the warrant, and it is in evidence that Hira Singh was employed on that night looking for Babu Amar Nath in another direction, it is possible that Hira Singh held the warrant, unless, indeed, duplicate warrants had been given to them, which is not alleged, much less proved. Sita Ram did not allege that he held the warrant; [321] he swore—"I do not recollect whether I said I had the warrant or not. I do not recollect whether or not I named the name of the decree-holder, nor whether I said the amount of the decree." Now under the Indian Criminal Procedure Code (ss. 46 and 80) it is necessary that the person executing a warrant of arrest should have the warrant in his possession at the time of arrest: otherwise he would not be in a position to "notify the substance thereof to the person to be arrested, and, if so required, to show him the warrant." This being the law in respect of the arrest of a supposed criminal, it follows, *a fortiori*, that an arrest under civil process must be governed by a similar restrictive provision. It is settled law in the English Courts that an arrest under any warrant "which is in the nature of a civil proceeding," is illegal, if the officer making the arrest has not the warrant ready to be produced at the time of the arrest if required by the person whose arrest is made under it. That this plainly proper rule is in fact a rule of law as contained in the Indian Civil Procedure Code appears from consideration of ss. 336 and 337 of that Code. By the former it is provided in cl. (*b*) that when the decree in execution of which a judgment-debtor is arrested is a decree for money, and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him; and by s. 337 it is enacted that every warrant for the arrest of the judgment-debtor shall direct the officer intrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs, if any, to which he may be liable, be sooner paid. But without seeing the warrant the judgment-debtor might not, and ordinarily would not, know what sum he should pay to procure his release from the arrest of the officer: and even assuming he knew with certainty the amount of the principal decree-money, regarding which a judgment-debtor, under an *ex parte* decree, might well be ignorant, it is obvious that a reference to the warrant would be needed to ascertain the charge for interest and costs. Indeed the form of the warrant No. 154, 4th sch., Act XIV of 1882, shows that an essential part of that instrument is a bill stating exactly the amount for "principal, interest, costs, and execution," the payment of which will operate [322] to avoid the arrest thereunder directed to be made. For these reasons I would hold that the arrest of Babu Amar Nath without a warrant would be illegal; and in the strange condition of the record in this respect there is no evidence that he was arrested legally, but rather strong presumptions to the contrary.

5 A. 322=3 A.W.N. (1883) 49.

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APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

SOBHA PANDEY (*Defendant*) *v.* SAHODRA BIBI (*Plaintiff*).*
[2nd February, 1883.]

Act XV of 1877 (*Limitation Act*), *sch. ii, No.* 91—*Suit for cancellation of instrument—Declaratory decree—Act I of* 1877 (*Specific Relief Act*), *s.* 39.

The plaintiff alleging that he was the proprietor of certain land ; that defendant No. 2 had wrongfully and fraudulently mortgaged it to defendant No. 1 ; and that defendant No. 1 had applied for foreclosure of the mortgage, and notice of foreclosure had issued ; claimed " that, the mortgage-deed being set aside, the land be protected from the illegal foreclosure, by cancelment of the foreclosure proceedings."

Held, that the suit was not strictly one for the cancelment or setting aside of an instrument to which the limitation in No. 91, sch. ii of the Limitation Act, 1877, would apply, (which relates to suits of the nature of those referred to in s. 39 of the Specific Relief Act), but rather one for a declaratory decree.

[F., 6 A. 260 (261) ; 16 B. 1 (10) ; R., 6 A. 75 (76) ; 16 A. 73 (74) ; 56 P.R. 1903 (F.B.)=93 P.L.R. 1903 ; 1 C.L.J. 73.]

THE plaintiff in this suit alleged in his plaint that he was the proprietor and in possession of a one anna four pies share of a certain village, although defendant No. 2, his deceased brother's widow, was recorded as proprietor ; that defendant No. 2 fraudulently mortgaged the share to defendant No. 1 ; that such mortgage was invalid as defendant No. 2 had no power to make the same ; that defendant No. 1 applied for mutation of names by virtue of the mortgage, but the application was refused on objection taken by him, plaintiff ; that defendant No. 1 applied to foreclose the mortgage, and having obtained foreclosure, sued defendant No. 2 for possession of the share ; that he, plaintiff, was made a defendant in this suit on his own application ; that such suit was dismissed, by reason of the foreclosure proceedings not having been valid ; and that defendant No. 1 had made a second application for foreclosure against him, plaintiff, and defendant No. 2, [323] and notice of foreclosure had issued. The plaintiff, on these allegations, claimed " that, the mortgage-deed being set aside, the share be protected from the illegal foreclosure, by cancelment of the foreclosure proceedings." The suit was defended by defendant No. 1 only, who set up as a defence that the share in dispute was the property of defendant No. 2, and that the suit was barred by limitation. The Court of first instance dismissed the suit on the ground that it was barred by limitation. On appeal by the plaintiff the lower appellate Court held that the suit was within time and gave him a decree.

In second appeal the defendant contended that the suit was barred by limitation, being governed by No. 91, sch. ii of the Limitation Act, and the period of limitation provided by that article having expired.

Munshi *Sukh Ram* and Maulvi *Mehdi Hasan*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the respondent.

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* Second Appeal No. 818 of 1882, from a decree of Rai Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 1st May, 1882, reversing a decree of Maulvi Hafiz Rahim, Munsif of Bansgaon, dated the 20th December, 1881.

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APPELLATE CIVIL.

5 A. 322 = 3 A.W.N. (1883) 49.

The Court (OLDFIELD, J., and BRODHURST, J.) made the following order of remand:—

ORDER OF REMAND.

OLDFIELD, J.—We are of opinion that the suit is not barred by limitation. We understand the claim to be not so much to have the instrument itself delivered up and cancelled as to have it declared ineffectual in respect of the plaintiff's right in the property, and to have his right declared, and to have the proceedings now taken to foreclose declared not to affect his right in the property. It is not a suit strictly for cancelment or setting aside an instrument to which the limitation in No. 91, sch. ii of the Limitation Act will apply, which are suits of the nature of those referred to in s. 39 of the Specific Relief Act, but it is rather a suit for a declaratory decree, and is not barred by limitation. (After observing that the lower appellate Court had failed to determine the issues properly arising in the case, and stating those issues, the learned Judges proceed to direct that they should be tried by the lower appellate Court).

Case remanded.

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5 A. 324 (F.B.) = 3 A.W.N. (1883) 51 = 8 Ind. Jur. 50.

[324] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

BHAJAN AND ANOTHER (*Defendants*) *v.* MUSHTAK AHMAD (*Plaintiff*).*
[9th February, 1883.]

Vendor and purchaser—Sale—Mortgage—Pre-emption.

In July 1870, *R*, the owner of a share of a village, executed in favour of *M* an instrument whereby he transferred by sale the share to *M* absolutely. In November, 1870, *M* agreed to re-transfer the share to *R*, if *R* desired, at any time within thirteen years to re-purchase it, on payment of the sum which *M* had paid for it. During the term mentioned in the agreement of November, 1870, *R* not having taken advantage of the agreement, *M* sued, as owner of the share, to enforce the right of pre-emption in respect of the sale of another share of the village.

Held, that, *M* having become under the transfer of July, 1870, the out-and-out proprietor of the share, until *R* availed himself of the option given him by the agreement of November, 1870, the full estate of an owner, carrying with it the right of pre-emption, vested in *M*, and it was competent for him to enforce such right by suit.

Ramsaran Lal v. *Amirta Kuar* (1), distinguished.

[D., 14 A. 195 (198); 3 O.C. 260 (262).]

THIS was a suit to enforce the right of pre-emption in respect of the sale of a share in a certain patti in a certain mahal. On the 20th July, 1870, one Ramdial, the owner of a share in the patti in question, executed an instrument in favour of Mushtak Ahmad, the plaintiff in this suit, purporting to transfer by sale such share to the latter absolutely. On the 25th November, 1870 or some four months later, Mushtak Ahmad

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* Second Appeal No. 1370 of 1881, from a decree of Maulvi Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 14th June, 1881, reversing a decree of Maulvi Nasr-ul-lah Khan, Munsif of Saharanpur, dated the 28th April, 1881.

(1) 3 A. 369.

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executed an instrument in favour of Ramdial, which, after reciting the sale-deed, and stating that he (Mushtak Ahmad) "is in possession of the land sold from the date of the sale," continued as follows:—"I make this agreement in writing as a matter of favour to Ramdial, vendor, that, if the said vendor shall wish to purchase the aforesaid land within thirteen years, by paying from his own funds (without borrowing the money), in a lump sum, the purchase-money entered in the sale-deed executed in my favour, together with the cost of the stamps for the sale-deed and agreement and the registration-fee, &c., then I shall sell the said land (sold to me) to him (the vendor) and execute a sale-deed in his favour." In April 1880, Ramdial [325] not having acted on the agreement above set out, one Bhajan, a co-sharer in the same patti, sold his share to Ramdial. Thereupon Mushtak Ahmad brought the present suit to enforce his right of pre-emption under the village *wajib-ul-arz* in respect of such sale, as a co-sharer in the same patti, by virtue of the instrument of the 20th July 1870, having a preferential right to purchase the share to that of the defendant Ramdial, who was a "stranger," that is to say, a person who was not a co-sharer in the same patti. The defendants set up as a defence to the suit, with reference to the instruments of the 20th July 1870, and 25th November 1870, that the defendant Ramdial was still a co-sharer in the patti, his share not having been absolutely transferred to the plaintiff, but being only mortgaged by conditional sale to him, and therefore the sale to the defendant Ramdial by the defendant Bhajan of his share was not impeachable. The Court of first instance allowed this defence, holding that the effect of those two instruments was to constitute the transfer of the defendant Ramdial's share to the plaintiff a mortgage by conditional sale. On appeal by the plaintiff the lower appellate Court took a contrary view of the question at issue, and held that the share of the defendant Ramdial had passed to the plaintiff absolutely, and the agreement of the 25th November 1870, did not operate to convert such absolute transfer into a mortgage by conditional sale.

The defendants appealed to the High Court, their grounds of appeal raising the question as to the nature of the transfer of the defendant Ramdial's share to the plaintiff. The Divisional Bench (STUART, C.J., and BRODHURST, J.) before which the appeal came referred the case to the Full Bench, the order of reference being as follows:—

STUART, C.J.—The plaintiff maintains that the effect of the sale to him in July 1870, was to make Ramdial defendant no longer a sharer, but a stranger in the village, and that his acquisition by purchase of Bhajan's share therein conferred on him no right which could compete with the plaintiff's pre-emptive claim, and that the agreement of November 1870, was a mere offer by him to the defendant in the eventuality of its being accepted within the thirteen years, and that in that respect it took effect from its own [326] date in November 1870, and not from the date of the sale-deed, upwards of four months before that. And if this contention be well founded, the two instruments must be read separately. Ramdial, the defendant, however, pleads that the sale by him in July 1870, to the plaintiff is subject to, and must be read with, the agreement of November 1870, and that the transaction between them was in virtue of that agreement changed from being an absolute and final sale into a conditional sale or mortgage, and that this state of things must be taken to date back to the time when the sale was made, and that he, Ramdial, is therefore still a sharer within the meaning

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of the *wajib-ul-arz*, and that the plaintiff has no right of pre-emption over him.

The question thus raised appears to fall within the ruling of the Full Bench in the case of *Ramsaran Lal* v. *Amirta Kuar* (1), where it was held by my colleagues PEARSON, SPANKIE, OLDFIELD, and STRAIGHT, JJ., that the effect of the sale and agreement together was to make the transaction a mortgage, and not an absolute and final sale, determining an absolute and controlling right in the vendee. I myself doubted the soundness of such an opinion for reasons which will be found in my judgment in that case, both in the Division Bench and in the Full Bench, although, as I said in the latter, I was not prepared to express a dissent from the opinion of my colleagues, retaining as I did the doubt I suggested in my order referring the case to the Full Bench. In fact, the opinion I inclined to in that case was that the sale was final and absolute, and not affected or qualified by the agreement. In fact, my own observations in that case, explaining the doubts which affected my mind, certainly favour the contention of the plaintiff-respondent in the case, and it will be seen that I refer to two authorities which are manifestly germane to the present case, *viz.*, "Sugden's Vendors and Purchasers," 14th edition, 1862, p. 199, where it is said :—"If a power to re-purchase be given upon a condition * * the right (that is the right to re-purchase) cannot be enforced unless the condition has been complied with, *for it is a privilege conferred.*" The other authority was a judgment of the Privy Council in *Shaw* v. *Jeffery* (2). That was a case from Lower Canada, and it involved the consideration of six deeds as to which it was ruled that, taken [327] together, they did not operate as a mortgage, but as an absolute sale with a contingent right of re-purchase. That judgment was delivered by Lord Justice KNIGHT BRUCE, and at p. 461 his Lordship laid down the law thus :—"Upon the plain language of the instruments, and on consideration of the circumstances existing at the time of their execution, their Lordships think it clear that this was nothing like a mortgage, but was an absolute sale, to which was attached a conditional right of re-purchase, to be exercised, if at all, on the happening of a certain event, the period for the happening of which was fully and equally within the knowledge of both parties." These authorities, however, did not move my colleagues, who adhered to their view, and finally recorded their opinion, that under the circumstances of the case then before them, the two instruments, the sale and the agreement, together constituted one single mortgage transaction. The facts in that case, however, were in some particulars different from those in the present, for there the two instruments, the sale and the agreement, were of the same date, the latter being signed immediately after the former; whereas in the present case the agreement was not entered into till upwards of four months after the date of the sale, and this makes a difference of considerable importance between the two cases; and I would on that account alone refer the present case to the Full Bench of the Court when the law on the subject may be fully reconsidered.

BRODHURST, J.—The points for determination in this appeal are whether, under the deed of agreement executed by the plaintiff-respondent on the 25th November, 1870, the property therein referred to has become conditionally sold or mortgaged to the plaintiff, the defendant Ramdial

(1) 3 A. 369. (2) 13 Moo. P.C.C. 432.

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being the owner and mortgagor; or whether under the deed of sale executed in his favour on the 20th July, 1870, by the said defendant, the plaintiff is still the absolute proprietor of the property, and has the right of pre-emption in the land in suit. The sale-deed of the 20th July, 1870, shows that Ramdial sold the property therein alluded to absolutely to Mushtak Ahmad the plaintiff, for the sum of Rs. 2,865, and that he received the whole of the purchase-money. The vendor stated in the deed:—"I have given up my possession and put the aforesaid vendee in full possession of the property sold. I hereby covenant that the [328] vendee shall, in virtue of his proprietary title, always remain in possession and enjoyment of the sold property in question: now the executant or my heirs have no sort of claim or concern whatever with the sold property, nor shall I have any: the vendee has every power to remain in possession thereof by appropriating the produce and paying the Government revenue: the whole and entire consideration money has been received through Abdul Aziz, karinda of the aforesaid vendee."

It is quite clear from the terms of this document that Ramdial wholly divested himself of all rights in the property by an absolute transfer by sale to Mushtak Ahmad. The deed of agreement of the 25th November, 1870, was executed by Mushtak Ahmad more than four months after the date of the deed of sale, and it recites that the executant has since the date of sale been in possession of the land that he had purchased from Ramdial under a registered deed of sale of the 20th July, 1870, and it contains the following agreement:—"I make this agreement in writing as a matter of favour to Ramdial, vendor, that if the said vendor shall wish to purchase the aforesaid land within thirteen years, by paying from his own fund, without borrowing the money, in a lump sum, the purchase-money entered in the sale-deed executed in my favour, together with the costs of the stamps for the deeds of sale and agreement, and the registration-fee, etc., then I shall sell the said land—sold to me—to him the vendor, and execute a sale-deed in his favour: the aforesaid vendor cultivates the above-mentioned land along with his sons: if he shall make any objection as to the cultivation of the land and payment of profits every year up to the beginning of Asarh, he shall deprive himself of the benefit of this agreement; in other words, my agreement for executing the sale-deed within the aforesaid period shall become null and void."

There is nothing in the last-mentioned deed to show that any change has under it been effected in the ownership of the property, and that the absolute sale of the 20th July, 1870, has been converted into a conditional sale or mortgage by the agreement of the 25th November, 1870; on the contrary, it is evident that Mushtak Ahmad in still in proprietary possession of the property, and that Ramdial has not, at present, any right in the said property, and will not [329] have any right in it, unless he, within the short remaining term of the thirteen years, fulfils—as he is not at all likely to do—the condition contained in the deed of agreement, when he will be entitled to have a deed of sale executed in his favour, and to be put in proprietary possession of the land. As no alteration in the ownership of the property has yet been caused by the contract entered into on the 25th November, 1870, and as Mushtak Ahmad is still the sole and absolute proprietor of the land under the deed of sale of the 20th July, 1870, he has the right of pre-emption in the land in suit, and I would therefore dismiss the appeal with costs.

1883 FEB. 9. — FULL BENCH. — 5 A. 324 (F.B.) = 3 A.W.N. (1883) 51 = 8 Ind. Jur. 80.

The following postscript was made to the order set out above:

BRODHURST, J.—When I wrote my judgment on the 26th ultimo, my attention had not been directed to the ruling of the Full Bench of this Court in the case of *Ram Saran Lal* v. *Amirta Kuar* (1). There is, I consider, a wide difference between that case and the present one, though the authorities referred to by the learned Chief Justice in his judgment strongly support the views I have recorded above. I do not think that a reference to the Full Bench is, in this instance, required, but I nevertheless agree to it in deference to the wishes of the Honourable the Chief Justice.

Babu *Ram Das Chakarbati*, for the appellants.

Pandit *Bishambhar Nath*, for the respondents.

The following judgments were delivered by the Full Bench:—

JUDGMENTS.

STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ.—It does not appear necessary to us to enter at length into the point raised by this reference, because in our opinion the Full Bench ruling, mentioned by the learned Chief Justice in his referring order, the correctness of which we see no reason to question, is not applicable to the case before us, and we concur in the opinions severally expressed by the Chief Justice and BRODHURST, J., that the instrument, the legal character of which is in dispute in the present appeal, was an absolute sale-deed and not one of mortgage. It is clear that the plaintiff became the out-and-out proprietor of his vendor's zamindari rights, and until the latter availed himself of the option given him by the agreement of November, 1870, the full estate of an [330] owner, carrying with it the right of pre-emption, vested in the former, and it was competent for him to enforce it by suit. The pleas taken therefore have no force, and the appeal must be dismissed with costs.

STUART, C.J.—It would perhaps be sufficient for me to say that I adhere in all respects to the views expressed in my order of reference in this case, but as my colleagues in their answer have stated that in their opinion the Full Bench ruling mentioned by me in *Ram Saran Lal* v. *Amirta Kuar* (1), the correctness of which they see no reason to question, is not applicable to the present case, I think it right to explain that when I said that the question now raised before us appeared to fall within that Full Bench ruling, I meant of course the ruling as determined by the opinions of my then colleagues. I myself did not there record any dissenting judgment, although I doubted the soundness of the conclusion they had arrived at. "In fact," as I stated in my order of reference, "the opinion I inclined to in that case was, that the sale there was final and absolute, and not affected or qualified by the agreement." But I pointed out that the facts in that case were in some particulars different from those in the present; for there the two instruments, the sale and the agreement, were of the same date, the latter being signed immediately after the former, whereas in the present case the agreement was not entered into till upwards of four months after the date of the sale, and this makes a difference of considerable importance between the two cases. The legal principle, however, which I recognized in that case clearly applies to the present, and therefore, as well as for the reasons assigned by my colleagues for their conclusion, I have, in agreement with them, no hesitation in holding that the appeal in the case referred by BRODHURST, J., and myself must be taken to fail.

(1) 3 A. 369.

5 A. 331 (F.B.)=3 A.W.N. (1883) 55=8 Ind. Jur. 53.

1883 FEB. 14. FULL BENCH. 5 A. 331 (F.B.)= 3 A.W.N. (1883) 55= 8 Ind. Jur. 53.

[331] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

KARAM KHAN AND OTHERS (*Plaintiffs*) v. DARYAI SINGH AND ANOTHER (*Defendants*).* [14th February, 1883.]

Suit to set aside mortgage—Declaratory suit—Court-fee—Act VII of 1870 (*Court Fees Act*), *s.* 17 (*iv*), *cl.* (*c*)—*Act I of* 1877 (*Specific Relief Act*), *s.* 39.

C's father mortgaged certain land to *D*. *A* purchased the instrument of mortgage and sued *C*, whose father had died, upon it, and obtained a decree enforcing the mortgage. *C* then mortgaged a moiety of the land to *B*, and subsequently sold the same moiety to *A*. *A* sued *B* for the cancellation of the instrument of mortgage to *B*. *Held*, that the suit was in the nature of a simple declaratory suit.

[**Diss.**, 2 L.B R. 266 (267); 87 P.R. 1916=127 P.W.R. 1916=36 Ind. Cas. 95; **F.**, 1 O.C. 123 (124); **R.**, 20 B. 736 (741); 29 B. 207=6 Bom. L.R. 1125 (1127); A.W.N. (1889) 124; 1 O.C. Sup. 4 (6) (**F.B**); **Cons.**, 23 M. 490 (491); **D.**, 6 C.L.J. 427=11 C.W.N. 705 (707); 28 M.L J. 118=(1915) M.W.N. 118=17 M.L.T. 154 =28 Ind. Cas. 79 (81).]

THE following case was referred to STRAIGHT, J., by the taxing officer of the High Court, for determination as to the amount of Court-fees payable on the plaint and petition of appeal:—

The father of *C* hypothecated to *D* twenty-five biswansis of land for a loan of Rs. 400. *A* purchased the bond, and subsequently sued *C*, whose father had died, upon it, and obtained a decree for enforcement of lien. *C* then mortgaged to *B* twelve and a half biswansis of the twenty-five biswansis, and afterwards executed a sale-deed to *A* of the same twelve and a half biswansis. *A* now sued *B* for the cancelment of the mortgage-deed to *B*.

The taxing officer was of opinion that the suit was one "to obtain a declaratory decree or order, where consequential relief is prayed," and that it fell under s. 7, para. iv, cl. (*c*), Court Fees Act, 1870.

STRAIGHT, J., referred the point to the Full Bench, the order of reference being as follows:—

STRAIGHT, J.—I have hitherto held this view, and have decided in accordance with it in several cases; among others in *Ram Lal* v. *Kashi Ram* (1) and *Mahadeo Pershad Singh* v. *Deo Narain Rai* (2). In doing so I considered myself bound by the ruling in *Tacoordeen Tewarry* v. *Ali Hossein Khan* (3) which was followed in *Joy Narain Giree* v. *Grish Chunder Mytee*(4). As, however, both these decisions [332] were passed long before the Specific Relief Act came into operation, and as upon careful consideration the case now referred appears to me to be one exactly of the kind mentioned in s. 39 of that Act, and to be in the nature of a simple declaratory suit, I think it desirable to take the opinion of the Full Bench upon the point.

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* Second Appeal No. 1391 of 1881, from a decree of T. R. Redfern, Esq., Judge of Mainpuri, dated the 23rd August, 1881, modifying a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Mainpuri, dated the 24th June, 1881.

(1) 1 Legal Remembrancer (N.W.P.) 140.

(2) 1 Legal Remembrancer (N.W.P.) 141.

(3) 21 W.R. 340. (4) 22 W.R. 438.

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FULL BENCH.

5 A. 331 (F B.) = 3 A.W.N. (1883) 55 = 8 Ind. Jur. 53.

The Full Bench delivered the following opinion :—

OPINION.

STUART, C.J., and STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ.—We concur in the opinion expressed in this reference, that the case is in the nature of a simple declaratory suit.

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5 A. 332 = 3 A.W.N. (1883) 47.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

KUBAIR SINGH (*Plaintiff*) *v.* ATMA RAM (*Defendant*).*
[15th February, 1883.]

Mortgage—Suit for redemption—Valuation of suit—Jurisdiction.

The purchaser of the equity of redemption of certain land sued to redeem the same. He made the mortgagor and vendor of the land a "*pro forma*" defendant. *Held*, that the value of the subject-matter of the suit was not the market-value of the land, but the amount of the mortgage-money.

[F., 31 A. 44 = 5 A.L.J. 713 = A.W.N. (1908) 276 = 1 Ind. Cas. 703; R., 14 C.P.L.R. 154 (155); 8 Ind. Cas. 464 (465) = U.B.R. (1910) 10 (11); 8 Ind. Cas. 973 (975).]

THE plaintiff in this suit, who had purchased the equity of redemption of a five biswas share of a certain village for Rs. 1,500, claimed to redeem the mortgage of the share on payment of Rs. 240, the mortgage-money. He joined as a defendant, *pro forma*, the mortgagor and vendor of the share in suit. The suit was instituted, regard being had to the amount of the mortgage-money, in the Munsif's Court. The defendant mortgagee set up as a defence to the suit that the value of the share being Rs. 1,500, the suit was not cognizable in the Munsif's Court. The Munsif held that the suit should be valued, for the purposes of jurisdiction, at the alleged value of the mortgage, that is to say, Rs. 240, and not at the value of the property, and that the suit was therefore within his cognizance; and in the result gave the plaintiff a decree. On appeal by the defendant the lower appellate Court held that the suit was not cognizable by the Munsif, inasmuch as it should be valued at the value of the mortgaged property, not being one merely between a [333] mortgagor and mortgagee, and it set aside the decree of the Munsif, and directed that the plaint should be returned to the plaintiff in order that it might be presented to the proper Court.

In second appeal the plaintiff contended that the suit should be valued at the mortgage-money, and it had therefore been properly instituted in the Munsif's Court.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Pandit *Bishambhar Nath*, for the appellant.

Pandits *Ajudhia Nath* and *Nand Lal*, for the respondent.

The Court (STUART, C.J., and TYRRELL, J.) delivered the following judgment :—

JUDGMENT.

This appeal must be allowed. The Court of first instance took a proper view of the value of the subject-matter in dispute; and the lower appellate Court was wrong in reversing the decree on that question only.

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* Second Appeal No. 826 of 1882, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 5th July, 1882, reversing a decree of Maulvi Abdul Haq, Munsif of Chaphund, dated the 20th February, 1882.

We set aside the decree of the lower appellate Court, and finding no force in the other pleas urged before the Subordinate Judge, we restore the decree of the Court of first instance and decree this appeal with costs.

Appeal allowed.

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APPELLATE CIVIL.

5 A. 332 = 3 A.W.N. (1883) 47.

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5 A. 333 (F.B.) = 3 A.W.N. (1883) 56.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

DAYA NAND (*Appellant*) v. BAKHTAWAR SINGH (*Respondent*).
[16th February, 1883.]

Order refusing to file in Court agreement to refer to arbitration—Appeal—Court-fee—Civil Procedure Code, ss. 2, 523—"Decree."

Held by the Full Bench (OLDFIELD, J., *dissenting*) that an order refusing to file in Court an agreement to refer to arbitration is not appealable.

Per OLDFIELD, J.—That such an order is appealable, and the court-fee payable on the memorandum of appeal is an *ad valorem* fee computed on the value of the subject-matter in dispute in the appeal.

Janki Tewari v. *Gayan Tewari* (1), distinguished by STUART, C J., and followed by OLDFIELD, J.

[**Diss.**, 22 M. 299 = 9 M.L J 10 (11); **Appr.**, 33 C. 11 (13); **R.**, 6 A. 186 (188) (F B.); A.W.N (1895) 121; A.W.N. (1907) 177 = 11 O.C. 116 (117) (F.B.); **D.**, 117 P.R. 1916 = 107 P.W.R. 1916 = 34 Ind. Cas. 192.]

ONE Daya Nand applied under s. 523 of the Civil Procedure Code to have an agreement to refer to arbitration filed in Court. [334] The application was numbered and registered as a suit, under the provisions of the same section, and was eventually rejected by the Court of first instance. The plaintiff appealed from the order rejecting the application to the High Court, paying a court-fee of Rs. 10 on his memorandum of appeal. The taxing officer referred the question as to the court-fee payable on the memorandum to STRAIGHT, J., observing as follows:—

"According to the Calcutta High Court ruling in *Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* (2) the appeal will not lie at all apparently. If, however, the appeal will lie, then it must be an appeal from a decree, *Janki Tewari* v. *Gayan Tewari* (1), and in that case (as in F. A. No. 79 of 1881) (3) the fee payable on the memorandum of appeal will be an *ad valorem* fee computed on the value (Rs. 13,495), set forth in the memorandum of appeal—that is to say, a fee of Rs. 580 is payable, and there is a deficiency of Rs. 570 to be made good."

STRAIGHT, J., referred the question raised by the taxing officer to the Full Bench for its opinion.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

The following opinions were delivered by the Full Bench:—

OPINIONS.

STUART, C.J.—At the hearing of this reference before the Full Bench several of my colleagues appeared to be of opinion that the order refusing to file the award was appealable, seeing that it was synonymous with

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(1) 3 A. 427. (2) 7 C. 490. (3) Not reported.

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(1883) 56.

"decree," as that word is defined in s. 2 of the Civil Procedure Code, and that by s. 523 of the Code it was an order made in an application or proceeding which was directed to be "numbered and registered as a suit." But on further consideration the majority of them have—in agreement with myself, for I have held that opinion throughout—arrived at the consideration that the order in question was not of such a character, and they have therefore answered the question in the negative. To my mind the question before us is a very simple one, and the answer obvious. The order refusing to file the agreement to [335] arbitration was distinctly not "the formal expression of an adjudication upon a right claimed or defence set up in a Civil Court," and which "decides a suit or appeal." It was, indeed, suggested that such an order was of the same character as one rejecting a plaint or directing accounts to be taken, which s. 2 provides is within the definition given of "decree." But that is clearly a misapprehension, for these are orders which, although of a preliminary character, necessarily result in the disposal of the suit or appeal, in the case of rejection of the plaint for any of the reasons mentioned in ss. 53 and 54 of the Code of Procedure, and in the case of the accounts to be taken the order going directly to the merits of the suit or appeal The present order therefore is not a decree, but in the words of the definition rather an order which means "the formal expression of a decision of a Civil Court" other than a decree, as that term is defined in the Code of Civil Procedure.

A case before SPANKIE, J., and myself—*Janki Tewari* v. *Gayan Tewari* (1)—was referred to as supporting the opposite contention, but that was a totally different case from the present. There the procedure, which in our opinion warranted an appeal, is described in my own judgment, and was in this wise:—"A pleading in the form of a plaint was filed, and it prayed that after the necessary requisites of the law have been fulfilled, the arbitration award may be ordered to be filed, and that after its being filed it may be duly acted upon, and all this without the least reference to the directions provided by s. 526. In this form the Munsif entertains the case, takes evidence, and ultimately records a judgment, dismissing the claim on grounds such as these,—that all the property referred to arbitration had not been dealt with in the award, and that the arbitration agreement had not not been executed by all the parties named therein. Such having been the procedure adopted for the conduct and disposal of the suit by the Munsif, there was really no case for the application of s. 522, and therefore none for the exclusion of an appeal to the Judge, the Munsif adopting a different line of inquiry from that provided by the Procedure Code for arbitration cases, and giving a decision and order by which he dismissed the claim, and making a "decree" [336] within the meaning of that term as defined by s. 2 of Act X of 1877, for it was clearly an adjudication or order which decided the suit in the form in which it had been taken cognizance of by him, and therefore such an order dismissing the claim was clearly a decree within the meaning of s. 540, and was appealable to the Judge."

A Calcutta case was cited before us—*Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* (2) before PONTIFEX and FIELD, JJ.—and seems directly in point. There it was decided that no appeal lay, and it is noticeable that PONTIFEX, J., expressed the opinion that the words in s. 523 "to

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(1) 3 A. 427.

(2) 7 C. 490.

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be numbered and registered as a suit" were merely intended for administrative purposes.

In the present case there clearly is no appeal, and that being so, it is unnecessary to say anything on the question of the court-fee.

STRAIGHT, BRODHURST and TYRRELL, JJ.—The primary question raised by this reference is, whether an order passed under s. 523 of the Civil Procedure Code, refusing an application to file an agreement to arbitration, comes within the definition of decree, as mentioned in the interpretation clause of that Act, and is therefore appealable. In other words, is such an order the formal expression of an adjudication upon a right claimed in a Civil Court by which a suit has been decided? Whether prior to the passing of the Contract Act the Courts of India were bound to follow the principle adopted by the Equity Courts in England of refusing to enforce specific performance of a contract to refer, it is not necessary now to consider, for by *Excep.* 1 to s. 28 of that Act, specific performance of such agreements was distinctly declared to be enforceable by suit. But when the Specific Relief Act came into operation, this provision was repealed, and the law now stands that no contract to refer a controversy to arbitration shall be specifically enforced, save in the manner provided by Chap. XXXVII of the Code of Civil Procedure. It therefore seems obvious that the Legislature intended to abolish the right to bring a suit for specific performance, as conferred by s. 28 of the Contract Act, and only to save the minor remedies provided in Chap. XXXVII of the Code. If they had regarded these remedies as virtually constituting a suit, it is difficult to see what necessity there was for any [337] alteration in the law as it stood, whereas the anomaly now presents itself, if proceedings under s. 523 of the Code are to be regarded as amounting to a suit, that while an agreement to refer cannot be specifically enforced by suit, it may nevertheless be enforced by some other proceeding, which though not in name is in effect a suit for all practical purposes. It is impossible to suppose that such a glaring inconsistency could have been overlooked. Indeed the only reasonable inference is that it was intended to restore the English principle, which s. 28 of the Contract Act had temporarily disturbed, namely, that specific enforcement of contracts to refer to arbitration by suit should not be permitted, while saving to parties the remedy *short* of a suit which is to be found in s. 523 of the Civil Code. The provisions therein contained are analogous to those contained in s. 17 of the Common Law Procedure Act of 1854, and their object obviously is, by facilitating the filing of agreements to refer, to bring the reference under the cognizance and control of the Court, and by s. 524 of the Code to make the foregoing provisions of Chap. XXXVII, "so far as they are consistent with any agreement so filed," applicable "to all proceedings under an order of reference made by the Court under s. 523, and to the award of arbitration, and to the enforcement of decree founded thereon." Under all these circumstances we find it impossible to hold, that a "special proceeding" under s. 523 of the Code amounts to a suit, and it follows as a necessary consequence that orders passed in pursuance of that section are not decrees. Hence we must answer the first question put to us by this reference in the negative, and in this view of the matter the second need not be considered.

OLDFIELD, J.—The first question raised in this reference is whether an order disallowing an application to file an agreement to refer to arbitration under s. 523, Civil Procedure Code, is appealable, and the

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answer will depend on whether such an order is a decree within the meaning of s. 2, Act X of 1877.

A decree is defined to be "the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal;" and an order rejecting a plaint is under [338] the section within the definition. Now the order in question is an adjudication upon a right, for by the provisions of s. 21, Specific Relief Act, and s. 523, Civil Procedure Code, the parties to an agreement to refer a controversy to arbitration have a right to have the agreement enforced, and it is only when sufficient cause is shown why the agreement should not be filed, that the Court can refuse to order it to be filed, and to make an order of reference.

The order in question also seems to me to be an adjudication which, so far as regards the Court expressing it, decides the suit.

The proceedings taken under ss. 523 and 524 appear to me to come within the meaning of the term "suit" in s. 2, for s 523 directs that "the application shall be in writing, and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the other or others of them as defendant or defendants, if the application have been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants," and notice is given to the parties to the agreement to show cause why the agreement should not be filed, and if no sufficient cause be shown, the Court may cause the agreement to be filed, and shall make an order of reference thereon, and nominate the arbitrator when he is not named in the agreement, and the parties cannot agree as to the nomination, and the foregoing provisions of Chap. XXXVII, so far as they are consistent with any agreement so filed, are made applicable to all proceedings under an order of reference made by the Court under s. 523, and to the award of arbitration, and to the enforcement of the decree founded thereupon.

There is thus a direction that the application to file an agreement to refer to arbitration shall be dealt with as a suit between the parties, and the proceeding has all the essentials in form and substance of a suit: the Court may, on sufficient cause shown, disallow the application, or cause the agreement to be filed, and make an order of reference, on which an award will follow, and judgment be passed on the award followed by a decree, and which can be enforced as a decree.

It has been contended that these directions are only for convenience, but the result remains that the proceeding is dealt with [339] as a suit and becomes a suit for all purposes of the Civil Procedure Code, for the word "suit" in s. 2 must be taken to mean and include a proceeding which the Code itself in another section refers to and directs to be dealt with as a suit.

The adjudication also decides the suit so far as the Court expressing it, for it disallows the right claimed to enforce the agreement, and is tantamount to a dismissal of the suit.

The order will, in my opinion, therefore come within the definition of a "decree" given in s. 2, Code of Civil Procedure, and be appealable.

The question before us whether the proceeding under s. 523 is a suit cannot be affected by the repeal of the 2nd clause of *Excep.* 1, s. 28, Contract Act. That law allowed a suit to be brought for specific performance of a contract to refer a dispute to arbitration, and it was repealed

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by the Specific Relief Act, which by s. 21 enacts that "save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced." There is nothing in the mere repeal of the 2nd clause, *Excep.* 1, s. 28 of the Contract Act, to prevent the procedure prescribed by the Civil Procedure Code being considered to be a "suit" within the meaning of the word in s. 2 of the Code, and that is the only point for consideration.

The case of *Janki Tewari* v. *Gayan Tewari* (1) decided by STUART, C.J., and SPANKIE, J., supports the view I take. In that case the application had been made under s. 525, Act X of 1877, for filing an award in Court, and the Court disallowed it, and it was held by the High Court that an appeal would lie from the order, on the ground that it was a decree within the definition in s 2. Mr. Justice SPANKIE in his judgment in that case observes:—" Applications alike under ss. 523 and 525 are to be registered as suits. The application to file an agreement under s. 523 is to be made to any Court having jurisdiction in the matter to which the agreement relates; that under s. 525 "to the Court of the lowest grade having jurisdiction over the matter to which the award relates." These words are not to be found in s. 327 of Act VIII of 1859. [340] The applications alike in ss. 523 and 525 are at *once* to be registered as suits before notice is given to the other side. In this respect they differ from ss. 326 and 327 of Act VIII of 1859, under which notice is given before the application is registered as a suit. This circumstance may seem unimportant, but the difference seems to me to indicate that such applications were really to be dealt with from the moment they were received as suits, and that the orders on the award under them were to have a final character. The procedure adopted, the use of the word decree in s. 524, the mode in which effect is to be given to the award, seem to me to point to distinguish the ultimate orders from those orders appealable under s. 588 of the Code, and bring them under the definition of s. 2 of the Act, wherein "decree" means the final expression of an adjudication upon any right claimed or defence set up in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal: an order rejecting a plaint, or directing accounts to be taken, or determining any question referred to in s. 244, but not specified in s. 588, is within the definition. An order rejecting a plaint is appealable as a decree, and in this respect an order rejecting an application to file an award may be regarded as a decree. It *decides* the suit. If the application be granted, the suit is similarly decided, and an appeal would lie when the decree was in excess of, or not in accordance with, the award."

The grounds of the decision in that case apply equally to an order disallowing an application to file an agreement to refer a dispute to arbitration under s. 523, for if the order rejecting the application to file an award under s. 525 is a decree within the meaning of s. 2 and appealable, then on similar grounds the order disallowing the application to file an agreement to refer a dispute to arbitration will also be a decree and appealable.

My answer therefore to this reference is that the order is a "decree," as defined in s. 2, Act X of 1877, and that an appeal will lie from it: and with regard to the second question that arises, that the fee payable is an *ad valorem* fee computed on the value of the subject-matter in dispute in the appeal.

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(1) 3 A. 427.

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CIVIL REVISIONAL.

5 A. 341= 3 A.W.N. (1883) 48.

5 A. 341=3 A.W.N. (1883) 48.

[341] CIVIL REVISIONAL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

RAMESHAR CHAUBEY (*Plaintiff*) *v.* MATA BHIKH (*Defendant*).*
[15th February, 1883.]

Act XV of 1877 (*Limitation Act*), *sch. ii, No.* 48.

R sued *M* for a certain sum of money on the ground that he had given such sum to *M* to deliver to his (*R's*) family; that *M* had not delivered the money and that when this fact became known to *R* and he demanded the money, *M* denied having received the same. *Held*, that the limitation law applicable to the suit was that provided by No. 48, sch. ii of the Limitation Act, 1877, and the time from which the period of limitation began to run was when *B* first learnt that *M* had retained the money in his possession instead of paying it as directed.

[R., 30 M.L.J. 587=19 M.L.T. 386.]

THE plaintiff in this suit claimed to recover Rs. 160 from the defendant on the ground that he had given that amount to the defendant to deliver to his (plaintiff's) family; that the defendant had not delivered the money; and that when this fact became known to the plaintiff and he had demanded the money, the defendant had denied having received the same. It appeared that more than three years had elapsed from the date of the alleged receipt of the money by the defendant, and the date of the institution of the suit, and that, according to the plaintiff's allegation, he had learnt that the money had not been delivered to his family some four or five months before the latter date. The Court of first instance dismissed the suit, holding that, as it had not been brought within three years from the date of the alleged receipt of the money, it was barred by limitation. The plaintiff applied for revision of the decree of the Court of first instance, contending that No. 48, sch. ii of the Limitation Act, 1877, was applicable to it, and as three years had not elapsed from the date when the plaintiff first learnt that the money was in the defendant's possession, the suit was within time.

Munshi *Kashi Prasad*, for the plaintiff.

The defendant did not appear.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the limitation law applicable to this suit is art. 48, and the time from which the period of [342] limitation will begin to run is when the plaintiff first learnt that the money was retained in the possession of the defendant, instead of being paid to the person to whom he directed it to be paid. The lower Court must dispose of the point of limitation accordingly, and if the suit is not barred, decide it on the merits. We reverse the decree and remand the case accordingly. Costs to be costs in the cause.

Case remanded.

* Application No. 296 of 1882, for revision under s. 622 of the Civil Procedure Code of a decree of Maulvi Zain-ul Abdin, Subordinate Judge of Mirzapur, exercising the powers of a Court of Small Causes, dated the 6th September, 1882.

5 A. 342=3 A.W.N. (1883) 56.

1883 FEB. 15.

APPELLATE CIVIL.

5 A. 342= 3 A.W.N. (1883) 56.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

GOLAB SINGH (*Decree-holder*) v. PEMIAN (*Judgment-debtor*).*
[15th February, 1883.]

Execution of decree—Decree for enforcement of mortgage—Execution limited to mortgaged property—Equity.

K brought to sale in execution of a simple decree for money which he held against *P* certain property and purchased it himself. The property was subject to a mortgage at the time it was sold. Subsequently a decree was obtained against *P* enforcing this mortgage, of which *K* became the holder. *K* sought to have this decree executed, not against the mortgaged property, but against other property belonging to *P*.

Held, that if *K* purchased the property knowing that it was mortgaged, or if in consequence of the mortgage he purchased it for a less sum than it would otherwise have fetched, it would be inequitable to allow him to obtain satisfaction of the decree out of the other property of *P*.

CERTAIN persons known as Khwajas Muhammad Husain, Ahmad Husain, and Muhammad Ismail applied for execution of a simple decree for money which they held against the respondent to this appeal, and certain immoveable property belonging to her was brought to sale on the 20th November, 1879, and was purchased by the Khwajas. At the time they purchased this property it was mortgaged to one Kishori Lal. The latter sued to enforce this mortgage, and obtained a decree against the respondent for the recovery of the amount of the mortgage-money from the respondent personally and by the sale of the property. This decree he assigned to Golab Singh, appellant in this case. There being a surplus of proceeds of the sale of the 20th November, [343] 1879, due to the respondent, the appellant sought to obtain the same in execution of Kishori Lal's decree. This application was allowed by the first Court. The lower appellate Court disallowed it, on the ground that the appellant was not entitled under s. 295 of the Civil Procedure Code to share in the proceeds of the sale of the 20th November, 1879. It appeared that the appellant was not the real holder of Kishori Lal's decree but the nominal holder only, the real holders being the Khwajas. It was contended by the appellant that s. 295 of the Civil Procedure Code did not affect his claim to execute his decree against the balance of the sale-proceeds in question.

Shaikh *Maula Bakhsh*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), Pandit *Ajudhia Nath*, and Babu *Aprokash Chandar Mukarji*, for the respondent.

The Court (OLDFIELD and BRODHURST, JJ.) remanded the case to the lower appellate Court to determine the issues whether the Khwajas had purchased the property of the respondent, knowing that it was mortgaged to Kishori Lal, and whether they had purchased the property for less than they would have purchased it, had it not been mortgaged to Kishori Lal.

The order of remand was as follows:—

OLDFIELD, J. (after stating the facts stated above continued):—Section 295 has nothing to do with the case before us. It applies to a

* Second Appeal No. 86 of 1881, from an order of W. H. Hudson, Esq., Judge of Aligarh, dated the 20th August, 1881, reversing an order of Munshi Mata Prasad, Munsif of Aligarh, dated the 20th May, 1881.

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case where more persons than one have, prior to the realization by sale in execution of a decree, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor. Here the realization by sale in execution of the Khwajas' decree had taken place before Kishori Lal obtained a decree. But it will be seen that the Khwajas are the real holders of the decree now in execution, and that it is a decree not only against the judgment-debtor personally, but against the property of the judgment-debtor, which the Khwajas put up to sale and purchased in execution of their money-decree, and which was the security for the debt, and which is liable to satisfy the decree. If therefore the Khwajas, Muhammad Husain, Ahmad Husain, and Muhammad Ismail purchased the judgment-debtor's property with the knowledge that it was [344] liable for the amount of the debt due to Kishori Lal, for which the property was security, or if in consequence of the lien they purchased the property for a less sum than otherwise it would have fetched, it would be inequitable to permit them to satisfy the decree now in execution from the personal estate of the judgment-debtor; they would in fact be paid twice over. The issue we have above indicated is remitted for trial, and the case remanded.

The lower appellate Court found that the Khwajas did not purchase the property of their judgment-debtor, the respondent, which was put up for sale in execution of their own decree, with the knowledge that it had been mortgaged to Kishori Lal; and that they did not obtain such property for a less sum than it would have otherwise fetched in consequence of the lien of Kishori Lal.

On the return of these findings the following order was made by the Court (OLDFIELD and BRODHURST, JJ.) :—

ORDER.

OLDFIELD, J.—We must accept the finding of the lower appellate Court on the issues remitted, and reverse the order of the lower appellate Court and restore that of the Court of first instance with costs.

Appeal allowed.

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5 A. 344=3 A.W.N. (1883) 57=8 Ind. Jur. 53.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

ALI MUHAMMAD KHAN (*Judgment-debtor*) *v.* GUR PRASAD AND ANOTHER (*Decree-holders*).* [16th February, 1883.]

Execution of decree—" Step in aid of execution "—Act XV of 1877 (*Limitation Act*), *sch. ii, No.* 179 (4).

An application by a decree-holder in the course of an investigation into an objection to the attachment of property to have his witnesses summoned is an application within the meaning of No. 179 (4), sch. ii of the Limitation Act, 1877.

[F., 5 Ind. Cas. 292 (293); R., 22 B. 722 (726).]

ON the 7th May, 1878, the decree-holders in this case applied for execution. The proceedings taken in pursuance of this application were

* Second Appeal No. 41 of 1882, from an order of C. Daniel, Esq., Judge of Moradabad, dated the 1st May, 1882, affirming an order of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 16th December, 1881.

interrupted on the 15th July, 1878, by a person intervening and claiming the property which had been attached in execution of the decree. The objections of this person were heard and disallowed finally on the 20th December, 1878. During the investigation of the objections the decree-holders, on or about the 26th August, 1878, made an oral application for the issue of sum-[345]monses to his witnesses and for their examination in proof of his contention that the attached property belonged to the judgment-debtor. On the 20th July, 1881, the decree-holders again applied for execution of the decree. The judgment-debtor objected that this application was barred by limitation, as more than three years from the date of the previous application for execution had elapsed. The decree-holders contended in answer to this objection that their oral application of the 26th August, 1878, was an application to the Court to take a "step in aid of execution of the decree," within the meaning of No. 179 (4), sch. ii of Act XV of 1877, and limitation should be computed from that date. Both the lower Courts allowed this contention.

In second appeal the judgment-debtor again contended that the application of the 20th July, 1881, was barred by limitation.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the appellant.

Pandit *Bishambhar Nath* and Lala *Harkishen Das*, for the respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the application of the decree-holders to the Court, to summon witnesses in the proceeding originating in the objector's application objecting to the attachment and sale of the property, was an application within the meaning of No. 179 (4), sch. ii of the Limitation Act, 1877. The appeal is dismissed with costs.

Appeal dismissed.

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5 A. 345 (F.B.)=3 A.W.N. (1883) 81.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

SARSUTI AND ANOTHER (*Defendants*) v. KUNJ BEHARI LAL AND ANOTHER (*Plaintiffs*).* [22nd February, 1883.]

Declaratory suit—Suit for possession of immoveable property—Relinquishment of part of claim—Act VIII of 1859 (Civil Procedure Code), ss. 7, 15—Adverse possession—Limitation—Declaration of title—" Relief."

In 1868 *B* made, it was alleged, a gift of a zamindari estate to *K*. In 1869 *B* died, and *K*'s name was recorded in the revenue registers in the place of *B*'s [346] name in respect of the estate. In 1870 *K* died and her daughter *S* applied to have her name recorded in the revenue registers in respect of the estate. *M*, the illegitimate son of *B*, objected, claiming to have his name recorded. His objection having been disallowed and *S*'s name having been recorded, *M*, in 1876, sued *S* for a declaration of his proprietary right to the estate, and on the 29th June, 1878, obtained such declaration. In January, 1880, *M* sold a moiety

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* Second Appeal No. 1087 of 1881, from a decree of F.E. Elliot, Esq., Judge of Mainpuri, dated the 18th June, 1881, affirming a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Mainpuri, dated the 20th April, 1881.

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of the estate, and in December, 1880, *S* sold the entire estate. In February, 1881, *M's* transferees sued *S* and her transferee for possession of the moiety of the estate transferred to them by *M*.

Held, by the Full Bench (STUART, C.J., *dissenting*) that such suit was not barred by the provisions of s. 7 of Act VIII of 1859, by reason that *M* had omitted to claim in the suit of 1876 possession of the estate. *Darbo* v. *Kesho Rai* (1) and *Kalidhun Chutturpadhya* v. *Shiba Nath Chutturpadhya* (2), followed.

Held, also, that the possession of *S* and her transferee could be considered adverse only from the date of the decree of the 29th June, 1878, declaring *M's* proprietary title to the estate. *Radha Gobind Roy* v. *Inglis* (3), referred to.

Held, by STUART, C.J., that such suit was barred by the provisions of s. 7 of Act VIII of 1859, by reason of such omission. *Darbo* v. *Kesho Rai* (1), distinguished.

The meaning of the term "relief" explained, and the distinction between it and the term "cause of action" pointed out.

[R., 11 A. 438 (447); 34 A. 172 = 9 A.L.J. 111 = 13 Ind. Cas. 154; 14 B. 31 (39); 27 B. 379 (383); 30 P.R. 1908 (F.B.) = 102 P.L.R. 1908 = 35 P.W.R. 1908.]

THIS appeal was referred to the Full Bench by STUART, C.J., and STRAIGHT, J., the Judges of the Divisional Bench before which it originally came for hearing. The facts of the case are stated in the orders under which the reference was made, which were as follows:—

STRAIGHT, J.—This is a second appeal from a decision of the Judge of Mainpuri, dated the 18th June, 1881, and passed under the following circumstances:— One Baldeo Prasad, a native of Etawah, in which district the property now in suit is situate, had by his lawfully wedded wife two children, a son Reoti Ram, and a daughter Jhamna. Reoti Ram, who pre-deceased his father, married one Kaunsila, by whom he had a daughter Sarsuti, but no son. It appears that Baldeo Prasad was, during the latter part of his life, absent for a considerable period of time, discharging his duties as a public servant at Orai in Jalaun, and during his residence there [347] he formed a connection with a woman of the *Ahir* caste, by whom he had born to him a son Mannu Lal and other children. In the year 1868 Baldeo Prasad returned to Etawah, and it was subsequently alleged by Kaunsila, and afterwards by her daughter Sarsuti, that in that year he made a gift of his property in favour of Kaunsila. How far this story is true, does not very clearly appear, nor is it necessary in the present case to enter into that question; but after the death of Baldeo Prasad, on 11th January, 1869, Kaunsila's name was recorded in the *khewat* in succession to that of Baldeo Prasad. During all this period of time Mannu Lal was a minor and continued to reside at Orai. In 1870 Kaunsila died, and thereupon her daughter Sarsuti applied for *dakhil-kharij*. To this Mannu Lal, who for the first time made his appearance on the scene, objected in the Revenue Department, claiming to have his own name entered. His objection, however, was rejected, and on the 23rd August, 1870, Sarsuti was recorded in the place of her mother. No further steps appear to have been taken by Mannu Lal until the 28th August, 1876, when he filed a suit in the Court of the Subordinate Judge of Mainpuri against Sarsuti for a "declaration of his right to 20 biswas of mouza Bidhani in tahsil and zila Etawah, together with five houses and five shops, and a garden of ten bighas." Sarsuti objected to the suit, on the ground that, as Mannu Lal could obtain further relief by asking for possession, he was not entitled to a mere declaratory decree; that his plaint was under-stamped; and that he was not a legitimate son of Baldeo Prasad. The Subordinate Judge overruled

(1) 2 A. 356. (2) 8 C. 483. (3) 7 C.L.R. 364 = 3 Suth. P.C.C. 809.

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5 A. 345 (F.B.) = 3 A.W.N. 1883 81.

the first two grounds of defence, but on the third he dismissed the suit. Mannu Lal appealed to the then Judge of Mainpuri, who happened to be my brother TYRRELL, and he, holding the suit to be in reality one for possession, directed Mannu Lal to pay up the deficiency in stamps. He also entered at great length into that part of the decision of the Subordinate Judge which related to the question of Mannu Lal's illegitimacy, and finally remanded an issue to the lower Court upon the point as to whether there was any usage or custom among persons of the class to which Baldeo Prasad belonged, by which the right to inheritance of illegitimate sons among Sudras was recognized and acted upon. When the case got back to the Subordinate Judge, Mannu Lal made good the deficiency in stamps, and further applied for leave to amend his plaint by inserting [348] a claim for possession. This latter prayer was refused, and the Subordinate Judge, having made the requisite inquiry under the remand order, recorded his finding on the 21st May, 1878, to the effect that the issue of a "widow of the brotherhood married with *dharok* ceremonies is entitled to get the estate of the deceased equally with the issue of the wedded wife." This finding was returned to the then Judge of Mainpuri, Mr. YOUNG, and he, on the 29th June, 1878, gave Mannu Lal a mere declaratory decree. Sarsuti appealed to this Court on the following grounds among others, that as Mannu Lal could have claimed consequential relief, his suit for a declaration only was not maintainable; that there had been no amendment of the plaint; that the mere taking of extra Court-fees did not cure the defect in the suit, and that Mannu Lal was not entitled to possession. PEARSON and OLDFIELD, JJ., who heard the appeal, sustained the decision of the Judge, remarking, as to the first ground mentioned above, that "this plea cannot now be allowed under the circumstances. There is no doubt that the claim is one for a declaration of right only, and that the plaint has never been amended, and the decree passed is only for a declaration of right, but the plaintiff has paid up full institution fees, and we are not disposed to throw out the suit at this stage." The declaratory decree given to Mannu Lal was accordingly confirmed by this Court on the 23rd January, 1879. On the 17th January, 1880, Mannu Lal sold to the plaintiffs, respondents to the present appeal, ten of the twenty biswas in Etawah left by Baldeo Prasad, and on the 6th December following Sarsuti executed a sale-deed of the whole twenty biswas to the defendant-appellant Kinloch. The present suit was instituted against Sarsuti and Kinloch on the 4th February, 1881, and the plaintiffs-respondents prayed "that proprietary possession of ten biswas zamindari right be decreed them by rendering ineffectual the alienation of the defendant Sarsuti of the 6th December, 1880, and for mesne profits for one year." Mannu Lal was joined as a defendant *pro forma*. Both the lower Courts decreed the claim, and the defendants Sarsuti and Kinloch appeal to this Court. The pleas urged by the learned counsel for the appellants are, first, that as the plaintiffs-respondents stand in the shoes of Mannu Lal, and as Mannu Lal in his suit against Sarsuti in 1876 might have claimed possession, but did not do so, they are barred, as he would have been, by the pro-[349]visions of s. 43 of the Procedure Code; second, that if it is to be assumed that Mannu Lal did sue for possession in the suit of 1876, such relief not having been granted to him must be taken to have been refused, and that matter is now *res judicata* under s. 13 of the Code; third, that the true cause of action on which the present suit is founded was the alienation by Baldeo Prasad to Kaunsila in 1868, and it is therefore barred by limitation,

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5 A. 345 (F.B.) = 3 A.W.N. (1883) 81.

Sarsuti and her mother before her having been in adverse possession for a period of upwards of twelve years.

With regard to the first of these pleas, it is to be observed that at the time the former suit was instituted, in August 1876, the Specific Relief Act was not in force, and the claim was therefore governed by s. 15 of Act VIII of 1859. As the law then stood—according to the decisions of the Privy Council as well as of the High Courts of this country—a declaratory decree could not be given unless the plaintiff had a right to consequential relief, capable of being had in the same Court, or under special circumstances of jurisdiction in some other Court. Moreover, no suit was open to objection on the ground that merely declaratory decree or order was sought, and it was lawful for the Civil Courts to make binding declarations of right without granting consequential relief. There was nothing unusual therefore in the shape of the suit brought by Mannu Lal, and the objection that, because he could have asked for consequential relief but did not, his suit should have been dismissed, is practically answered by the language of the law as it then stood. The basis of his then claim was the entry of Sarsuti's name in the *khewat*, and it was as against this that he sought a declaration of his right; and in order to obtain it there was no necessity for him to enter into the question of possession, for "*non constat,*" but that he was willing to let her remain in enjoyment of the property so long as his title was recognized and declared. The cause of action in the present suit, namely, the alienation by Sarsuti to Kinloch in December, 1880, was a totally distinct matter, and had not accrued at the time of the former litigation. The principle laid down in *Tulsi Ram* v. *Ganga Ram* (1) and *Darbo* v. *Kesho Rai* (2) appears to me to be applicable to the proceedings [350] now before me; and concurring as I do in the views therein expressed, I am of opinion that the appellant's plea with regard to s. 43 of the Code fails.

As to the second objection taken, I do not think it can be assumed that in the suit of 1876 possession was part of the relief prayed, although the Judge, when the appeal first came before him, seems so to have thought, and allowed the plaintiff to supply the deficiency in stamps. No amendment in the plaint ever took place, and it remained in its original form solely as for a declaration of right. The mere payment of the extra Court-fees in no way altered the scope or character of the suit, and both the Judge in the return to the remand order and this Court in appeal treated it as for a declaratory decree only. Under such circumstances it is impossible to hold that the question of possession is *res judicata,* and the plea under this head fails.

With regard to the point of limitation, it is urged by the appellants that the possession of Kaunsila first in 1869, and of Sarsuti afterwards, was all along adverse, and that such possession having lasted for more than twelve years prior to the institution of the present suit, an indefeasible title has been acquired. I do not agree with this contention. At the time of the alleged alienation by Baldeo Prasad to Kaunsila, the real character of which transaction, by the way, is not very clear, Mannu Lal was a minor, living with his mother at Orai, and it may well be that for a long period he remained in ignorance of what had taken place. As I remarked at the hearing, it is by no means impossible that, being an illegitimate son, he was willing to allow his father's son's widow and legitimate daughter to enjoy the income of the property so long

(1) 1 A. 252. (2) 2 A. 356.

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as they did nothing to prejudice his proprietary rights. For aught that appears to the contrary, down to 1870, when Sarsuti obtained the entry of her name in the *khewat*, there is nothing to show that her possession and that of her mother before her was other than permissive. At any rate, I do not find anything to show that it was adverse, and this it was upon Sarsuti or her representative to prove when once Mannu Lal had established his title. Allowing that the defence put forward by Sarsuti to the suit of 1876 cast upon Mannu Lal the obligation of enforcing his rights, [351] that is the earliest date from which, to my mind, any adverse possession can be held to have commenced. Holding this view, I do not think the present suit is barred by limitation and the third plea fails. I would dismiss the appeal with costs

STUART, C.J.—The facts and proceedings in this case appear to be correctly stated by my learned colleague, Mr. Justice STRAIGHT, but I entertain serious doubts whether the present suit can be maintained. The plaintiffs undoubtedly stand in Mannu Lal's shoes, and cannot make any claim which he could not advance; and as he only obtained a declaration of his right in 1876, and did not then ask for possession, the plaintiffs, who are his vendees, are precluded from making that claim now. Mannu Lal, indeed, applied to amend his plaint so as to make it include such a claim, but his application was refused, and the ultimate decree in the suit was one simply declaring his right without any other relief.

The procedure which applies to the suit of 1876 was that provided by Act VIII of 1859, the material sections being 15 and 7. It appears to me that, having regard to the nature of the claim which Mannu Lal was entitled to make, and could have made, in his suit, s. 15 ought to be read with s. 7 of Act VIII of 1859, and that Mannu Lal having omitted to claim possession, the present plaintiffs are precluded from doing so, and that therefore their suit ought to have been dismissed, and the present appeal to this Court ought to prevail.

Such is the view I feel disposed to take of the case, and such would be my judgment were I to deliver it at once. But the question involved is a very important one, and as I do not hold the opinion I have indicated in these remarks, without some degree of doubt in my mind, I would refer the question of the validity of the present suit to the Full Bench of the Court.

STRAIGHT, J.—I quite concur in the proposed reference which, it would be well, should extend to the appeal in its entirety.

STUART, C.J.—Be it so.

Messrs. *Ross* and *Conlan*, for the appellants.

Mr. *Hill* and Pandit *Nand Lal*, for the respondents.

[352] Mr. *Ross*.—The suit is barred by s. 7 of Act VIII of 1859. Mannu Lal might have sued for possession in 1876, but omitted to do so, and he cannot now be allowed to do so. The cause of action in this and in the former suit was the same, *viz.*, the denial of his title. The question whether s. 7 bars the suit is not affected by s. 15. He was bound in 1876 to sue for possession, Sarsuti being in possession, and having obtained possession after a contest with him in the revenue department. *Darbo* v. *Kesho Rai* (1) is distinguishable from this case. In that case no relief was granted, but the plaintiff was remitted to her proper remedy. The plaint in the former suit shows that Mannu Lal had

(1) 2 A. 356.

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a right to sue for possession. In *Tulsi Ram* v. *Ganga Ram* (1) there were two causes of action.

Mr. *Conlan*.—Kaunsila claimed under the gift. From the date of the gift, December, 1868, her possession was adverse to any one claiming as heir to Baldeo Prasad. The decree of the 29th June, 1878, was incapable of execution. It did not and could not interrupt the adverse possession. The suit is barred by limitation.

Mr. *Hill*.—The question really does not arise whether the suit is barred by s. 7. Section 15 controls s. 7—*Kalidhan Chutturpadhya* v. *Shiba Nath Chutturpadhya* (2). The causes of action are different. The cause of action in this suit is the transfer by Sarsuti, and had not arisen when the former suit was instituted. In the former suit the right was in dispute. In the present the question is who should be in possession. *Darbo* v. *Kesho Rai* (3) and *Tulsi Ram* v. *Ganga Ram* (1) are in point. Those cases show that s. 7 applies to the splitting of a relief, not of remedies. The fact that in *Darbo* v. *Kesho Rai* (3) a declaratory decree was refused does not distinguish it from this case.

The title of the plaintiffs being established by the decree of the 29th June, 1878, the *onus* of showing adverse possession lies on the defendants—*Radha Gobind Roy* v. *Inglis* (4). The defendants have failed to prove adverse possession for twelve years before the suit was brought. Such possession could not commence till Baldeo Prasad died. The defendants have not shown that he [353] died more than twelve years before the institution of the suit. The decree of the 29th June, 1878, is a binding acknowledgment of the plaintiff's title. It can be used as the basis for a suit for possession—No. 122, sch. ii of the Limitation Act, 1877, and *Jugur Nath* v. *Balgobind* (5).

The following judgments were delivered by the Full Bench :—

JUDGMENTS.

OLDFIELD, J. (BRODHURST and TYRRELL, JJ., *concurring*).—This is an appeal which has been referred to the Full Bench for decision by the Chief Justice and Mr. Justice STRAIGHT. The facts are fully stated by Mr Justice STRAIGHT and need not be repeated. There are two questions which are raised in the appeal—(i) whether this suit, which the plaintiff has brought to recover possession of 10 biswas zamindari right in mauza Bidhani, by rendering ineffectual the agreement executed by the defendant Sarsuti in favour of the defendant Mr. C. Kinloch, and to recover mesne profits, is barred with reference to the provisions of s. 7, Act VIII of 1859, by reason of the plaintiff's vendor Mannu Lal having already brought a suit against Sarsuti, whom Mr. Kinloch represents, for a declaration of his right in the property now in suit; (ii) whether the suit is barred by adverse possession of Sarsuti and her mother Kaunsila, inasmuch as the cause of action accrued to Mannu Lal when his father Baldeo Prasad made a gift of the property to Kaunsila on the 1st December, 1868.

We determine the first question in accordance with the ruling of the Full Bench of this Court in *Darbo* v. *Kesho Rai* (3). In that case the plaintiff sued, in the first instance, for a declaration of right to property, and it was held that the second suit for possession was not barred by s. 7, Act VIII of 1859. The only difference between that case and the one before us is, that the claim for a declaration of right had been refused,

(1) 1 A. 252. (2) 8 C. 483. (3) 2 A. 356.
(4) 7 C.L.R. 364=3 Suth. P.C.C. 809. (5) N.W.P.H.C.R. (1869) 22nd May.

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whereas here it was granted by the decree in the former suit; but the principle upon which the decision is based applies equally to the case before us; and this ruling has been followed by this Court, and the same question was determined in a similar way by the Full Bench of the Calcutta Court in *Kalidhan Chutturpadhya* v. *Shiba Nath Chutturpadhya* (1).

[354] In the case before us the plaintiff cannot be held to have omitted any portion of the claim arising out of the cause of action of the former suit, the cause of action in this suit, which is the alienation by Sarsuti to Kinloch in December, 1880, being a distinct cause of action, and one which had not accrued at the time of institution of the former suit. Apart from this consideration, we are of opinion that s. 7 and s. 15, Act VIII of 1859, must be read together; and when we take into consideration that a declaratory decree cannot be made under s. 15 unless the plaintiff is entitled to obtain some consequential relief, and that it is not a matter of absolute right to obtain a declaratory decree, but is discretionary with the Court to grant it or not, it follows, as a necessary consequence, that the withholding or granting of such relief cannot affect the right to sue subsequently for consequential relief. The provisions of s. 15 would in any other view be meaningless, and only a trap for the unwary.

With regard to the second question, we hold that no title by adverse possession can be set up successfully by the defendants in view of the fact that the plaintiff's right in the property was declared by the decree dated the 29th June, 1878, in the suit he brought against Sarsuti. His title is based on that judgment, which gives him a fresh cause of action. No adverse possession on the part of the defendant or those he represents prior to its date can avail him to bar this suit or as a foundation of a title by possession. His possession only became adverse subsequently to the judgment of the 29th June, 1878. *Radha Gobind Roy* v. *Inglis* (2) is an authority to show that when the plaintiff has proved his title to land, the defendant is bound to prove that he has lost it by reason of his (defendant's) adverse possession for twelve years, and in the case before us the plaintiff's title having been established by the decree in 1878, it is for the defendant to show he *has lost* that title by his (defendant's) adverse possession. We dismiss the appeal with costs.

STRAIGHT, J.—For the reasons given in the opinion recorded by me prior to this reference to the Full Bench, I entirely concur in the views expressed in the judgment of Mr. Justice OLDFIELD.

[355] STUART, C.J.—In my referring order in this case I stated that I entertained serious doubts whether this suit could be maintained, seeing that the plaintiffs stood in Mannu Lal's shoes and could not make any claim which he had not advanced, and as Mannu Lal had only obtained a declaration of his right in 1876 and did not then ask for possession, the plaintiffs, who, as his vendees, are in the same right, are, under s. 7, Act VIII of 1859, which applies to the case, precluded from making that claim now. These doubts have not been removed either by the arguments used at the hearing of this reference or by the considerations which have been accepted by the other Judges of the Court. At the same time, I feel considerable difficulty in attempting a solution of the question raised by the reference, by reason not only of the peculiarities of the case, but by

(1) 8 C. 483. (2) 7 C.L.R. 364 = 3 Suth. P.C.C. 809.

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what appeared to me to be the far from satisfactory rulings which have been made by the different High Courts, and especially by this Court.

There is one peculiarity in this case which has not been sufficiently noticed, that is, the fact that in the suit in 1876 Mannu Lal, finding the mistake that had been made in his plaint by limiting his claim to a mere declaration of right, applied to amend that pleading so as to make it include a claim for possession. This application was refused, although for no other reason apparently than that it was, in the opinion of the judicial officer to whom it was presented, made too late. It could not have been refused for the reason stated in the proviso to s. 53 of the Code of Civil Procedure, because the effect of the amendment which was asked for could not have been to convert the suit into one of a different and inconsistent character, seeing that a claim for possession was not only not inconsistent with, but was the logical and necessary sequence of the right sought to be declared. The refusal rather appears to have been arbitrarily given, probably from some notion of the inconvenience of incumbering the record at the time with such a proceeding. But in my judgment it was not only a mistake, but it is very much to be regretted that such an order was made. As a general rule, amendments of pleadings, or the filing of additional pleas, may be made at any time before judgment, and we have even in this Court entertained suggestions for such pro-[356]cedure by remanding cases with directions to amend, and by allowing additional pleas taken at the last stage of a case in appeal before ourselves. The refusal to entertain Mannu Lal's application to amend his plaint is therefore to be deprecated; but it is also to be regretted that Mannu Lal did not carry the matter further, and instead of acquiescing in the refusal of his application, which he appears to have done, that he did not make it the subject of an application to this Court under s. 622, which would probably have resulted in the order being set aside and the amendment of the plaint allowed. That, however, would appear to have been his only remedy, for such an order would, I fear, not have been appealable to the Judge. No. 6 of s. 588 of the Code of Civil Procedure provides for an appeal from "orders returning plaints for amendment or to be presented to the proper Court;" and it might also, in my opinion, have been very reasonably provided that orders refusing amendment of plaints should also be appealable, but such a proceeding does not appear to be open to suitors, and the only remedy therefore is under s. 622. Mannu Lal, however, made no attempt to have the obstruction to the relief he wanted removed, but acquiesced, and he must be taken to have deliberately and advisedly acquiesced, in the refusal of his application,—an acquiescence which it might be fairly argued was tantamount to an admission that the only relief for which he could sue was for a declaration of right. There was, however, no meaning in such conduct, nor indeed in the order refusing the application, if notwithstanding a new suit by Mannu Lal himself, or by those in his right, could be instituted for the very claim which he had been prevented from adding to his plaint in the first suit. The entertainment of a suit under such circumstances is in my view a gross judicial anomaly, and although I am not prepared to lay down absolutely that such a suit would not under any circumstances lie, I very much doubt whether, on sound principles of procedure, it ought to be allowed.

The law of procedure which applies to such a view of the case is that provided by s. 7 of Act VIII of 1859, that being the Code which applied to the declaratory suit in 1876. The corresponding section of the present

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Code, Act X of 1877, as amended by Act XII of 1879, to my mind clearly excludes a suit for possession in [357] a case like the present, for it provides that "every suit shall include the whole of the claim," not merely arising out of as in s. 7 of the former Code, but "which the plaintiff is *entitled to make* in respect of the cause of action ; " and "if a plaintiff omit to sue," not for, but "in respect of" any portion of his claim, "he shall not afterwards sue in respect of" the same portion. The section then goes on to provide that "a person entitled to more than one remedy in respect of the *same*," not merely claim, but the same "*cause of action* may sue for all or any of his remedies, but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so admitted." These provisions would, I think, if applicable, have excluded the suit for possession in the present case. And I think it may fairly be allowed that if I am right in this view of s. 43 of the present Code of Procedure, such a construction as I have put on s. 43 throws considerable light on the true meaning and intention of s. 7 of the former Code.

I have said that the rulings that have been made on this subject under s. 7, Act VIII of 1859, are not satisfactory to my mind, nor do they appear to me to be consistent with each other. There may be said to be two classes of cases in which they have been made. One where the right to bring a suit for possession has been expressly reserved, or, in other words, when the suit may be said to be brought by leave of the Court, and the other where parties in suits have acted on their own responsibility. This is a division of suits which is distinctly recognized by s. 43 of Act X of 1877, as amended by Act XII of 1879, where, as I have already shown by the quotation I have given from that section, it is provided that "a person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies, but if he omits (*except with the leave of the Court obtained* at the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted." The distinction here stated is not so clearly shown by s. 7 of the former Code, but it is undoubtedly within the meaning of its terms, and to say the least, it is quite consistent with the latter section, for it would be idle to expect that a Court which had judicially advised the second suit would punish a plaintiff with [358] dismissal of his suit for simply acting on the Court's advice ; in fact, no Court, in the face of its own order to that effect, could do otherwise than entertain a suit of the supplementary character we are now considering. The other class of cases is obviously on a different footing, for in these parties without any suggestion from the Court appear as litigants fully responsible for the incidents and consequences of their own procedure, and they have no right to complain if, under such circumstances, they are told by a Court of Law that their suit is based on insufficient grounds, and is therefore liable to dismissal. And such is the character of the suit out of which this reference has arisen. Not only was no leave given to bring it, but the plaintiff deliberately acquiesced in the Court's refusal of his application to add to his plaint a claim for possession, no steps being subsequently taken by him to have such order of refusal set aside. The precedent chiefly relied on at the hearing, and apparently also by my colleagues, was the case of *Darbo* v. *Kesho Rai* (1), where a suit for possession, notwithstanding a previous

(1) 2 A. 356.

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declaration of right, was held to be good. I myself appear to have been one of the Full Bench in that case, and I regret that I was. The judgment was prepared by a Judge who is not now in this Court, and it is unfortunate that it was not somewhat more discriminating in its exposition. It was, however, the entire judgment I signed, and not the short extract, the reporting of which I would probably have objected to. It was one of that first class of cases to which I have referred, the suit having been brought, not at the spontaneous instance of the plaintiff, but by leave of the Court, and of course no other result than that recorded could possibly have occurred. Being thus a case in which leave to bring the suit for possession was expressly given, it is in my view of little or no authority in the case before us, where the plaintiff has acted entirely on his own sense of his litigious interests.

In relation to that case and the practice in such cases generally, I may point out what appears to me to be a misapprehension of the law by which the term "relief" is confounded with the larger and more comprehensive expression "cause of action." The judgment I have referred to is in these terms:—"In so far as the appellant [359] now claims possession of property to which she formerly claimed a declaration of title, we are of opinion that the suit is clearly not barred; she is seeking a different relief, and the relief she formerly sought was refused her in respect of this property, on the ground that the Court ought not to exercise its discretionary power of awarding a declaration of title when relief can be obtained by an ordinary suit for possession." It will be observed that the *ratio* given for allowing the suit for possession is that by it the plaintiff "is seeking a different relief" from that granted in a previous suit for a declaration of right. Now, neither in s. 7 of Act VIII of 1859, nor in the corresponding section (s. 43) of Act X of 1877, is the word "relief," or any single term corresponding to it, to be found. On the contrary, it is "the *whole of the claim arising out of the cause of action*" that must be included in the suit, and the term "relief," to my mind, ought to be understood as synonymous with the words "any portion of the claim," which are to be found both in s. 7 of Act VIII of 1859, and s. 43 of Act X of 1877. The word "relief," at least as used in this country, is not a term of exact or precise technicality, but simply means the remedy which a Court of Justice may afford in regard to some actual or apprehended wrong or injury, such remedy being large or small as the case may be. But it is not synonymous with "cause of action," that term including all the reliefs covered by the facts, on the strength of which a plaintiff comes into Court, and therefore if he omits to ask for any of them, he does so under the sanction of s. 7 or s. 43, so that if possession was one of the reliefs open to the plaintiff, the first Court in the Full Bench case I have referred to was right in its reading of s. 7, and in dismissing the suit on the ground that the plaintiff had not sued for possession, and this Court was mistaken when it virtually reversed that decision by expressly referring the plaintiff to a suit for possession. Such a permission, however, takes the procedure in the case of *Darbo* v. *Kesho Rai* (1) out of the principle of procedure to be applied to the present case and in regard to which that case is in fact no authority.

For these reasons I must decline to join in the answer to the present reference which my colleagues have concurred in, prefer-[360]ring to

(1) 2 A. 356.

hold that according to what I conceive to be the true construction of s. 7 of Act VIII of 1859, read by the light of s. 43 of Act X of 1877, as amended by Act XII of 1879, possession of the property ought to have been claimed in the previous suit brought for declaration of right, and that not having been so claimed, it could not be asked in a subsequent suit.

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APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Tyrrell.

STAMP REFERENCE. [30th March, 1882.]

Lease granted to a cultivator—Kabuliyat—Exemption from stamp duty—Act I of 1879 (Stamp Act), sch. ii, No. 13 (b) and (c).

By the term "cultivator" in No. 13, sch. ii of the Stamp Act, 1879, only those persons are connoted who actually cultivate the soil themselves or who cultivate it by members of their household, or by their servants, or by hired labour, and with their own or hired stock. The class of husbandmen or actual agriculturists is meant; not farmers, middlemen, or lessees, even though cultivation may be carried on to some extent by such persons in the area covered by their lease.

Held therefore, where the land, the subject of a kabuliyat (counterpart of a lease) was for a large part not cultivable or susceptible of being treated as a "cultivator's" holding in any legitimate sense of that word, that such kabuliyat was not exempted from stamp-duty under No. 13 (c), sch. ii of the Stamp Act, 1879.

[D., 15 B. 73 (76).]

THIS was a reference under s. 46 of Act I of 1879 (Stamp Act) by the Lieutenant-Governor of the North-Western Provinces and Chief Commissioner of Oudh, in his capacity as Chief Controlling Revenue Authority for Oudh, under cl. 7, s. 3 of that Act. The case, and the opinion of His Honour thereon, as stated in the letter from the Secretary to Government, North-Western Provinces and Oudh, in the Oudh Revenue Department, dated the 21st January, 1882, was as follows :—

"One Lachman Prasad, lambardar, and Gopal Prasad Awasti, lessee of mauza Pariar in the Unao district, gave a kabuliyat, agreeing to pay Rs. 611 per annum for five years from 1287 fasli, for the fallow land attached to Jora Katarhar, including jungle, *jhil*, grass, *tin*, etc. The Deputy Commissioner found that the kabuliyat was on plain paper, and asked the Commissioner of Stamps what stamp it should bear. He pointed out (i) that the **[361]** kabuliyat, though to the same purport, was not the counterpart of the pattah; and (ii) that the lessee was not a cultivator, *i.e.*, that he did not cultivate the whole of the land leased.

"The Commissioner of Stamps did not notice the first point, as indeed it was hardly necessary that he should. On the second point he replied that a person who cultivates something less than the entire area of his holding is not the less a cultivator on that account, and relying on sch ii, art. 13 (*c*), of Act I of 1879, expressed his opinion that the kabuliyat required no stamp.

"The papers were called for by the Lieutenant-Governor and Chief Commissioner, and the conclusion arrived at by His Honour after their perusal is that the ruling of the Commissioner of Stamps was erroneous. It appears to Sir GEORGE COUPER that if that ruling be correct, the

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lessee of a village, or even of a taluka, need only cultivate a single bigha within the area leased by him to escape the payment of stamp-duty on the kabuliyat which he gives. His Honour is of opinion that the kabuliyat, to be exempt from duty, must relate to land in the *bona fide* cultivating occupation of the person executing it: by this the Lieutenant-Governor and Chief Commissioner does not mean that the whole of the land must be cultivated by such person, but that it should be in his *bona fide* holding and worked with his stock. It was not intended, nor does the law provide, that a thikadar should be excused the payment of duty. Moreover, it is evident from the language of the kabuliyat that the two persons executing it did not propose to cultivate the whole of the land themselves. In short, the exemption from duty is only in favour of a lease of land let as an agricultural holding to a cultivator, the size being immaterial, so long as the cultivation is undertaken by the lessee, and he is, in a true sense, the cultivator, and not merely a farmer."

The kabuliyat referred to above was in these terms:—"Kabuliyat executed by Lachman Prasad, lambardar, and Gopal Prasad Awasti, lessee, of mauza Pariar, in which they ask for a lease of the fallow land attached to Jungle Jora Katarhar, from the border of Manapur to the borders of Gadian, Angwan, Haji, and Barhola Rampur, together with the land belonging to mauza Pariar, for five years, from 1287 fasli, and promise to pay the money, **[362]** instalment by instalment, without raising any objection, whether the land is cultivated or not: Rs. 611.—Jungle, *jhil*, grass, *tin*, etc."

The High Court gave the following opinion:—

OPINION.

STUART, C.J., and STRAIGHT and TYRRELL, JJ.—The case stated for our opinion is, whether a kabuliyat (counterpart of a lease) given under certain specified circumstances is or is not exempt from stamp-duty under the provisions of the Stamp Act of 1879, as laid down in its sch. ii, art. 13, sub-articles (*b*) and (*c*).

The kabuliyat embodies the terms of a contract on the part of two persons, the lambardar and lessee, respectively, of a village called Pariar, whereby they undertake to pay Rs. 611 per annum, for a period of five years, to the owners of certain fallow and other land belonging, apparently, to the proprietors of a village called Jora Katarhar, on the other part, for the use of such land with all its appurtenances.

The fixed annual payments were covenanted to be made "*kist* by *kist*, whether the land is cultivated or not." The appurtenances of this land were described at the foot of the kabuliyat as being *jangal* (forestry), *jhil* (water-produce), *ghas* (grass), *tin* (straw), and *sikarhar* (beds of rushes). This deed was not stamped, and the question is raised whether it is exempt from duty. Under the stamp laws from time to time in force up to the year 1878 the following leases and counterparts thereof—that is to say pattahs and kabuliyats—were exempt from stamp-duty, to wit:—"Any lease executed to a ryot or other *actual* cultivator, provided that no fine or premium be paid as part of the same transaction," and "any counterpart of a lease executed by a ryot or other *actual* cultivator of the soil, provided that no fine or premium be paid as part of the same transaction." All agricultural leases and their counterparts were thus before 1879 practically exempt from duty. But a large change in this respect was introduced by Act I of 1879. In sch. ii of that Act, art. 13 exempts from duty the following leases, *viz.*,

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"leases executed in the case of a cultivator without the payment or delivery of any fine or premium—(1) when a definite term is expressed, (2) and such terms does not exceed one year, (3) or when the annual rent reserved does not exceed one [363] hundred rupees," but "all counterparts of any lease granted to a cultivator" were made free from stamp-duty. Thus the area of exemption was circumscribed in respect of leases, and enlarged in regard to their counterparts: while the somewhat vague word "ryot" being omitted, the receipt of unstamped pattahs and kabuliyats was limited definitely to "cultivators" only. The Select Committee appointed to consider the Stamp Bill, which eventually became Act I of 1879, reported on this subject as follows:—"48. The entries in the exemption schedule are for the most part transferred from existing enactments or from notifications issued by the Government under the powers conferred by the present Stamp Act; but among those *now added* we may mention (2) "lease, pattah, kabuliyat, or other undertaking to cultivate, occupy, or pay rent for land granted to or by a cultivator without the payment, &c., &c.," and (3) "counterparts of any lease granted to a cultivator."—*Gazette of India, 7th September, 1878.*

The word "cultivator" alone is used in these portions of the Stamp Act of 1879, and by this term we are of opinion that only those persons are connoted who actually cultivate the soil themselves, or who cultivate it by members of their household, or by their servants, or by hired labour, and with their own or hired stock. The class of husbandmen or actual agriculturists is meant; not farmers, middlemen, or lessees, even though cultivation may be carried on to some extent by such persons in the area covered by their lease. It is true that for the purposes of the North-Western Provinces Rent Act (No. XII of 1881) a "tenant" is defined so as to include a "thikadar" (farmer), and a "katkanadar" (lessee), and the term "rent" is made to cover "whatever is to be paid, delivered, or rendered by such persons (*i.e.*, tenants, farmers, and lessees), on account of the holding, use, or occupation of land." But *quoad* the Stamp Law and its scheduled exemptions, we are of opinion that such tenants only as are actual *bona fide* "cultivators" in direct connection with the soil are entitled to get their kabuliyats free from duty. In the Oudh Rent Act No. XIX of 1868, we find no such extension of the term "tenant" as we noticed above in Act XII of 1881, but we think that, however, this may be, the definition of "tenant" in the Rent Acts, and for their purposes only, is [364] not relevant to the question before us. In this view of the strict limitation to be applied to the word "cultivator" of the Stamp Act, we hold that a farmer or lessee would not ordinarily be entitled to the benefit of the exemption provided in sch. ii, art. 13 (*b*) and (*c*): and that, in respect of the particular kabuliyat before us, it is obvious that the land, the subject of the deed, is for a large part not cultivable or susceptible of being treated as a "cultivator's" holding in any legitimate sense of that word. Our answer to this reference would therefore be, that we concur in the opinion of His Honor the Chief Commissioner of Oudh as expressed in the 4th paragraph of his Secretary's Letter No. 2271/1882, dated the 21st January, 1882.

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FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

RAGHUBAR DAYAL (*Plaintiff*) *v.* THE BANK OF UPPER INDIA, LIMITED (*Defendant*).* [8th February, 1883.]

Sale in execution set aside—Suit by purchaser for interest in purchase-money—Act VIII of 1859 *(Civil Procedure Code)—Act X of* 1877 *(Civil Procedure Code), s.* 315.

A judgment-debtor, whose property had been sold in execution of the decree, under Act VIII of 1859, appealed from the order disallowing his application to set aside the sale, after Act X of 1877 (Civil Procedure Code) came into force. The appellate Court set aside the sale. The purchaser sued the decree-holder for interest on the purchase-money and the expenses of the sale, the purchase-money having been returned to him, under the order of the Court executing the decree, without interest and less such expenses.

Held by the Full Bench that the provisions of Act X of 1877, and not of Act VIII of 1859, were applicable to the determination of the matter in dispute in the suit.

Held by the Divisional Bench (STRAIGHT and TYRRELL, JJ.) that, with reference to the ruling of the Full Bench, the suit was maintainable.

Held also by the Divisional Bench that, under the circumstances of the case, the plaintiff ought not to be granted the relief sought.

[F., 39 M. 803 (808).]

THE plaintiff in this suit was the purchaser of certain immoveable property put up for sale in execution of a decree held by the [365] defendant, the Bank of Upper India, on the 20th June, 1877, while Act VIII of 1859 (Civil Procedure Code) was in force. The judgment-debtor applied to have the sale set aside, but his application was rejected, and the sale was confirmed on the 2nd October, 1877. He appealed to the High Court, and on the 19th July, 1878 (Act X of 1877 having come into force), the High Court set aside the sale. On the 9th August, 1878, the defendant in the present suit, the decree-holder, repaid into Court the sale-proceeds which it had realized on the 11th October, 1877. The money was refunded to the plaintiff in this suit, the auction-purchaser less the expenses of the sale, and an application by the plaintiff for interest on the money was rejected. He therefore brought the present suit against the defendant, the decree-holder, for interest on the purchase-money and the expenses of the sale. The Court of first instance gave the plaintiff a decree. The lower appellate Court held that the suit would not lie, as under s. 315 of Act X of 1877, which was in force when the sale was made, and was applicable, the claim was one which should be determined by the Court executing the decree, and not by a suit.

In second appeal to the High Court the plaintiff contended that the suit was maintainable. The appeal raised the question whether Act VIII of 1859, the Code of Civil Procedure in force when the sale took place, or Act X of 1877, the Code in force when the appeal which resulted in the sale being set aside was made, should be applied to the determination of the matter in dispute in this suit. This question the Divisional Bench before which the appeal came (TYRRELL and MAHMOOD, JJ.) referred to the Full Bench.

* Second Appeal No. 1310 of 1881, from a decree of Babu Kashi Nath Biswas, Additional Subordinate Judge of Cawnpore, dated the 15th August, 1881, reversing a decree of Maulvi Ahmad-ul-lah, Munsif of Fatehpur, dated the 30th June, 1881.

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The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Pandit *Ajudhia Nath*, for the appellant.

Mr. *Howard*, for the respondent.

The following opinions were delivered by the Full Bench :—

OPINIONS.

STUART, C.J. and STRAIGHT, BRODHURST and TYRRELL, JJ.—We think that the provisions of Act X of 1877 are applicable.

OLDFIELD, J.—I concur so far as being without prejudice to any rights accrued under Act VIII of 1859.

[366] On the case being returned to the Divisional Bench (STRAIGHT and TYRRELL, JJ.) the following judgment was delivered by the Bench :—

JUDGMENT.

STRAIGHT, J.—Having regard to the Full Bench ruling we are not prepared to say that the suit to which this appeal relates was unmaintainable. At the same time the claim of the plaintiff for mere interest, which he never put in Court until more than two years and a half after he had received back his purchase-money, is of a kind we feel no disposition to favour or encourage, more particularly when we remember that it was unsuccessfully preferred in the execution department, as far back as September, 1878. It was through no fault of the defendant Bank that the sale, at which the plaintiff purchased, was set aside; on the contrary it was owing to the irregularity of the mode in which the Court executing the decree made the publication of sale. It is obvious that while the order confirming the sale of the 20th June, 1879, to the plaintiff was under appeal to this Court, the defendant Bank was not in a position to make any use of the purchase-money it had taken out of Court in October, 1877, for it might be called on to refund it at any moment, and as a matter of fact it voluntarily repaid the amount immediately after the sale was set aside. From the remarks of PEARSON and TURNER, JJ., in their order of the 19th July, 1878, it would seem that the plaintiff bought the property very cheap, and the fact that he was afterwards made to pay the judgment-debtor the mesne profits received by him during the time he was in possession, which was money that obviously belonged to the latter, does not appear to us to lend weight or force to his claim for interest against the defendant Bank. As the Court executing the decree did not allow him that interest, and as in ordinary course that would be the fittest tribunal to determine the question, we, in the absence of any very strong case being established to the contrary, do not feel called upon to accord it him. For the reasons above given we affirm the order of the lower Court dismissing the plaintiff's suit, and we dismiss the appeal. The plaintiff will pay the costs in all the Courts.

Appeal dismissed.

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[367] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

GUR DAYAL (*Defendant*) *v.* KAUNSILA (*Plaintiff*).*
[13th February, 1883.]

Hindu Law—Hindu wife—Maintenance—Charge on husband's estate—Transfer of estate for payment of debts.

The *bona fide* purchaser for value of the estate of a Hindu husband, sold in order to satisfy the husband's debts, does not take such estate subject to the wife's maintenance, even if such maintenance is fixed and charged on the estate. *Jamna* v. *Machul Sahu* (1) and *Sham Lal* v. *Banna* (2), referred to.

[F., 16 M.L.T. 551=25 Ind. Cas. 759.]

THE plaintiff in this suit, wife of the defendant Sitau, sought by the present suit to obtain, (i) avoidance of a deed of gift of two houses made by her husband to the defendants Madho, Ramdial and Bisheshar, on the 10th June, 1876, as also of a sale-deed in respect of one of the houses executed by those persons in favour of the defendant Gur Dayal, on the 25th September, 1877; (ii) a declaration of her right to reside in both the houses covered by the deed of gift; (iii) a declaration of her right to maintenance at the rate of Rs. 5 per mensem against the person of the defendant Sitau, as also against the houses abovementioned; (iv) arrears of maintenance to the amount of Rs. 285 against the person of the defendant Sitau, and by sale of the two houses. The Court of first instance (Subordinate Judge) gave the plaintiff a decree for Rs. 5 per mensem as maintenance and Rs. 150 for arrears against the defendant Sitau and the two houses. It also declared her entitled to reside in a particular portion of one of the houses (No. 1), as also that the deed of gift and the sale-deed, in so far as they affected her right to maintenance and residence, should have no effect. The defendant Gur Dayal alone appealed to the District Judge, alleging, *inter alia*, that the rent of house No. 1 was sufficient for the plaintiff's maintenance, and therefore that house No. 2, purchased by him, could not be liable; that he bought the house No. 2 in good faith for valid consideration, and without notice of any maintenance being chargeable on it; and that the suit was instituted by the plaintiff in collusion with her husband. The District Judge agreed [368] with the decision of the first Court, and held further that the appellant had knowledge of facts, which amounted to notice that the plaintiff was entitled to maintenance.

In second appeal to the High Court the defendant Gur Dayal urged (i) that a wife had no lien for her maintenance against the property of her husband and could not follow it into the hands of a purchaser for value; (ii) that there was nothing to establish notice to the appellant of any charge; (iii) that the house purchased by him could not be sold until it was established that all the other available property of Sitau was inadequate to discharge the plaintiff's maintenance.

Pandit *Ajudhia Nath* and Babu *Aprokash Chandar Mukarji*, for the appellant.

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* Second Appeal No. 806 of 1882, from a decree of W. Duthoit, Esq., D.C.L., Judge of Allahabad, dated the 1st April, 1882, affirming a decree of Babu Promoda Charan Banarji, Subordinate Judge of Allahabad, dated the 6th September, 1881.

(1) 2 A. 315. (2) 4 A. 296.

1883 FEB. 13.

APPELLATE CIVIL.

5 A. 367= 3 A.W.N. (1883) 65= 8 Ind. Jur. 100.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the respondent.

The Court (STRAIGHT and BRODHURST, JJ.) delivered the following judgment :—

JUDGMENT.

STRAIGHT, J. (after stating the facts as set out above, continued) :—The personal obligation of the defendant Sitau to maintain the plaintiff-respondent is conceded, and as regards house No. 1 the defendants Madho, Ramdial, and Bisheshar neither appealed to the Judge nor have they to this Court. The sole point for us to determine, therefore, is, whether the maintenance of the plaintiff-respondent was such a charge on the property of her husband Sitau, that his donees and the appellant Gur Dayal the vendee from them took the house No. 2 subject to such maintenance. Much stress is laid upon the ruling of this Court in *Jamna* v. *Machul Sahu* (1) in which it was held that where a husband in his lifetime made a gift of his entire estate, leaving his widow without maintenance, the donee took and held such estate subject to her maintenance. But the circumstances of that and of the present case are somewhat different; for here the donees of the alleged gift asserted that it was made to them by Sitau in consideration of their discharging certain debts due from him, and it would seem that a mortgage of the two houses was first made to raise money sufficient to pay such debts; and then house No. 2 was subsequently sold to [369] the appellant Gurdial in order to release the mortgage. Now it must be admitted that payment of her husband's debts, whether he be alive or dead, must take precedence of a wife or widow's maintenance, and we are unable to find anything in the Hindu Law authorizing the notion that such maintenance can stand in the way of sales or alienations being made by the husband during his lifetime, or by his heirs after his death, to satisfy his creditors. Since the ruling above referred to there has been a Full Bench decision of this Court—*Sham Lal* v. *Banna* (2) by which it was held that "the maintenance of a Hindu widow is not, until it is fixed and charged on her deceased husband's estate by decree or agreement, a charge on such estate which can be enforced against a *bona fide* purchaser of such estate for value without notice." In that case it was further very clearly pointed out that if the estate had passed to a purchaser to satisfy a claim against the original owner for which it was responsible under the Hindu Law, the purchaser would not take it subject even to maintenance fixed and charged upon it before his purchase. We are unable to see how in this respect the maintenance of a wife and that of a widow stands upon a different footing; and in this view of the matter it seems to us necessary to have a clear finding on the following issue :—Was the sale of house No. 2 to the appellant Gurdial a genuine and *bona fide* transaction for good consideration ; and was such consideration employed in discharging a debt or debts due and owing by Sitau. For the purpose of determining this question we remand the case under s. 566 of the Code.

Case remanded.

(1) 2 A. 315. (2) 4 A. 296.

1883
FEB. 21.

APPELLATE CIVIL.

5 A. 369 = 3 A.W.N (1883) 58.

5 A. 369=3 A.W.N. (1883) 58.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

RAMLAL (*Defendant*) v. DALGANJAN (*Plaintiff*).*
[21st February, 1883.]

Contingent damage—Removal of trees—Cause of action.

The plaintiff claimed the removal of certain trees, planted by the defendant on his own land, on the ground that the trees had been planted so near his land that when they grew up they would injure his crops. *Held* that until the plaintiff's enjoyment of his own land was directly and immediately interfered with by the growth of the defendant's trees, he had no right to ask for their removal, and he had therefore no cause of action.

[370] THE plaintiff in this suit claimed the removal of two mango trees planted by the defendant at a distance of six feet from his field, on the ground that they were so near his field that when they grew up they would overshadow it, and injure his crops. The defendant set up as a defence to the suit, amongst other things, that the trees were at a distance of two "*lathas*" from the plaintiff's field, and caused him no injury. The Court of first instance found that one of the trees was less than a "*latha*" from the plaintiff's field, and the other a little more than that distance, and gave the plaintiff a decree for the removal of the trees on the ground that, when they grew up, they would overshadow the plaintiff's field and thus cause him injury. On appeal the defendant contended that the plaintiff had no cause of action, as he had sustained no loss from the planting of the trees. The lower appellate Court disallowed this contention, and affirmed the decree of the first Court, observing as follows:—"It is clear that if these trees grow into great trees, they may extend over the plaintiff's field to the extent of thirty or forty feet, and their shadows would extend much further, and in this way about one-half of the plaintiff's crops would certainly be destroyed, as none of the ordinary crops thrive under the shade of trees. The defendants say that the plaintiff cannot sue till he sustains some injury; but if he is to wait for fifteen or twenty years till the trees grow up and begin to cause injury, he would then be too late; the defendants would have acquired a right of easement, and would successfully plead limitation. I see nothing to prevent the plaintiff from suing to prevent a prospective damage, which is as certain as anything can be, if the trees are allowed to grow to a great size."

In second appeal the defendant again contended that the plaintiff had no cause of action, not having sustained any injury from the planting of the trees.

Munshi *Hanuman Prasad* and Mr. *Niblett*, for the appellant.

Mr. *Conlan*, for the respondent.

The Court (STUART, C.J., and STRAIGHT, J.) delivered the following judgment:—

JUDGMENT.

The first plea taken in appeal is obviously a sound one, and it is clear that at present no cause of action has accrued [371] to the plaintiff-respondent entitling him to maintain this suit. Until his enjoyment of

* Second Appeal No. 888 of 1882, from a decree of W. Barry, Esq., Judge of Jaunpur, dated the 25th May, 1882, affirming a decree of Babu Lalta Prasad, Munsif of Jaunpur, dated the 15th March, 1882.

his own lands directly and immediately interfered with by the growth of the defendant-appellant's trees, he has no right to ask for their removal from the defendant's own land, who is entitled to have them there so long as he does not thereby injure the plaintiff.

The appeal is decreed with costs, and the suit of the plaintiff will stand dismissed.

1883
FEB. 21.

APPELLATE CIVIL.

5 A. 369 = 3 A.W.N. (1883) 58.

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5 A. 371=3 A.W.N. (1883) 59.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

PETMAN (*Defendant*) v. BULL (*Plaintiff*).*
[23rd February, 1883.]

Patent—Suit for infringement—Jurisdiction—Transfer of suit—Civil Procedure Code, s. 25—*Particulars of breaches—Act XV of* 1859, ss. 22, 34.

A suit for the infringement of certain inventions, instead of being instituted in the Court having, by virtue of s. 22 of Act XV of 1859, jurisdiction to entertain it, was instituted in a Court subordinate to such Court not having such jurisdiction. The Court having jurisdiction to entertain such suit, at the joint request of the parties, transferred it for trial to itself under s. 25 of the Civil Procedure Code, and tried it.

The plaintiff did not, as required by s. 34 of Act XV of 1859, deliver with his plaint particulars of the breaches complained of in the suit. In his plaint, after describing his inventions, he alleges generally that the defendant had made and used them at a certain place without his license.

Held that, inasmuch as the parties had assented to the transfer of the suit, and its transfer brought it into the right Court, the fact that the suit had been originally instituted in the wrong Court did not render the transfer illegal, and the Court having jurisdiction had properly tried the suit.

Held also that, as required by s. 34 of Act XV of 1859, the plaintiff should have delivered with his plaint particulars of the breaches complained of; that the general allegation as to infringement contained in the plaint did not amount to such particulars; and that under these circumstances the plaintiff came into Court with a case which could not be tried.

THIS was a suit for Rs. 10,000, compensation for the infringement of a patent. In the first paragraph of the plaint the plaintiff stated as follows :—

"That early in June, 1872, the plaintiff invented a continuous flame kiln for burning bricks, in which the continuous action or draught is caused and maintained by the use of moveable iron chimneys, placed at intervals in such portions or parts of the kiln [372] where the burning of the bricks is to be effected, and plaintiff also invented a particular method of loading and working such kiln, and that consisted of placing the green (or unburnt) bricks in the said kiln in concentric continuous walls or lines with parallel open spaces or draught passages between such walls or lines of bricks, and on the 28th June, 1872, the plaintiff, in pursuance of the provisions of Act XV of 1859, filed his specification of the said inventions, and on the 28th June, 1872, obtained the patent or right to the sole and exclusive privilege of making, selling and using the said inventions in India, and of authorizing others to do so, for the term of fourteen years, from the 28th of June, 1872."

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* First Appeal No. 53 of 1882, from a decree of A. Sells, Esq., Judge of Cawnpore, dated the 22nd May, 1882.

1883
FEB. 23.

APPELLATE CIVIL.

5 A. 371 = 3 A.W.N. (1883) 59.

In the 2nd paragraph the plaintiff stated:—"In working or using the patent kiln, described in the preceding paragraph, fuel was supplied through furnace mouths in the sides of the kiln, and the plaintiff, early in 1878, discovered, that by having or providing vertical holes (or open spaces) in the continuous concentric lines or walls of green or unburnt bricks, the fuel could, with greater advantage, be supplied from the top of the kiln, by being lowered, through the said open spaces or vertical holes into the furnaces below, where combustion is effected, and plaintiff discovered other improvements described in the specification, dated the 17th May, 1878, which was in pursuance of the said Act filed on the 20th May, 1878, and the plaintiff thereby became the patentee of the said inventions."

In the 3rd paragraph the plaintiff stated:—"In 1878, plaintiff also discovered, that by using the said patented methods of constructing, loading, and firing the kiln invented by him, it was possible to effect a great saving and profit, by substituting a kiln formed by a trench dug into the earth for the usual superstructure, which previously used to be erected at a great cost on or above the earth. On the 27th September, 1878, the plaintiff filed his specification of the said invention, and became the patentee thereof, in accordance with the provisions of Act XV of 1859."

In the 5th paragraph the plaintiff stated:—

"The defendant H. C. B. Petman has used, and is now using in Cawnpore, a kiln with two sets of operations, similar to that patent-[373]ed in manner above described by the plaintiff, and in such kiln the various inventions patented by the plaintiff as aforesaid have been made and used without any license from the plaintiff, who therefore claims Rs. 10,000 as royalty and damages."

The suit was instituted on the 2nd February, 1882, in the Court of the Subordinate Judge of Cawnpore. On the 15th February, 1882, the parties made a joint application to the District Judge of Cawnpore to transfer the suit to his Court, and on the same day the application was granted, and the suit transferred accordingly. On the 2nd March, 1882, which date had been fixed by the District Judge for the settlement of issues, the defendant objected to the hearing of the suit in the District Judge's Court on the following grounds:—

(i) "Because the order of the District Judge withdrawing the suit from the Court of the Subordinate Judge was bad in law, in that according to the provisions of s. 22 of Act XV of 1859 (Patent Act), the suit could only be instituted in the "principal Court of original jurisdiction in civil cases, within the local limits of whose jurisdiction the cause of action shall accrue or the defendant shall reside as a fixed inhabitant;" and that the provisions of s. 25 of the Civil Procedure Code imply at least an appellate jurisdiction in the Court exercising the powers of withdrawal and transfer conferred therein, which the District Judge would not possess by law in respect of the money value of the suit; and further, that the terms of the section distinctly contemplate the institution of a suit according to the provisions of s. 15 of the Code, and the valid pendency of a suit legally instituted in the proper Court": (ii) "Because no subsequent acts of the parties or order of the District Judge under s. 25 of the Civil Procedure Code, whether valid or invalid, could be held in law to cure or remedy so grave a contravention of the imperative provisions of law as those contained in ss. 15, 48 and 57 of the Code": and (iii) "Because the plaint, instituted under the provisions of Act XV of 1859, was not accompanied by the

'particulars of the breaches complained of,' as required by s. 34 of that Act, and that therefore no valid plaint, as required by law, had been instituted in any Court to which the defendant could be called upon to answer."

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APPELLATE CIVIL.

5 A. 371 = 3 A.W.N. (1883) 59.

[374] The District Judge (Mr. J. H. Prinsep) on the same day disallowed the defendant's objections, holding, on the question of the jurisdiction, that it was "not necessary to look to the manner in which the suit came before the Court;" "that there had been no such irregularity" in the proceedings which could be "deemed to act prejudicially to the interests of either party, and until that was found there was no call for pronouncing it to be such as vitiated the proceedings already taken;" and that the power conferred in s. 25 "must be held to embrace all suits, whether rightly or wrongly brought in the first instance;" and on the point whether the plaint contained the particulars of the breaches complained of, that it contained enough of such particulars to enable the defendant to answer to the suit. On the 17th April, 1882, the defendant filed his written statement. In this he again objected to the competency of the District Judge to try the suit, and to the frame of the plaint, for the reasons contained in his petition of the 2nd March, 1882. In the third and last paragraph of the statement he stated as follows:—"That so far as defendant is able to answer, in the absence of such particulars, defendant denies liability on every ground permitted by law, as defendant has in fact committed no infringement, inasmuch as defendant has burnt bricks on his own process." On the 22nd April, 1882, the plaintiff was examined on his own behalf. At the beginning of his examination objection was taken on behalf of the defendant to the plaintiff giving evidence as to the manner in which the defendant had infringed his patent, on the ground that the particulars required by s. 34 of Act XV of 1859 had not been given in the plaint. This objection was overruled, and the plaintiff was allowed to give evidence as to the manner in which his patent had been infringed. On the 27th April, the defendant applied for time to file a supplemental written statement, giving particulars of the grounds of his defence to the suit, and to be allowed to produce evidence in support of those grounds. The District Judge rejected this application.

Upon the first and second issues framed in the suit the District Judge (Mr. A. Sells) held as follows:—

"Could the original error in the institution of the suit in the Subordinate Judge's Court be cured by the order of transfer, [375] under s. 25, Act X of 1877, issued by Mr. Prinsep, on the 2nd March, or in the exact words of the issue as recorded, 'under the circumstances of the civil suit having been originally preferred in a Court not having jurisdiction, can the transfer to this Court, under its own orders, and with the consent of the parties, correct the original error, and be accepted as legally equivalent to original institution in this Court?' The defendant's counsel contends that there could be no legal order of transfer, under s. 25 of Act X, because the plaint having been filed illegally in the Court of the Subordinate Judge, there could be no case actually 'pending' in that Court. This interpretation of the word 'pending' seems to me somewhat strained. The case, it is urged, was not pending at all in the Subordinate Judge's Court: because, under s. 25, no suit regarding infringement of patent will lie in any Court below the District Court. The wording of s. 22 is, that no suit will be 'maintainable' in any other than the District Court, and by this term I

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understand that no relief can be granted, unless the suit is heard and determined in the District Court. But if it is held that the very plaint is in itself a nullity, and all proceedings are absolutely void, then the same might be said of such causes as are barred by the Statute of Limitations. These cases also are not maintainable, no relief can be granted, and so far all proceedings are infructuous, but if the very pendency of such suits is to be denied, then the conclusion follows, that no order of dismissal even can be passed; such order would itself be a nullity. The cases seem to me so far analogous, that in both the condition of jurisdiction would be ordinarily governed by Act X of 1877, and such jurisdiction (in the one case, in all Courts; in the other, in all Courts below the District Court) is barred only by special laws. Further, in the present case, the action taken with the consent of both parties resulted in bringing the case into the Court that actually has jurisdiction, and though the proceeding, by which this end was gained, was unquestionably irregular, the case may, it appears to me, be regarded as falling within the principle laid down in the case of *Sadasiva Pillai* v. *Ramalinga Pillai* (1), that where the parties have agreed to certain proceedings [376] which may have been quite contrary to the ordinary *cursus curiæ*, those proceedings should, in cases where the Court had a general jurisdiction over the subject-matter, not be pronounced infructuous. The defendant's counsel quotes the case of *Piarey Lall Mozoomdar* v. *Kamal Kishor Dissia* (2). But in that case the Court in which the appeal, the transfer of which was sought, was filed, had no jurisdiction even ordinarily. But in the present instance the plaint was filed in a Court, which, under Act X, would have had full jurisdiction, had it not been for a special provision under Act XV of 1859. The cases therefore are not altogether analogous. A nearer approach to the present conditions is furnished by the case of *Grose* v. *Amirtamayi Dasi* (3). In this case suit had been brought against the two defendants, appellants, in the Hooghly Court, which really had no jurisdiction over the latter defendant. He joined in an application to have the case tried by the High Court, and the application was granted. Subsequently, the question of jurisdiction was raised. PHEAR, J., held, that all that took place in the Hooghly Court was certainly without jurisdiction, but held also, that the 'suit must be treated exactly as if the plaint had been originally filed in the High Court, and that all irregularity of proceeding which have occurred was rendered unimportant, because the parties had all appeared in the Court, ready to go to trial, and no one had in fact been misled, or put to any disadvantage by the course pursued,' and on appeal, MACPHERSON, J., held that 'the original want of jurisdiction was cured,' and no question as to it could any longer 'be raised.' This ruling may, I am of opinion, be fairly applied to the present case. No one has been misled, or in any way prejudiced by the procedure, irregular though it has been, while the rejection of the suit would involve to the parties further delay and greater expense. For the above reasons, I hold that there is no prejudice to the jurisdiction of this Court in the present case."

"The 2nd issue is—Have the provisions of s. 34 of the Patent Act been sufficiently complied with, in regard to particulars of the breaches complained of." For the defendant, it is contended that the plaintiff has failed to observe the conditions of [377] the law, and that the particulars

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(1) 15 B.L.R. 383. (2) 6 C. 30. (3) 4 B.L.R. O.C. 1=13 W.R. O.J. 12.

1883 Feb. 23.

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5 A. 371 = 3 A.W.N. (1883) 59.

required have not been furnished. Now it does not appear from the section referred to, I think, that it is necessary, that there should be any separate statement of these particulars. The simple object of the law is, I presume, that the Court shall know exactly the specific points in regard to which the infringement of patent is alleged, and that the defendant may be made distinctly aware of the breaches of the patent with which he is charged, in order that he may be in a position to answer to them. The 'particulars' required may, I hold, be contained in the plaint itself, and there is this advantage in the incorporation, that the defendant is made distinctly cognizant of the particulars, as under the existing laws a copy of the plaint itself is delivered to the defendant, unless specially ordered by the Court. The question is simply, are the required 'particulars of breaches' stated in the plaint in the present case? Now looking at paragraphs (1), (2) and (3) of the plaint, we find a concise statement of the various inventions patented by the plaintiff, as concise almost as could be, without detailing the whole of the specification. In paragraph (1) the continuous flame kiln as patented in 1872, is concisely described, the manner of maintaining the continuous draught by means of moveable chimneys, placed at intervals over the various portions of the kiln, where the burning of the bricks is to be effected, and the method of loading by means of concentric walls of green bricks with air passages between them, are clearly stated. In paragraph (2) also, the salient points in the second patent of 1878 are given, consisting of the providing of vertical holes in the continuous concentric walls of green bricks for the introduction of fuel, while in paragraph (3) again, the patent for the trench kiln (of 1878), as a substitute for the previous structure above ground, is described. Then in paragraph (5) it is stated that the defendant is using at the present time, in Cawnpore, a kiln, in which 'the various inventions patented by the plaintiff, as aforesaid, have been made and used without any license' from the latter. The defendant's counsel lays great stress upon the remarks of the High Court in the case of *Sheen* v. *Johnson* (1). That judgment simply insists upon the necessity of the particulars of infringement being given, and upon the inadmissibility of any **[378]** evidence to infringement, if such particulars have not been given. In reality, this is simply a reiteration of the clear provisions of the law itself. But there is nothing in that judgment, upon which to base an argument, that in the present case the required particulars have not been given. As to the absolute necessity of the statement of particulars of infringement, the law is undoubtedly peremptory. Whether the particulars have or have not been furnished, and whether the particulars that have been furnished are or are not sufficient to meet the requirements of the law, is a matter for the decision of the Court in each particular case : and looking at what appears to me to have been the object of that special provision of s. 34, as noted above, I cannot see that in the present case there has been any failure on the part of plaintiff to comply with the law. The salient points of the various patents have been concisely described and the time and place of the infringement are also given. The defendant, says the plaint, has at the present time working in Cawnpore a kiln, in which the various inventions patented by the plaintiff, as already described in this plaint are in use. Nothing can well be plainer than this, and the defendant could scarcely have been more clearly apprised of the distinct points in the construction and

(1) 2 A. 381.

1883 FEB. 23.

APPELLATE CIVIL.

5 A. 371 = 3 A.W.N. (1883) 59.

working of his kiln, to which exception was taken, and in regard to which he would have to adduce rebutting evidence. Indeed, I have failed to understand the persistence with which, on the defendant's side, it has been contended that the 'particulars' have not been supplied. There is no special form laid down in the law in which the particulars are to be given. The form is presumed, therefore, to be immaterial, so long as the special points of infringement are clearly recorded, and in the present case I fail altogether to see that the requirements of the law have not been fully met. I may here note that one point in the patent of 1872 has certainly not been entered in the plaint, *viz.*, the iron dampers to prevent back draught. In this respect, therefore, no infringement can be alleged. Upon the 2nd issue, then, I find, for the reasons given above, that the particulars of breaches as required by law have been furnished by the plaintiff." Upon the 3rd issue the Judge held that, in the construction of the working of the kiln referred to in paragraph (5) of the plaint, the defendant had infringed the plaintiff's patent as described in para-**[379]**graphs (1), (2) and (3) of the plaint; and upon the 4th issue that the plaintiff was entitled to the damages claimed.

The defendant appealed to the High Court, the 1st and 2nd grounds in his memorandum of appeal being (1) that the District Judge was not competent to try the suit, as brought before him, and nothing done by the parties cured the defect; and (2) that the Judge had erred in law in holding that the plaintiff was not compellable to file particulars of breaches.

Messrs. *Howard* and *Hill*, for the appellant.

Messrs. *Conlan*, *Rose*, and *Jackson*, for the respondent.

The Court (STUART, C.J., and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

We unhesitatingly disallow the first reason of appeal. The argument based upon it cannot for a moment be listened to. The filing of the suit at first in the Court of the Subordinate Judge was a mere mistake on the part of the plaintiff's pleader, and it would be absurd to contend that the transfer to the Judge's Court was made in contravention of the provisions of the Code of Civil Procedure, both parties being agreed as to the necessity of the transfer, and the Patent Act XV of 1859, s. 22, expressly providing that "no such action (for the infringement of the patent) shall be maintained in any Court other than the principal Court of original jurisdiction in civil cases within the local limits of whose jurisdiction the cause of action shall accrue."

The objection raised by the second reason of appeal is a much more serious matter, going as it does, to the relevancy of the suit as brought. By s. 34 of Act XV of 1859, it is distinctly provided that "in any action for the infringement of such exclusive privilege the plaintiff shall deliver with his plaint particulars of the breaches complained of in the said action." This provision has not been complied with in the present case. What is stated on the subject is nothing more than the general allegation contained in the 5th paragraph of the plaint that "the defendant, H. C. B. Petman, has used, and is now using in Cawnpore, a kiln, with two sets of operations, similar to that patented, in manner above described by the plaintiff, and in such kiln the various inventions patented by **[380]** the plaintiff, as aforesaid, have been made and used without any license from the plaintiff." The same s. 34 further provides that "at the trial

of any such action or issue no evidence shall be allowed to be given in support of any alleged infringement, or of any objection impeaching the validity of such exclusive privilege, which shall not be contained in the particulars delivered as aforesaid." So that the plaintiff came into Court without any case which could possibly be tried. The attempt made at the hearing to show that the statement in the 5th paragraph of the plaint amounted to notice of particulars as required by the Act, was only supported by going into matters which were outside the plaint altogether.

How, in the face of such very plain and distinct directions as those contained in s. 34 of the Act, the plaint should have been framed in its present form it is difficult to understand. The second reason for appeal must therefore prevail, but we will allow the plaintiff another opportunity of a hearing on the merits, and for that purpose we direct that the plaint be amended and presented in the proper Court, *viz.*, the principal Court of original jurisdiction in civil cases at Cawnpore, and that with the plaint the particulars required by s. 34 be duly delivered. As to costs, these, under the circumstances, had better be reckoned as costs in the cause, and we order accordingly.

Appeal allowed.

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5 A. 380 = 3 A.W.N. (1883) 60.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

SIRAJ-UL-HAQ AND ANOTHER (*Defendants*) *v.* KHADIM HUSSAIN AND ANOTHER (*Plaintiffs*).* [23rd February, 1883.]

Appeal—Security for costs—Practice—Notice to show cause—Rejection of appeal—Civil Procedure Code, ss. 2, 549—"Decree."

An order under s. 549 of the Civil Procedure Code rejecting an appeal because security has not been furnished, as directed under that section, is a "decree" within the meaning of s. 2, from which an appeal will lie.

The discretion conferred on an appellate Court by s. 549 to demand security for costs must be properly exercised; and such discretion is not so exercised when the order requiring such security is made without notice to the appellant to show cause why the order should not be made.

No order affecting a party should be made without notice to him calling upon to show cause why the order should not be made.

[Overruled, 18 A. 101 (103) (F.B.).]

[381] THE plaintiffs in this suit obtained a decree in the Court of first instance. From this decree the defendants appealed. The appellate Court, without giving notice to the defendants to show cause why they should not give security for the costs of the appeal, on the 12th May, 1882, under s. 549 of the Civil Procedure Code, made an order requiring them to give such security within ten days. The defendants did not give the required security within such time. On the 23rd May the plaintiffs applied to the appellate Court to reject the appeal on the ground that the defendants had failed to give security. The case came on for hearing on the 27th May, and on that day the defendants applied for further time, and contended that security had been improperly required

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* Second Appeal No. 916 of 1882, from a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Saharanpur, dated the 27th May, 1882, affirming a decree of Maulvi Nasr-ul-lah Khan, Munsif of Saharanpur, dated the 31st March, 1882.

1883 FEB. 23. — APPELLATE CIVIL. — 5 A. 380= 3 A.W.N. (1883) 60.

from them. For the plaintiffs it was contended that the Court had no power to grant further time after the expiration of the time originally fixed. The appellate Court allowed the contention of the plaintiffs, with reference to *Haidri Bai* v. *The East Indian Railway Company* (1), and directed that the appeal should be struck off. The defendants preferred an appeal, in the shape of a "second appeal," to the High Court, contending, *inter alia*, that the order requiring security from them was bad, inasmuch as it had been passed without notice having been given to them to show cause.

Pandit *Nand Lal*, for the appellants.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the order striking off the appeal, because security was not furnished as directed under s. 549, Civil Procedure Code, is a decree within the meaning of s. 2, from which an appeal will lie. We also consider that the order cannot stand. No doubt a Court may "at its discretion" demand from the appellant security for the costs of the appeal, or of the original suit, or of both; but the discretion must be properly exercised; and it has not been so exercised, when the order demanding security has been made without opportunity being given to the appellant to show cause against it. It is a wholesome rule of practice [382] that no order affecting a party should be made without notice to him calling upon him to show cause why the order should not be made; and the present case is an example to prove that a party may be seriously injured by non-observance of this rule. We reverse the order of the lower appellate Court, and remand the case to be disposed of according to law.

Appeal allowed.

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5 A. 382=3 A.W.N. (1883) 66=8 Ind. Jur. 102.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

MUHAMMAD LATIF (*Plaintiff*) *v.* GOBIND SINGH AND OTHERS (*Defendants*).* [20th February, 1883.]

Pre-emption—Bad title of vendor as to part of property—Pre-emptor and preferential pre-emptor—Purchase-money.

Certain persons sold an eight-anna share of a village. *G* sued the vendors and purchasers of the share to enforce his right of pre-emption in respect of the sale, and obtained a decree. *M*, claiming one anna four pies of the share as his property, sued the vendors and purchasers of the share, and *G*, for such one anna four pies, and obtained a decree. He then sued the same parties to enforce his right of pre-emption in respect of the remainder of the share, that is, six annas eight pies, claiming to pay only a proportionate amount of the price paid for the whole share. *Held*, that *M* was not bound to pay the price paid for the whole share, but only the proportionate amount of such price.

[R., 32 A. 340 (343)=7 A.L.J. 259 (263)=5 Ind. Cas. 527 (529); 103 P.R. 1894.]

* Second Appeal No. 849 of 1882, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 12th May, 1882, affirming a decree of Pandit Soti Behari Lal, Subordinate Judge of Azamgarh, dated the 6th January, 1882.

(1) 1 A. 687.

1883 FEB. 20.

APPELLATE CIVIL.

5 A. 382 = 3 A.W.N. (1883) 66 = 8 Ind. Jur. 102.

THIS was a suit to enforce the right of pre-emption in respect of the sale of an eight-anna share in a certain village. The plaintiff's grandmother died leaving as heirs to the eight-anna share in question two sons and two daughters. The plaintiff was the son of one of the daughters. His mother's share of the eight annas as an heir to her mother was one anna and four pies. On his mother's death this one anna and four pies devolved on the plaintiff. On the 7th August, 1880, the plaintiff's mother being dead, the plaintiff's uncles and aunt sold the eight-anna share to persons called Mansab Ali and Wali Muhammad for Rs. 2,000. Thereupon certain co-sharers in the village, Gobind Singh and Ajaib Singh, sued the vendors and purchasers of the share to enforce their right of pre-emption in respect of the sale, and obtained a decree on the 10th November, 1880. The plaintiff then instituted a suit against the vendors and purchasers of the eight-anna share, and the persons who had obtained a decree for that share [383] by right of pre-emption, Gobind Singh and Ajaib Singh, for one anna and four pies, claiming as heir to his mother. He obtained a decree in this suit on the 17th June, 1881. He then brought the present suit against the vendors and purchasers of the eight-anna share, and Gobind Singh and Ajaib Singh, in which he claimed six annas eight pies of the eight annas, by right of pre-emption, on payment of Rs. 1,666-10-8, the sum proportionate to the price paid for the eight annas, *viz.*, Rs. 2,000. Both the lower Courts decided that the plaintiff was entitled to the six annas eight pies, by right of pre-emption, but held that he was bound to pay Rs. 2,000 for the property, as the defendants Gobind Singh and Ajaib Singh had paid that amount.

In second appeal it was contended on the plaintiff's behalf that he was not bound, in equity, to pay for the six annas and eight pies more than the proportionate amount of the price paid for the eight annas.

Mr. *Spankie* and Munshi *Kashi Prasad*, for the appellant.

Shah *Asad Ali*, for the respondents (Gobind Singh and Ajaib Singh).

The High Court (STRAIGHT and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—The purchase by the defendants-vendees, which was successfully impeached by the defendants-pre-emptors, must, now that the plaintiff-appellant has established his right by inheritance to the one-anna four pie share, be regarded as one of six annas eight pies and no more. Of any defect that has since turned out to exist in the title of the original vendors, not only the vendees but the pre-emptors must take the consequences, and it would be most inequitable to hold that the plaintiff is bound to pay not only for what the vendors had power to sell, subject to the right of pre-emption, but also for what they had not power to sell by reason of its belonging to himself. We think that the appeal should prevail, in so far that the judgments of the lower Courts will be modified to this extent, that the plaintiff will be declared entitled to possession of the six annas eight pies on payment of Rs. 1,666-10-8. The respondents will pay costs in all the Courts. The Rs. 1,668-10-8 must be paid into the Court of the Subordinate Judge within one month from [384] the date of the receipt of the decree of this Court, otherwise the suit will stand dismissed.

Appeal allowed.

1883
FEB. 26.

APPELLATE CIVIL.

5 A. 384 = 3 A.W.N. (1883) 61 = 8 Ind. Jur. 102.

5 A. 384 = 3 A.W.N. (1883) 61 = 8 Ind. Jur. 102.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

RAMA NAND SINGH AND ANOTHER (*Defendants*) *v.* GOBIND SINGH AND ANOTHER (*Plaintiffs*).* [26th February, 1883.]

Hindu Law—Mitakshara—Joint Hindu family—Joint family property—Alienation by a member of his share.

One member of a joint and undivided Hindu family, governed by the law of the Mitakshara, cannot mortgage or sell his share of the family property without the consent, express or implied, of the other members. *Chamaili Kuar* v. *Ram Prasad* (1), followed. *Deendyal Lal* v. *Jugdeep Narain Singh* (2) and *Suraj Bunsi Koer* v. *Sheo Prasad Singh* (3), referred to.

[F., 112 P.W.R. 1911; R., 6 A. 205 (208); 20 Ind. Cas. 921.]

THE plaintiffs in this suit claimed to set aside a mortgage by the defendant Raghunandan Singh of his interest in certain zamindari estates to the other defendants, dated the 24th August, 1880. They alleged that they and Raghunandan Singh were members of a joint undivided Hindu family; that the zamindari estates in question were joint ancestral property; and that the mortgage by Raghunandan Singh of his interest therein was void, under Hindu Law, having been made without their consent. The defendants set up as a defence to the suit that Raghunandan Singh was not a member of a joint undivided family together with the plaintiffs, but was separated from them, and was in separate possession of the mortgaged property, and was therefore competent to make the mortgage. The Court of first instance decided that the plaintiffs and Raghunandan Singh were members of a joint Hindu family; that the mortgaged property was a portion of the ancestral family estate; and that according to Hindu Law the mortgage was void, as it had been made without the consent of all the members of the family; and it gave the plaintiffs a decree setting aside the mortgage. On appeal by the defendant it was contended on their behalf, *inter alia*, that notwithstanding the [385] zamindari shares were joint ancestral property, the defendant Raghunandan Singh was not precluded by Hindu Law from mortgaging his interest therein. The lower appellate Court disallowed this contention.

In second appeal the defendants again contended that a member of a joint undivided Hindu family was competent to mortgage his interest in the family property.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellants.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the respondents.

The Court (STRAIGHT and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—It has long been the rule of decision in this Court that one member of a joint and undivided Hindu family cannot mortgage

* Second Appeal No. 376 of 1882, from a decree of Pandit Soti Behari Lal, Subordinate Judge of Azamgarh, dated the 30th December, 1881, affirming a decree of Mirza Kamar-ud-din Ahmad, Munsif of Azamgarh, dated the 5th September, 1881.

(1) 2 A. 267. (2) 3 C. 198. (3) 5 C. 148.

or sell his share without the consent, express or implied, of his co-parceners. The question was fully discussed in a judgment of our brother OLDFIELD in *Chamaili Kuar* v. *Ram Prasad* (1) and in the views expressed by him in that case we concur. Whatever may be the inferences to be drawn from the remarks of their Lordships of the Privy Council in *Deendyal's* (2) and *Suraj Bunsi Koer's* (3) *cases*, to which reference is so frequently made, we do not feel called upon to disturb a uniform and unbroken course of decisions, which have the advantage of being based on, and being in harmony with, the Mitakshara itself. In the present appeal, it being found as a fact that the plaintiffs-respondents and the defendant Raghunandan were joint, the former were entitled under the Hindu Law to come into Court to have the mortgage of the 24th August, 1880, set aside, and the Courts below have rightly so decided. The appeal must be dismissed with costs.

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We think it as well to add that the question raised by the second plea in the memorandum of appeal must now, so far as this Court is concerned, be taken as determinately concluded.

Appeal dismissed.

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5 A. 386 = 3 A.W.N. (1883) 72.

[386] CRIMINAL REVISIONAL.

Before Mr. Justice Oldfield.

EMPRESS *v.* SAJIWAN LAL. [9th March, 1883.]

Appellate Criminal Court, powers of, in disposing of appeal—Appellant bound to show ground for interference—Criminal Procedure Code, ss. 421, 423.

A convicted person appealing is not in the same position before the appellate Court as he is before the Court trying him: he must satisfy the appellate Court that there is sufficient ground for interfering with the order of conviction; and if no such ground is shown, it is the duty of the appellate Court not to interfere.

THIS was an application for the revision under s. 439 of the Criminal Procedure Code of an appellate order of Mr. R. J. Leeds, Sessions Judge of Gorakhpur, dated the 10th February, 1883. The applicant had been convicted by a Magistrate, and had appealed to the Court of Session, and his conviction had been affirmed.

It was contended on behalf of the applicant that the Sessions Judge had not properly dealt with the appeal. It was urged that the Sessions Judge had failed to form an independent judgment on the evidence, having after expressing doubts whether the evidence for the prosecution or that for the defence was most reliable, decided in favour of the prosecution, with reference to the conclusion arrived at by the Magistrate, on the ground that the latter had better opportunities of judging of the veracity of the witnesses; whereas he should have given the applicant the benefit of the doubt.

The Sessions Judge's observations were:—"An appellate Court is bound to examine the evidence and consider carefully whether it is such as to warrant the conclusions arrived at by the Magistrate; but it should give very great weight to such conclusions, and is not justified in reversing a Magistrate's decision unless it is fully satisfied that such decision is wrong." Again:—"It is for the appellant to show beyond all reasonable

(1) 2 A. 267. (2) 3 C. 198. (3) 5 C. 148.

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5 A. 386 = 3 A.W.N. (1883) 72.

doubt that his conviction is wrong." Again, after dealing with the grounds of appeal and the evidence, the Sessions Judge came to this conclusion :—"On the whole, after reading twice through the evidence with care, I can find no very strong reason for believing one side rather than the other, and such being the case, I consider that I am bound to accept the conclusions arrived at by the Magistrate, who, having [387] seen and heard the witnesses, has necessarily had a better opportunity of judging of their relative credibility."

Mr. *A. S. Reid*, for the applicant.

JUDGMENT.

OLDFIELD, J.—(After stating the contention on behalf of the applicant, and the observations of the Sessions Judge, continued) : This is in effect holding that the appellant should satisfy the Court that there are good reasons for interfering, and that in this case none such having been shown, the conviction is fit to be affirmed. I am of opinion that in thus dealing with the appeal the Judge is not in error, but has followed the course prescribed by the Criminal Procedure Code. It will be seen that s. 421 gives an appellate Court a summary power of rejecting an appeal, if, after perusing the petition and copy of judgment, it considers there is no sufficient ground for interference ; and if the appeal has not been rejected under the provisions of s. 421, the appellate Court, under s. 423, after perusing the record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, may, if it considers there is no sufficient ground for interfering, dismiss the appeal. From the above provisions it is obvious that an appellant is not precisely in the same position before an appellate Court as he is before the Court trying him, but must satisfy the Court that there is sufficient ground for interfering with the order of conviction ; and if no sufficient ground is shown, it is the duty of the appellate Court not to interfere. I am of opinion, therefore, that no case has been made out for revision, and the application is dismissed.

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5 A. 387 = 3 A.W.N. (1883) 71.

CRIMINAL REVISIONAL.

Before Mr. Justice Oldfield.

EMPRESS *v.* JAMNI. [9th March, 1883.]

False charge—Act XLV of 1860 (*Penal Code*), *ss.* 182, 211.

J complained to the Police that she had been raped by *R*. The Police having reported the charge to be false, criminal proceedings were instituted against her under s. 182 of the Penal Code. In the meantime *J* made a complaint in Court, again charging *R* with rape. This complaint was not disposed of, but the proceedings against her under s. 182 of the Penal Code were continued, and she was eventually convicted under that section.

Held, setting aside the conviction and directing that *J*'s complaint should be disposed of, that such complaint should have been disposed of before proceedings were taken against her under s. 182.

[R., 14 C. 707 (711); D., 5 Ind. Cas. 991 (992) = 11 P.W.R. 1910.]

[388] THIS was a case reported to the High Court for orders, under s. 438 of the Criminal Procedure Code, by Mr. W. Barry, Sessions Judge of Jaunpur, at the instance of Mr. G. Dale, Magistrate of the Jaunpur district. The facts of the case, as stated by the Magistrate, were these :—Jamni reported at a Police-station that she had been raped by one Ram

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5 A. 387 = 3 A.W.N. (1883) 71.

Prasad. The Police-officer in charge of the station investigated the case, and reported it as a false one to the District Superintendent. That officer requested the Deputy Magistrate having jurisdiction to prosecute the complainant under s. 182 of the Penal Code. The Deputy Magistrate issued a summons to Jamni to appear and answer a charge under that section. In the meantime Jamni presented a petition to the Deputy Magistrate, again preferring the charge of rape against Ram Prasad. Her statement was recorded on the back of the petition, and further proceedings were postponed pending the result of the case against her, for the hearing of which a day had been fixed. On that day Jamni was charged under s. 182 of the Penal Code, witnesses for the prosecution were heard, and Jamni's statement was taken, in which she still adhered to her original story. She named witnesses for the defence, who were summoned for a certain day, but all did not appear on that day. On that day the Deputy Magistrate convicted Jamni, and sentenced her to six weeks' rigorous imprisonment. The Magistrate of the District was of opinion that the proceedings of the Deputy Magistrate were irregular, on the ground that s. 182 of the Penal Code was wholly inapplicable to the case; and that Jamni having made a direct charge of rape, the Deputy Magistrate should have inquired into the case, and if he found that the charge was false, should have then directed a prosecution against her under s. 211 of the Penal Code, and that prosecution should have taken the form of an inquiry into a case triable by the Court of Session, seeing that the alleged false charge was an offence (rape) punishable with imprisonment of more than seven years. The Magistrate therefore considered that the Deputy Magistrate's proceedings should be quashed, and he should be directed to inquire into the charge of rape brought by Jamni, and according to the result of that inquiry, direct or not (as the case might be) proceedings to be taken against her under s. 211 of the Penal Code. The Sessions [389] Judge, in forwarding the case, remarked that, as Jamni had been convicted of giving false information to the police, s. 182 of the Penal Code was perfectly applicable. He referred, as supporting this view, to *Empress* v. *Radha Kishan* (1). He also remarked that, Jamni having given a petition to the Deputy Magistrate repeating the charge of rape, if this "criminal proceeding" was proved to be false, it would then appear that she would be punishable under s. 211; and that the question, whether it was incumbent on the Deputy Magistrate to hold an inquiry into the truth of the charge of rape, before proceeding under s. 182 or s 211, had been ruled in the negative, citing *Empress* v. *Bhawani Prosad* (2).

JUDGMENT.

OLDFIELD, J.—The Magistrate's view is correct; as Jamni had made a complaint in the Deputy Magistrate's Court, charging Ram Prasad with rape, that complaint should have been inquired into and disposed of before proceedings were taken against her under s. 182. The proceedings and conviction by the Deputy Magistrate are set aside. He will dispose of the complaint preferred by Jamni in due course of law.

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(1) 5 A. 36.

(2) 4 A. 182.

1883
MAR. 12.

APPELLATE CIVIL.

5 A. 389 = 3 A.W.N. (1883) 73 = 8 Ind. Jur. 103.

5 A. 389=3 A.W.N. (1883) 73=8 Ind. Jur. 103.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

DHARAM CHAND AND ANOTHER (*Defendants*) *v.* JANKI (*Plaintiff*).*
[12th March, 1883.]

Hindu widow—Maintenance—Suit for maintenance fixed by decree—Small Cause Court suit—Jurisdiction—Liability of purchaser of ancestral property.

A suit by a Hindu widow for arrears of maintenance, based on a decree charging immoveable property with the payment of the maintenance allowance, is not a suit of the nature cognizable in a Court of Small Causes.

Pahlud Singh v *Ahlud Singh* (1), followed.

A decree obtained by a Hindu widow for maintenance directed that certain ancestral property, which *D* and *S* had purchased, should be liable in their hands for the payment of the maintenance allowance. *Held*, that the widow was not entitled, by virtue of such decree, to recover arrears of the allowance from *D* and *S* personally, after such property had left their hands.

[390] IT appeared in this case that the plaintiff Janki had brought a suit against Bharam Dat, her deceased husband's brother, and against Makhan Babu, widow, and Dharam Chand and Sham Chand, minor sons, of one Gobind Ram, for maintenance at Rs. 5 per mensem, on the ground that Bharam Dat had sold, and Gobind Ram, had purchased, a bungalow, which, she alleged, was ancestral property and liable for her maintenance. The Munsif trying this suit gave Janki a decree in December 1870, which directed that in the first instance Bharam Dat and any family property still remaining in his hands should be liable for the maintenance of Janki, and that the bungalow in the hands of Dharam Chand and Sham Chand should only be liable for the same, in case efforts had been made to recover the allowance from Bharam Dat and such efforts had failed. The estate of the minors, Dharam Chand and Sham Chand, subsequently came under the superintendence of the Court of Wards, and the Collector, as manager of such estate, sold the bungalow in question. It appeared that the Collector had made Janki an allowance of Rs. 5 out of the rents of the bungalow. In 1881 Janki brought the present suit against Bharam Dat, Dharam Chand and Sham Chand for Rs. 80, arrears of the allowance awarded her by the decree of 1870, the suit being based on the decree. The Court of first instance gave her a decree against all the defendants. Dharam Chand and Sham Chand appealed, contending—(i) that they were no longer liable for the payment of the allowance, the bungalow having left their hands; and (ii) that by the terms of the Munsif's decree they were not liable until every effort had been made to realize the allowance from Bharam Dat and the family property in his hands. As regards contention (i) the lower appellate Court observed as follows:—"It is not necessary to consider the legality of the Munsif's judgment, which was not appealed at the time. It is sufficient to observe that it is admitted that the Collector of Benares sold the bungalow without any notice to the purchaser that it was liable to this incumbrance. The appellants must, therefore, be held to have obtained its full value, and

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* Second Appeal No. 1006 of 1882, from a decree of D. M. Gardner, Esq., Judge of Benares, dated the 25th July, 1882, affirming a decree of Babu Mritonjoy Mukarji, Munsif of Benares, dated the 14th March, 1882.

(1) N.W.P.H.C.R. (1874) 91.

1883 MAR. 12.

APPELLATE CIVIL.

5 A. 389 = 3 A.W.N. (1883) 73 = 8 Ind. Jur. 103.

that, having its price, its equivalent, in their hands, they are as responsible as if they were still in possession of the bungalow." As regards contention (ii) the Court observed:—"The Munsif's judgment on this point and the decree of Decem-[391]ber, 1870, certainly leave an opening to raise difficulties; and considering that he held Bharam Dat to be colluding with the plaintiff, he might have known that the direction to realize from Bharam Dat first would probably be evaded. But as the plaintiff declares that she cannot realize from Bharam Dat, and as Bharam Dat has sworn that he has no property, and as it is stated by plaintiff, and not denied by defendants, that until November, 1878, the Collector of Benares, on part of the Court of Wards, used to pay the plaintiff Rs. 5 a month out of the rents of the bungalow in his hands, it may fairly be assumed that the state of things has arisen which, by the Munsif's judgment of December, 1870, formed the condition of the present defendants being liable." The lower appellate Court accordingly affirmed the decree of the first Court.

In second appeal the defendants Dharam Chand and Sham Chand contended that they were not liable for the payment of the allowance, the bungalow being no longer in their possession. For the respondent it was contended that a second appeal did not lie in the case, it being of the nature of one cognizable in a Court of Small Causes.

Babu *Jogindro Nath Chaudhri*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the respondent.

The Court (STRAIGHT and OLDFIELD, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We disallow a preliminary objection taken by the respondent's pleader that there is no appeal on the ground that the suit is of the nature of a Small Cause Court suit. It has been held by this Court that a suit brought to recover arrears of maintenance of the character which the plaintiff seeks to recover here is not a suit cognizable by a Court of Small Causes—*Pahlud Singh* v. *Ahlud Singh* (1). The appeal must, in our opinion, prevail. The decree which the plaintiff-respondent obtained against the appellants declared her right to maintenance to be a [392] charge on the property in their hands; but it will not entitle her to recover maintenance from them personally, now that the property has passed from them. We decree the appeal, and modify the decrees of the lower Courts, and dismiss the suit with all costs against the appellants.

Appeal allowed.

(1) N.W.P.H.C.R. (1874) 91.

1883
MAR. 14.

APPELLATE CIVIL.

5 A. 392 = 3 A.W.N. (1883) 75.

5 A. 392=3 A.W.N. (1883) 75.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SIDH GOPAL (*Defendant*) *v.* AJUDHIA PRASAD AND ANOTHER (*Plaintiffs*).* [14th March, 1883.]

Insolvent—Agreement by creditors to give time—Failure of consideration—Mortgage to creditors as security for payment of debts—Construction of instrument—Suit by creditor before expiration of time—Separate suits by creditors.

A certain firm gave its creditors jointly, and not severally a mortgage on certain immoveable property as security for the payment of the debts due to them by the firm, the consideration for such mortgage being a promise by all the creditors not to sue the firm for their debts for a certain time. Before the expiration of such time several of the creditors sued for their debts. Subsequently several of the creditors brought separate suits against the firm to enforce the mortgage in respect of their debts.

Held, that the consideration for the contract of mortgage, *viz.*, the forbearance of all the creditors not to sue for their debts for a fixed time, having failed, the firm was discharged from liability on the mortgage.

Held, also, that had the contract of mortgage remained in force, it would not have been competent for individual creditors to come into Court and enforce the contract in respect of their separate debts.

KHUNNA MAL, Banarsi Das, Radhe Lal, and Sidh Gopal, the sons of Dwarka Das, and members of a joint Hindu family, carried on business at Cawnpore and other places under the style of Dwarka Das Khunna Mal. Shortly before the 22nd June, 1875, the creditors of the firm apprehended that it was insolvent, and they pressed for payment. On that day Khunna Mal, Banarsi Das, and Radhe Lal, executed the following instrument, described as a mortgage-bond, in favour of their creditors:—

"We Khunna Mal, Banarsi Das, Radhe Lal, and Sidh Gopal, the sons of Dwarka Das, and proprietors of the firm known as that of Dwarka Das Khunna Mal, in Old General ganj, Cawnpore . . . . hereby declare that, being sound in mind and body, we agree that [393] a balance of Rs. 30,700 is due by us on account book accounts and hundis to the following creditors:—

"Ganga Prasad, proprietor of the firm of Sunder Lal Ganga Prasad, Rs. 6,600; to Babu Lal, proprietor of the firm of Babu Lal Bihari Lal, Rs. 3,100; to Chote Lal, proprietor of the firm of Sirdar Mal Deoki Nandan, Rs. 600; to Puran Chand, proprietor of the firm of Puran Chand Parmeshri Das, Rs. 2,400; to Salig Ram, proprietor of the firm of Salig Ram Har Narain, Rs. 5,200; to Jugal Kishore, proprietor of the firm of Gobardhan Das Sarup Ram, Rs. 2,500; to Madho Ram, Rs. 1,500; to Sidhari Lal and Baldeo Prasad, Rs. 1,500; to Parmeshri Das, proprietor of the firm of Thakur Das Sri Gopal, Rs. 1,400; to Mam Raj and Mustahkam Singh, Rs. 600; to Ram Prasad, and Damodhar Das, Rs. 1,350; to Munna Lal, proprietor of the firm of Munna Lal Sheo Sahai, Rs. 1,250; to Man Singh and Debi Charn's firm, Rs. 600; to Khaku Mal, proprietor of the firm of Manu Mal Bhawani Shankar, Rs. 300; to Jagan Prasad, Rs. 600; to Beni Ram and Brij Raj, Rs. 750; to Ram Gopal, proprietor of the firm of Ram Rattan Ram Gopal, Rs. 450.

"At the present time we cannot arrange to meet these liabilities. Therefore, in lieu of the Rs. 30,700 due to the aforesaid mahajans, we mortgage to them, collectively, three *pacca* masonry houses, together with the shop in which the business of

* First Appeal No. 130 of 1881, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 19th July, 1881.

1883 MAR. 14.

APPELLATE CIVIL.

5 A. 392 = 3 A.W.N. (1883) 75.

Dwarka Das Khunna Mal is carried on in Old General ganj, together with all its rights and appurtenances, *dakhili* and *khariji*, within the boundaries noted at foot, and which, up to this present moment, is in our proprietary possession, unincumbered by any sale, mortgage or gift, and without any other share-holders therein. The following conditions and particulars have been mutually agreed upon between us, the mortgagors and mortgagees :—

"(i) The mortgage-consideration, as detailed above, shall be repaid by us to each of the said mahajans within three months, together with an interest of ten annas per cent. per month, and the property shall be redeemed, and in this we shall raise no sort of excuses.

"(ii) That the interest due to each of the mahajans on any unpaid balance shall be paid to them monthly, and if we fail to [394] pay any of the mahajans the entire or any part of the interest due to them, then, consequent on such failure, all the mahajans shall be at liberty to cancel the fixed term of three months, and on the basis of the failure to pay the interest, sue us for the principal and interest, and to recover the same from the persons and property of us, the mortgagors, whether the said property be hypothecated or not, or be moveable, or immoveable, and it may be recovered from our heirs also. To this neither we nor our heirs shall demur.

"(iii) That until the entire dues of the said mahajans be realized we shall not mortgage, hypothecate, sell or give the mortgaged property to any one, and should we do so, it shall be invalid.

"(iv) That the said mahajans shall be at liberty, in order to realize the sums due to them, to sue for and recover the same from our persons and property, whether moveable or immoveable, either individually or collectively in a body, and to this we or our heirs shall not object.

"(v) That any payment made by us shall be indorsed at the back of this document, and signed also by the mortgagee, in whose custody this document may be; that no separate receipt, purporting to be payment, shall be considered valid by any Court.

"(vi) Should (God forbid) there be any difficulties in regard to the hypothecated property, we shall be answerable for the same, and the mortgagees shall in no way suffer in consequence.

"(vii) The possession and occupancy of the hypothecated property shall continue with us.

"(viii) This deed of hypothecation shall remain in the custody of Ganga Prasad, the proprietor of the firm of Sundar Lal Ganga Prasad.

"(ix) That the income arising out of the house of business at Benares, in the names of Radhe Lal and Sidh Gopal, and of the business at Lucknow, in the name of Radhe Lal, which belong to the executants hereof, shall be sent by us weekly by hundi, notes, or cash, to Lala Ganga Prasad for the payment of the principal and interest due under this document, and with whom this document shall be kept, and the said Ganga Prasad shall be at liberty, [395] when he has realized one or two thousand rupees, to make a proportionate distribution thereof to all the said mahajans, and to take their receipts for the same.

"(x) That if, within three months, a portion of the mortgage consideration be paid to all the mahajans, then the term of this mortgage-deed shall continue up to one year, and we shall thus pay up gradually the amount due to all the mahajans.

"This deed of hypothecation has, therefore, been executed for the satisfaction of the said mahajans, that it may stand good in evidence."

Although the bond recited that Sidh Gopal was a party to it, it was not executed by him. On the same date as the bond was executed, that

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is to say, the 22nd June, 1875, Debi Charan, one of the creditors mentioned therein, instituted a suit against the firm of Dwarka Das Khunna Mal to recover the debt due to him, and on the 17th July following, Sidhari Lal, another creditor mentioned therein, did the same. Both these creditors obtained decrees against the firm. On the 30th November, 1880, Ajudhia Prasad and Debi Prasad, sons of Ganga Prasad, a creditor mentioned in the bond, instituted a suit against Khunna Mal, Banarsi Das, Radhe Lal, and Sidh Gopal, in which they claimed the principal amount (Rs. 6,600) due to them and interest, asking for the enforcement of the mortgage contained in the bond. On the same date Puran Chand, another creditor, instituted a similar suit. In January, 1881, Beni Ram and Brij Raj, other creditors, instituted a similar suit. These three suits were the suits out of which the present appeal (No. 130 of 1881) and three other appeals (Nos. 131, 146, and 147) arose. The defendants set up as a defence to all three suits that "although under the deed in suit the plaintiff, as one of the several mortgagees who are mentioned therein, may have a separate right of suit yet the liability of the mortgaged property to the mortgagees is co-extensive, and the lien created in their favour co-extensive with the whole amount secured by the mortgage, and accordingly the plaint should be rejected by reason of the non-joinder of the other mortgagees as parties to the suit." The defendant Sidh Gopal set up as a special defence to the suits that the bond of the 22nd June, 1875, was not binding on him, as he did not **[396]** execute it; that he never authorized the defendants Khunna Mal, Banarsi Das, or Radhe Lal to execute it for him, nor was it executed on his behalf by them; that the property in suit being the joint ancestral property of himself and the other defendants, the mortgage of it without his consent was invalid under the Mitakshara Law; and that in any case the suits, as regards his share of the property, should be dismissed. The three suits were tried together, and the Court trying them held on the points raised by the defences set out above as follows: "As respects the first issue, as the obligors have in the bond engaged to pay the amount due to all and each of the creditors, and the property is made liable for the debt due to all and each of the creditors, the bond must be treated as executed in favour of each creditor separately. The fact of some of the creditors having sued separately has broken their unity. As the mortgage was given to all and each of the creditors simultaneously, no creditor can claim priority, and consequently no injury can be inflicted on any one by the plaintiffs suing separately. I think, therefore, that the suit is entertainable in the present form...............As respects the tenth issue, I think the first defendant (Khunna Mal), as head of the family, was competent to mortgage the property for the benefit of the family, and the defendant No. 4 (Sidh Gopal), against whom the claim rests on acquiescence to be inferred from his long silence after the contract came to his knowledge, and his having benefited by the transaction, is liable to the plaintiff's claim."

The defendant Sidh Gopal preferred an appeal to the High Court in the suit in which Ajudhia Prasad and Debi Prasad were the plaintiffs. The defendants Khunna Mal and Banarsi Das preferred a similar appeal in the same suit. They also preferred similar appeals in the two other suits. These appeals were numbered respectively 130, 131, 146, 147.

Mr. *Hill*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant in No. 130, and the appellants in No. 131.

Mr. *Conlan* and Pandit *Ajudhia Nath*, for the respondents in those appeals.

[397] The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellants in Nos. 146 and 147.

Pandits *Ajudhia Nath* and *Nand Lal*, for the respondent in No. 146.

Shaikh *Maula Bakhsh* and Shah *Asad Ali*, for the respondents in No. 147.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

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JUDGMENT.

STRAIGHT, J.—These four appeals, Nos. 130, 131, 146 and 147 of 1881, have reference to three suits instituted in the Court of the Subordinate Judge of Cawnpore by the several plaintiffs-respondents against the defendants-appellants and one Radhe Lal, who has not appeared, together with other persons who are not before us in appeal. The plaintiffs-respondents came into Court upon the basis of a mortgage or deed of hypothecation of the 22nd June, 1875, and they sued for the recovery of separate sums of money alleged to be due to them from the defendants-appellants, by enforcement of the lien created in that instrument, against three *pacca* houses situate at General ganj, in the city of Cawnpore. The lower Court, on the 19th July, 1881, decreed the claim in each case, and out of the array of defendants, Sidh Gopal, Khunna Mal, and Banarsi Das, appeal in the suit at the instance of Ajudhia Prasad and Debi Prasad, and Khunna Mal and Banarsi Das alone in the suits at the instance of Puran Chand and of Beni Ram and Brij Raj. It does not appear to us necessary to enter at length into the circumstances out of which this litigation has arisen, as the facts may be found very fully detailed by the Subordinate Judge in his judgment in the case in which Ajudhia Prasad and Debi Prasad were the plaintiffs. As the matters in difference between the parties are common to the three suits, the four appeals before us may be conveniently disposed of together.

The points arising for determination urged upon us by the learned counsel for the appellants involve the following considerations:—

(i).—Is the appellant Sidh Gopal bound by the instrument of the 22nd June, 1875, he not having been a party to its execution? [398] Upon this the further two questions arise, whether Sidh Gopal, being a member of a joint Hindu family along with his brothers Khunna Mal, Banarsi Das, and Radhe Lal, to which the Cawnpore firm of Dwarka Das Khunna Mal and the three other firms at Calcutta, Benares, and Lucknow belonged, the execution of the instrument of the 22nd June, 1875, by his co-partners, was an act necessary to the carrying on of the partnership business, and as such, according to the ordinary law of partnership, binding on him?

(ii).—Whether, if the ordinary law of partnership is not applicable to Sidh Gopal, or, if applicable, would exempt him from liability under the deed, he, being a member of a joint Hindu family with his three brothers, who admittedly executed the deed under an immediate and pressing necessity of preserving a joint family business, is, under the Hindu Law, bound by their act?

The second and main question, however, raised for the appellants is, assuming the appellant Sidh Gopal to be liable under the instrument of

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the 22nd June, 1875, in conjunction with his three brothers, was the consideration for which the houses were pledged in that deed a joint and common undertaking and promise of all the creditors of the firm of Dwarka Das Khunna Mal, whose names are recited therein, personally, or by the respondent Ajudhia Prasad on their behalf, to forbear from enforcing payment of their debts for three months, and, if such was the consideration, did the institution of the suits by Debi Charan, on the 22nd June, 1875, and by Sidhari Lal, on the 17th July following, vitiate the contract and discharge the appellants from liability? In other words, and to put it shortly, was the forbearance of the whole of the creditors mentioned in the deed a condition precedent to liability attaching to the defendants-appellants under the contract?

It is obvious that if this latter question can be answered in favour of the appellants, all three suits of the defendants-respondents which are founded upon the deed of the 22nd June, 1875, must fail, and in that event it will become unnecessary to enter upon a consideration of the nice and somewhat difficult points of partnership and Hindu Law raised by the first contention put forward in favour of the appeal. We accordingly address ourselves at once to the examination of the second question.

[399] We may premise by saying, that upon looking into the evidence we see no reason to doubt that the deed upon which so much turns was executed by the appellants Khunna Mal, Banarsi Das, and Radhe Lal *bona fide*, and with the object, if possible, of tiding over the insolvency that threatened the Cawnpore firm of Dwarka Das Khunna Mal, in consequence of the stoppage of the Calcutta concern of Dwarka Das Banarsi Das. Whether as a matter of fact all the creditors who are mentioned in the deed were or were not assenting parties thereto, or whether the respondent Ajudhia Prasad had or had not authority to represent them as consenting parties, are matters into which it seems unnecessary to enter. As far as we can judge, the only reasonable inference deducible from all the circumstances is, that the three appellants believed one of two things: either that all the recited creditors had given their consent to the arrangement, or that the respondent Ajudhia Prasad was the agent of some or all of them, to bind them in that behalf. If they were not under this impression, it is impossible to understand why they should ever have put their hands to the deed at all. For, as far as we can see, the only concession they could obtain at the time it was executed that would be of any value to keep the business of Dwarka Das Khunna Mal going, was to be given time by the whole of their creditors to turn round and make arrangements to meet the obligations that had been prematurely precipitated by the failure of the Calcutta firm. To our minds the terms of the instrument of the 22nd June, 1875, preclude the notion that it was intended to confer a separate lien in the case of each individual creditor enforcible by separate suit; on the contrary, taken as a whole, we can only regard it as a security-bond given to the whole body of the creditors for the payment of the debts due by the firm of Dwarka Das Khunna Mal to those persons, and interest thereon, through the hands of the respondent Ajudhia Prasad as a trustee, for, as will be observed, it was distinctly declared that he alone was to receive the moneys and indorse the receipt on the deed, and that after he had received one or two thousand rupees he was to make a proportionate distribution of the amount among all the creditors. Looking at the deed, therefore, in its entirety, we find ourselves quite unable to place the construction on it contended for by the respondents. It appears to us in very

[400] plain terms to indicate that the consideration, upon the strength of which the executants-appellants hypothecated their three houses was an actual or supposed promise of all the creditors mentioned in the instrument to forbear from enforcing payment of their debts for a period of three months from the date thereof. The value of an executory consideration of this kind could only be its value as a whole, and according as that was or was not forthcoming, would the contract stand or fall. The condition precedent to liability attaching to the defendants under the deed of the 22nd June, 1875, was broken when the suits of Debi Charan and Sidhari Lal were instituted within the three months. Hence there was, in our opinion, such a failure of consideration as discharged the appellants from their liability. In this view of the case it becomes unnecessary to determine the other points raised, to which we have adverted. We think, therefore, that the four appeals before us must be decreed with costs, and that the three suits instituted by the plaintiffs-respondents should stand dismissed. We may add, that had there not been the failure of consideration to which we have referred above, and the contract had remained in full force and effect against the appellants, it would not have been competent for individual creditors to come into Court to enforce the lien created by the deed of June, 1875, in respect of their separate debts, and upon this ground also the suits of the plaintiffs-respondents must have failed.

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Appeals allowed.

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5 A. 400=3 A.W.N. (1883) 79=8 Ind. Jur. 104.

CIVIL REVISIONAL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

AJUDHIA PRASAD (*Plaintiff*) v. BAKAR SAJJAD AND OTHERS (*Defendants*).* [17th March, 1883.]

Contract, relations resembling—Money paid—Voluntary payment—Act IX of 1872 (*Contract Act*), ss. 69, 70.

B sold certain immoveable property to *A*, one of the terms of the agreement of sale being that *A* should retain a portion of the purchase-money, and therewith pay the amount of a simple decree for money against *B* held by *C*. *A* failed to pay the amount of *C*'s decree, and *B* therefore sued him for the balance of the purchase-money, and obtained a decree. In the meantime *C* had the property attach-[401]ed in execution of his decree against *B*. *A* thereupon paid the amount of *C*'s decree. *B* subsequently took out execution of his decree against *A* for the balance of the purchase-money, and *A* paid the amount of the decree. *A* then sued *B* to recover the amount which he had paid in satisfaction of *C*'s decree against *B*.

Held, that *A* was entitled, under s. 70 of the Contract Act, 1872, to recover such amount, *B* having enjoyed the benefit of the payment, and the same not having been intended to be gratuitous.

Semble, that the case came within the provisions of s. 69 of the Contract Act and of the principle laid down in *Dulichand* v. *Ramkishen Singh* (1).

ON the 18th January, 1879, Bakar Sajjad, defendant No. 1 in this case, sold certain immoveable property to the plaintiff. He left in the

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* Application No. 274 of 1882, for revision under s. 622 of the Civil Procedure Code of a decree of H. A. Harrison, Esq., Judge of Farukhabad, dated the 5th July, 1882, affirming a decree of Munshi Man Mohan Lal, Munsif of Kanauj, dated the 24th April, 1882.

(1) 7 C. 648=8 I.A. 93.

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hands of the plaintiff Rs. 245, part of the purchase-money, in order that the plaintiff might satisfy a decree for money held against him by defendants Nos. 2 and 3, Chunni Lal and Lalman. The plaintiff neglected to satisfy the decree. Defendant No. 1 therefore sued him for the money, and obtained a decree on the 14th April, 1879. Previous to this decree, but subsequent to the sale of the property to the plaintiff, defendants Nos. 2 and 3 caused the property to be attached in execution of their decree against defendant No. 1. The plaintiff thereupon satisfied that decree. Defendant No. 1 subsequently applied for execution of the decree which he had obtained against the plaintiff on the 14th April, 1879. The plaintiff objected to the execution of the decree on the ground that he had satisfied it, by satisfying the decree of defendants Nos. 2 and 3. This objection was disallowed, and the plaintiff was compelled to satisfy defendant No. 1's decree. He thereupon brought the present suit against defendants Nos. 1, 2 and 3, in which he claimed to recover from them the money which he had paid in satisfaction of the decree of defendants Nos. 2 and 3. The plaintiff based his claim on the provisions of the Contract Act, 1872, s. 69. The Court of first instance dismissed the suit, holding that the plaintiff was not entitled to recover the money either under the provisions of that section or of s. 70. On appeal by the plaintiff the lower appellate Court affirmed the decision of the first Court. The material part of its decision was as follows :—

"The strongest contention in appeal is that the payment was made under compulsion and that in equity the plaintiff is entitled to recover from Bakar Sajjad.

[402] "Broom's Legal Maxims are referred to by the appellant, that no man should by law be deprived of his money which he has parted with under mistake, and when it is against justice and conscience that the receiver should retain it; that when money is paid to another under the influence of mistake, that is, upon the supposition that a specific fact is true, but which is untrue, and the money would not have been paid had it been known to the payer that the fact was untrue, an action will lie to recover it back; that the compulsion of law which entitles a person paying the debt of another to recover against that other as for money paid is not such a compulsion of law as would avoid a contract like imprisonment: restraint of goods, by the reason of non-payment of a debt due by one to another, is sufficient compulsion of the law, to entitle a person, who has paid the debt in order to relieve his goods from such restraint, to sustain a claim for money paid.

"The Court cannot find that the plaintiff did pay the money under mistake. In the suit of Bakar Sajjad against him it had been definitely decided that the property was not hypothecated for the debt due to Chunni Lal and Lalman, and that Bakar Sajjad, now that he had obtained a decree against the plaintiff, was liable to Chunni Lal and Lalman. When the facts had been decided the plaintiff cannot contend that he paid the money under mistake. The only excuse the plaintiff could have for paying the money was that, unless he paid the money, his property would be sold in execution of a decree; he could have only thought this if the property was hypothecated for the debt, but this he knew was not the case, as it had been decided that neither he or the property was liable. The Court cannot hold that there was even constructive compulsion. Precedents of English law are referred to, but those apply to cases in connection with moveable property. The case of *Nobin Krishna Bose*

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v. *Mon Mohun Bose* (1) is referred to by appellant. In that case the lower Court decreed the plaintiff's claim on the ground that in making payments they believed themselves interested in doing so. The High Court doubted whether the judgment could be supported on that ground, but that the conclusion arrived at by the lower Court could be supported upon [403] the principle that, when a payment is made by one person for the benefit of another, and that other afterwards adopts that payment and avails himself of it, the sum becomes money paid for his use. Now this Court doubts whether the payment made by the plaintiff in this case can be held to have been made for the benefit of Bakar Sajjad, nor can it be held that Bakar Sajjad adopted the payment.

"The real facts no doubt are that, as the plaintiff had to pay Bakar Sajjad under his decree, he thought he might satisfy the decree by paying the debt due to Chunni Lal and Lalman from Bakar Sajjad, and he pleaded satisfaction of the decree when Bakar Sajjad took out execution against him, but as the plaintiff's liability to pay Chunni Lal and Lalman had ceased on Bakar Sajjad obtaining his decree, his contention was not allowed.

"The Privy Council decision in *Dulichand* v. *Ramkishen Singh* (2) is quoted by appellant. It was there held that, where the purchaser of a mauza paid money into Court to prevent the sale thereof in execution of a decree which had already been satisfied, the payment was involuntary. Their Lordships held that there was no pretence for saying that the payment was voluntary. It was made to prevent the sale which would otherwise inevitably have taken place of the mauza, and was made therefore under compulsion of law, *i.e.*, under the force of execution proceedings.

"The Court does not see that the present case is at all similar. There had, it appears, been no proclamation of sale, and the plaintiff knew that his property was not liable for the debt. The liability of the property of plaintiff had been made the subject of issue in the suit of Bakar Sajjad against him and decided in plaintiff's favour before the payment was made.

"The suit too is pressed against Bakar Sajjad and not against those to whom the money was paid, and it is admitted that the payment was made without the consent of Bakar Sajjad.

"For respondent the case of *Mool Chand* v. *Ajoodhya Pershad* (3) was referred to, in which it was held that a person paying another's creditor, without that other's authority, cannot recover back from [404] the creditor the amount so paid. The case of *Ram Buksh Chutlangea* v. *Hridoy Monee Debia* (4) is also referred to. In that case the plaintiff purchased a *jote jamma* at a sale in execution of decree against the defendant: after it came into his possession, the former tenant was sued for arrears of rent due before the sale: the property was attached with a view to selling it: the plaintiff paid the arrears, and his payment was held to be a voluntary one, made without legal necessity, and was not recoverable by suit against the tenant. In the present case the debt the plaintiff paid was due before the sale to him, the property was attached but the attachment was illegal, and the plaintiff knew this; his payment therefore was a voluntary payment and made without legal necessity.

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(1) 7 C. 573 = 9 C.L.R. 182.
(2) 7 C. 648 = 8 I.A. 93.
(3) N.W.P.H.C.R. (1871), 162.
(4) 10 W.R. 446.

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"Reliance is placed on s. 69 of the Contract Act, but the Court holds that the plaintiff was not interested in the payment of the money, and further that he knew he was not so, as he knew that his property was not liable for the money. The Court does not think that, if the payment was made to render it unnecessary for the plaintiff to contest the attachment in Court, that was sufficient reason to hold the plaintiff interested in the payment. The contention that the money was paid in good faith is met by the fact that the plaintiff knew his property was not liable. If it was contended that plaintiff paid the money under the supposition that by doing so he satisfied the decree against him, the contention would no doubt be true; but the fact that the payment was a voluntary one, and made without legal necessity, would remain. The Court is of opinion that the lower Court is right and dismisses the appeal."

The plaintiff applied to the High Court for revision of the decrees of the lower Courts on the ground that he was entitled to recover from defendant No. 1 money which the latter was legally bound to pay, and which the plaintiff had been compelled to pay for him.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the plaintiff.

Babu *Ram Das Chakarbati* and Lala *Jokhu Lal*, for the defendants.

[405] The judgment of the Court (OLDFIELD and BRODHURST, JJ.), after stating the facts, continued as follows :—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the decrees of the Courts below cannot stand. Although the plaintiff had originally agreed to satisfy Chunni Lal and Lalman's decree out of the consideration money for the sale due by him to Bakar Sajjad, his obligation to do so ceased when Bakar Sajjad sued him for that sum of money. He therefore did not pay the amount as a debt which he had taken upon himself to satisfy; and we incline to hold that the payment of it, under the circumstances, made to release the property he had bought from attachment and sale under Chunni Lal's decree, cannot be called a voluntary payment, and it was immaterial that the property was not liable to be attached and sold, or that the plaintiff knew that fact. It might be contended that the payment was voluntary, since the plaintiff might have, but did not take proceedings to object to the attachment, which might have led to the release of the property. It is, however, doubtful whether he was bound to go to the cost and trouble of legal proceedings, and we are disposed to consider that the case comes within the provisions of s. 69 of the Contract Act, and of the principle laid down in the Privy Council decision in *Dulichand* v. *Ramkishen Singh* (1).

We do not, however, rest our decision on this ground, as we hold that, under the circumstances of this case, the plaintiff is entitled to recover the sum he claims under the provisions of s. 70 of the Contract Act, Bakar Sajjad having clearly enjoyed the benefit of the payment which was made for him, and which was not intended to be a gratuitous payment, by which the decree against him held by Chunni Lal and Lalman was satisfied. We, therefore, modify the decree of the Courts below, and decree the claim with costs against Bakar Sajjad, and dismiss it with costs against the other defendants.

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(1) 7 C. 648=8 I.A. 93.

5 A. 406 (F.B.)=3 A.W.N. (1883) 92.

1883 MAR. 17. FULL BENCH. 5 A. 406 (F.B.)= 3 A.W.N. (1883) 92.

[406] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

MADHO PRAKASH SINGH AND ANOTHER (*Defendants*) *v.* MURLI MANOHAR AND ANOTHER (*Plaintiffs*).*
HIRA SINGH (*Plaintiff*) *v.* MAKUND SINGH (*Defendant*).†
[17th March, 1883.]

Application of the Civil Procedure Code to suits in the Revenue Courts—Act XII of 1881 (N.-W.P. Rent Act)—Civil Procedure Code, ss. 43, 373—*Suit, withdrawal of—Relinquishment of part of claim.*

Held, by the Full Bench (STUART, C.J., *dissenting*), that the Courts of Revenue in the North-Western Provinces, in those matters of procedure upon which the Rent Act of those Provinces (Act XII of 1881) is silent, are governed by the provisions of the Civil Procedure Code.

The principle of decision in *Nilmoni Singh Deo* v. *Taranath Mukerjee* (1), followed.

Held, therefore that the procedure provided by ss. 43 and 373 of the Civil Procedure Code is applicable to suits tried under the N.-W.P. Rent Act, 1881.

[Appr., 12 C. 50 (51); R., 7 A. 36 (37); 19 A. 510 (511); 22 A. 182 (185); D., 6 A. 170 (171); 21 C. 514 (517); 36 C. 252=9 C.L.J. 125=13 C.W.N. 791; 19 C.L.J. 300=18 C.W.N. 782=23 Ind. Cas. 896.]

THE suit out of which Second Appeal No. 173 of 1882 arose was one for arrears of rent, instituted under Act XVIII of 1873 (N.-W.P. Rent Act), in the Court of an Assistant Collector of the second class. The Assistant Collector dismissed the suit. On appeal by the plaintiffs the Collector gave them a decree for a part of the money claimed. The defendants appealed to the District Court from the Collector's decree. It was contended in that Court on their behalf as follows:—"This claim was once previously brought in Court by the plaintiffs, and after the defendants' answer to the plaint, the plaintiffs, on the 23rd October, 1880, withdrew their claim without permission to bring a fresh suit: therefore this suit cannot be again instituted, according to s. 373, Act X of 1877." The District Judge disallowed this contention for reasons which it is not necessary to state; and affirmed the decree of the Collector.

[407] In second appeal by the defendants it was again contended on their behalf that the plaintiffs having formerly withdrawn the suit, without the permission of the Court to bring a fresh one, were precluded from bringing it again under the provisions of s. 373 of the Civil Procedure Code. The Divisional Bench before which the appeal came (BRODHURST and MAHMOOD, JJ.) referred the question raised by this contention, *viz.*, "whether the procedure sanctioned by s. 373 of the Civil Procedure Code, for the withdrawal of civil suits, is applicable also to suits tried under the Rent Act," to the Full Bench.

* Second Appeal No. 173 of 1882, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 22nd December, 1881, affirming a decree of H. C. Barstow, Esq., Collector of Cawnpore, dated the 28th March, 1881, modifying a decree of Munshi Zamin Ali Khan, Assistant Collector of the second class, dated the 9th February, 1881.

† Second Appeal No. 328 of 1882, from a decree of C. W. P. Watts, Esq., Judge of Aligarh, dated the 19th December, 1881, reversing a decree of R. Hollingberry, Esq., Assistant Collector of Aligarh, dated the 19th July, 1881.

(1) 9 C. 295.

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The suit in which Second Appeal No. 328 of 1882 arose was also one under the N.-W.P. Rent Act (Act XII of 1881) for arrears of rent for 1285 fasli. The Assistant Collector trying it gave the plaintiff a decree. On appeal by the defendant to the District Court it was contended on his behalf that, inasmuch as at the time of the institution of a suit previously brought by the plaintiff against the defendant for arrears of rent for 1284 fasli, the rent for 1285 fasli which the plaintiff now claimed had fallen due, and the plaintiff might have claimed it, the present claim for that rent was barred by the provisions of s. 43 of the Civil Procedure Code. The District Judge allowed this contention, and dismissed the suit.

The plaintiff appealed to the High Court, contending that s. 43 of the Civil Procedure Code was not applicable to suits in Revenue Courts. This appeal (S.A. No. 328 of 1882) came for hearing before the same Divisional Bench as S.A. No. 173 of 1882, and the learned Judges of that Bench (Brodhurst and Mahmood, JJ.), having regard to the reference made by them in S.A. No. 173, referred to the Full Bench the question "whether the provisions of s. 43 of the Civil Procedure Code, and the procedure of that Code generally, are applicable to suits under Act XII of 1881."

Mr. *Howell* and Babu *Baroda Prasad Ghose*, for the appellants.

Pandit *Bishambar Nath*, for the respondents in S.A. No. 173.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

Pandit *Ajudhia Nath*, for the respondent in S.A. No. 328.

[408] The following opinions was delivered by the Full Bench :—

OPINIONS.

Straight, Oldfield, Brodhurst and Tyrrell, JJ.—The references in Second Appeals 173 and 328 of 1882 may be conveniently disposed of together. In No. 173 we are asked whether the provisions of s. 373 of the Civil Procedure Code are applicable to suits under the Rent Act, and in No. 328, whether s. 43 and the procedure of the Civil Code generally are to be followed by the Revenue Courts. In substance, the question put to us comes to this, are the Revenue Courts in those matters of procedure upon which the Rent Act is silent, bound by the rules of procedure contained in the Civil Procedure Code, as coming within the description of Courts of Civil Judicature? Upon turning to the Rent Act, it is to be observed, that Chap. VI deals with the procedure in suits up to judgment, Chap. VII with execution of decrees, and Chap. VIII with appeal, re-hearing and review, so that as far as it goes the Act may be said to declare its own procedure. Such provisions as there are, are obviously shaped on the basis of the Civil Procedure Code, though a very slight examination will show them to be incomplete and inexhaustive ; for example—except in the special matter mentioned in s. 149—no directions are given as to the mode in which a decree is to be drawn up, or if defective, how it is to be amended. Nor in execution is any power conferred on the Revenue Courts to transfer their decrees for execution into a foreign jurisdiction. Again, there is no prohibition in terms to the repetition of suits or the splitting of demands, as forbidden by ss. 13 and 43 of the Civil Code, though we can scarcely suppose it would be seriously contended, that the principle of law recognized by the first-mentioned section should not be equally binding in rent as in all other cases. We then have to consider whether Revenue Courts are Courts of Civil Judicature within the meaning of the Civil Procedure Code. For if they are,

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then, unless in terms exempted by that Code itself, they would, in all matters except those in which special procedure is provided in the Rent Act, be governed by the law of the Civil Code. Upon this question of exemption, it is important to notice the change that was made in s. 4 of Act X of 1877 by s. 4 of Act XII of 1879, or as now of Act XIV of 1882. By s. 4 of Act X of 1877 it was provided that "nothing herein contained shall be deemed to affect any local law prescribing a [409] special procedure for suits between landlord and tenant", and this saved Act XVIII of 1873 in terms. But s. 4 of Act XII of 1879, or as now of Act XIV of 1882, has made a most material alteration, and it is now enacted, that "nothing herein contained shall be deemed to affect any law heretofore or hereafter passed under the Indian Councils Act, 1861, by a Governor or Lieutenant-Governor in Council, prescribing a special procedure for suits between landholders and their tenants or agents." Such being the language of the present saving clause of the Civil Code now in force, it was argued before us, that the North-Western Provinces Rent Act, 1881, not having been passed under the Indian Councils Act, 1861, by a Governor or Lieutenant-Governor in Council, but by the Governor-General in Council, was not exempted from the operation of the Civil Procedure Code in those matters, upon which special procedure is not to be found within its own four corners. The argument is an ingenious one, and it cannot be said that the difference in terms of s. 4 of Act X of 1877 and Act XIV of 1882 is merely a formal one. Moreover, it is to be remembered, that the change made in the last-mentioned Act was under the authority of the same Legislative Council that had passed the Rent Act of 1881, more than a year after that Act had come into operation. Are Revenue Courts then Courts of Civil Judicature? and for the purpose of answering this question, we do not think we can do better than refer to a recent ruling of the Privy Council in *Nilmoni Singh Deo* v. *Taranath Mukerjee* (1). There the Deputy Commissioner of Manbhum, exercising the powers of a Revenue Court, had ordered two decrees passed by him in rent suits under Act X of 1859 to be transferred for execution into another district. The High Court of Calcutta in revision held that the Deputy Commissioner had no power under Act X of 1859 to make such transfer, and its decision was appealed to the Privy Council. Their Lordships in the course of the judgment, remarking on certain section of Act X of 1859, particularly s. 77, which corresponds with s. 148 of Act XII of 1881, says—"It must be allowed that in those sections there is a certain distinction between the Civil Courts there spoken of and the Rent Courts [410] established by the Act, and that the Civil Courts referred to in s. 77 and the kindred sections, mean Civil Courts exercising all the powers of Civil Courts, as distinguished from the Rent Courts, which only exercise powers over suits of a limited class. In that sense there is a distinction between the terms; but it is entirely another question whether the Rent Court does not remain a Civil Court in the sense that it is deciding on purely civil questions between persons seeking civil rights, and whether, being a Civil Court in that sense, it does not fall within the provisions of Act VIII of 1859. It is hardly necessary to refer to those provisions in detail, because there is no dispute but that, if the Rent Court is a Civil Court within Act VIII of 1859, the Collector has, under s. 286, the power of transferring his decrees for execution into another district." Later on

(1) 9 C. 295.

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their Lordships observe: " But when we look at the provisions of the Act (X of 1859), it is clear that they go beyond the trial of such questions, and provide for the execution of decrees. At the same time the scope of the Act appears to be only to provide for the execution of the decrees of the Collector within the jurisdiction. There is nothing in the Act which provides for any execution beyond his jurisdiction, and there is nothing to forbid the conclusion that such executions *are left to the operation of Act XXXIII of 1852, or the corresponding portion of Act VIII of 1859*." The substantial result arrived at by their Lordships was, that the decision of the High Court of Calcutta was set aside, and the orders of the Deputy Commissioner, transferring his decrees for execution outside his own jurisdiction, were restored. Now, when we compare our present Rent Act XII of 1881 with the old Rent Act X of 1859, which applied to the whole of Bengal, we find a strong similarity in the provisions, and s. 139 of the former Act is almost identical with s. 77 of the latter, to which their Lordships make reference in the judgment from which we have quoted above. Equally in both Acts is to be found a series of clauses dealing with the procedure to be followed in suits in execution of decree and in appeal, and equally in both Acts is there an entire absence of any section conferring on Revenue Courts a power analogous to that given by s. 284 of Act VIII of 1859, and s. 223 of the present Civil Code. It would therefore seem that the ruling of the Privy Coun-[411]cil to which we have referred is as applicable in the one case as in the other, and it would appear to follow from it, that though a Revenue Court has no power under the Rent Act now in force to transfer its decree for execution into another jurisdiction, yet that it may do so under the provisions of the Civil Procedure Code. Had s. 4 of Act X of 1877 been left standing in its original shape, the special exemption therein given " to any local law prescribing a special procedure for suits between landlords and tenants " would, as we have already said, have saved the Rent Act of these Provinces from the operation of the Civil Code; but looking at s. 4 of Act XIV of 1882 and to the principle of the decision of the Privy Council, to which we have been referring, no such reservation can be held any longer to exist. We may refer once more to that judgment of their Lordships in which the following instructive passage occurs:—" The consequence of holding, as the High Court have held, is, that wherever Act X of 1859 applies, persons seeking their rent against a tenant who is insolvent in the district in which he is sued, have absolutely no remedy against him, though he may be possessed of great wealth in another district. No reason has been assigned, or so much as suggested, why such a distinction should exist between a person who is claiming a debt, founded on rent, and a person who is claiming a debt, founded on any other transaction. The distinction does not exist in any other part of India, neither indeed does it exist in those provinces of Bengal in which Act X of 1859 has been repealed, and the Bengal Act VIII of 1869 has taken its place. Therefore, although it is not impossible that the Legislature should have intended to establish in Manbhum and adjacent districts a distinction between claims for rent and all other claims which does not exist elsewhere, it requires very clear and cogent evidence on the face of the enactments to support the conclusion that they really do intend such a distinction." Again, further on it is said: " Suits for the recovery of rent are civil suits or proceedings, and nothing can be clearer on the face of this Act (XXXIII of 1852, which was substantially repealed by Act VIII of 1859) than that the Legislature intended that everybody, who

obtained a decree in a Court of Justice, should have a remedy against his debtor, wherever the property of that debtor might be."

[412] Now it is to be observed that s. 34 of Act VIII of 1869, an Act of the Lieutenant-Governor of Bengal in Council, which superseded Act X of 1859 and is the Rent Law now in force in Lower Bengal, specifically incorporates the rules of the Civil Procedure Code for the time being, and makes them applicable to rent ruits, probably because by that Act itself the cognizance of rent suits was transferred from the Collectorate Courts, hitherto empowered under Act X of 1859, to the Civil Courts. Hence the exemption of s. 4 of Act X of 1877 would have been virtually inoperative as regards them. Consequently down to the passing of s. 4 of Act XII of 1879 the anomaly existed of the Courts of Lower Bengal having jurisdiction in suits between landlord and tenant following one procedure, and those of these Provinces another, the latter obviously being of an incomplete and inexhaustive kind. As far as we are aware there is no such difference between these two parts of the country and the tribunals respectively dealing with questions arising between landlord and tenant therein, as to necessitate such a distinction in the rules of practice to be adopted, and it may well be that this was the view which presented itself to the minds of those who introduced the change that was imported into the law by s. 4 of Act XII of 1879. The view that the Revenue Courts are not the less Civil Courts, because only of the fact that their jurisdiction is limited to suits connected with the Revenue and rent of the land, is fortified by the consideration that in a large number of these suits, appellate jurisdiction being exercised in reference to them by the regular Civil Courts, the decrees to be drawn up and executed are necessarily the decrees of Civil Courts of Judicature. If then, as the Privy Council seems to have ruled in the case already referred to, by the analogy between Act X of 1859 with VIII of the same year, and of XII of 1881 with XIV of 1882, that Revenue Courts are Civil Courts, and that for the purpose of enforcing their decrees, where their own special procedure does not empower them, they may resort to the provisions of the Civil Code relating to execution, it would appear we should hold in regard to the present reference, that the Revenue Courts, being within the general description of Civil Courts, and in this sense, unless in terms exempted, subject to the procedure of the Civil Code, save in so far as special procedure is to be found in the Rent [413] Act itself, are in their general procedure in other respects to be governed by the rules of the Civil Code. As we have already said, looking to the terms of s. 4 of Act XIV of 1882, which followed Act XII of 1881, and the remarks of their Lordships of the Privy Council in the case from which we have so largely quoted, we find ourselves constrained to arrive at this conclusion. We may however add that though the principle we are approving seems at first sight a novel one, in the interest of convenience, uniformity and regularity of practice, it is well that the Revenue Courts should be governed by the Civil Procedure Code, and as a striking illustration of this, the two ss. 43 and 373, more particularly mentioned in the referring order, embody rules of procedure, the justice and propriety of which cannot for a moment be questioned. We must therefore answer this reference by saying that the Revenue Courts of these Provinces in those matters of procedure upon which the "Rent Act" is silent are governed by the provisions of the Civil Procedure Code.

STUART, C. J.—I entirely dissent from the opinion recorded by the other Judges of the Court in this reference. It is, in my judgment,

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wholly mistaken, and its reasoning is to a great extent based on considerations, which are beyond the domain of judicial exposition. The question they proposed to themselves is, "are the Revenue Courts in those matters of procedure upon which the Rent Act is silent, *bound* by the rules of procedure which govern the Courts of Civil Judicature?" And in answering this question, they distinctly conclude that in such matters of procedure the Revenue Courts "are *governed* by the provisions of the Civil Procedure Code," adding, however, before announcing this conclusion, "we may, however, add that, *though the principle we are approving* seems at first sight a *novel* one, in the interest of convenience, uniformity and regularity of practice, it is *well* that the Revenue Courts *should* be governed by the Civil Procedure Code." Now with great deference this is really the language of legislation, and not of judicial exposition. It is one thing to say that it is convenient and fitting that the Revenue Courts should in their practice, and so far as their procedure is not expressly provided in the Rent Act, follow the Procedure Code; but it is quite another thing to [414] say that these Courts are "governed," that is, legally bound in all respects, by the provisions of the Civil Procedure Code, in the same way and to the same extent that the Procedure Code governs and binds the Civil Courts. The reasoning which seeks to derive help from the consideration that Revenue Courts are, as regards their general character, Civil Courts, utterly fails in the attempt to show that they are Civil Courts within the meaning of the Code of Civil Procedure, for on looking at Act XIV of 1882, the last of the Procedure Codes, it will be found that the Civil Courts or Courts of Civil Judicature are defined in such a way as to exclude the idea of Revenue Courts being contemplated by any of its provisions. Thus Act XIV of 1882 is entitled "an Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature." Then in s. 2 it is declared that "in this Act 'district' means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a 'District Court') and includes the local limits of the ordinary civil jurisdiction of a High Court." Then again "Collector" means "every officer performing the duties," not, be it observed, "of a Judge of a Revenue Court," but "of a Collector of land revenue." Then "decree" means "the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court"—the words "any right" of course signifying any "civil right",—and the term "order" means "the formal expression of any decision of a Civil Court which is not a decree as above defined." These definitions, I think, show clearly that the expressions "Civil Court" or "Court of Civil Judicature" are to be interpreted in a limited and technical sense, as the only Civil Courts to which the Code of Procedure applies, as the law of procedure by which they are governed or bound.

The argument in favour of the opposite view based on s. 4 of the Procedure Code appears to me to be quite irrelevant. It goes too far, for if the meaning of the exemption of the four Courts mentioned be that we are to infer that the Code of Procedure was to apply to the Revenue Courts, we are forced, by parity of reasoning, to conclude that the intention of the section was, that the Procedure Code was to apply to all other Courts whatever, whether having a procedure of their own or not, except these four, which [415] surely no one could maintain. And in my view it is an assumption of the most violent kind to lay down that, because the Rent Act of these Provinces is not expressly mentioned in s. 4, that therefore and thereby the whole or any part of the Code

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of Civil Procedure is imported into the Rent Act; and that in a legally coercive and binding sense, even if we had not other considerations leading to the opposite conclusion.

The Revenue Courts have, in Chapters VI, VII and VIII of the Rent Act, a procedure of their own, and a procedure which was evidently very carefully considered, and it is probable that the framers of the Rent and Revenue Acts had, when drawing up such procedure, present to their minds the provisions of the Civil Procedure Code ; but instead of arguing from that circumstance that they intended the general adoption by the Revenue Courts of the Code of Procedure, I would reason in a wholly contrary direction, *viz.*, that the very fact of the framers of the Acts in question having had the Civil Code of Procedure before them when drawing up their own procedure, shows that they intended something different, and to exclude, at least not expressly to include, all other provisions to be found in the Code. If they had meant otherwise, nothing could have been easier than to have incorporated the whole Civil Procedure into the practice of the Revenue Courts by a single sentence, and such appears to be the legislative practice when such is the intention. An instance of this may be found in s. 34 of the Lower Bengal Rent Act VIII of 1869 (B.C.), which is in these terms :—"Save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein, shall be regulated by the Code of Civil Procedure passed by the Governor-General in Council, being Act VIII of 1859, and by such further and other enactments of the Governor-General in Council in relation to Civil Procedure as now are, or from time to time may be, in force; and all the provisions of the said Act and of such other enactments shall apply to such suits." Now the absence of any such provision in the Rent Act of these Provinces appears to me to indicate very significantly the intention of the Legislature to exclude from the latter any such or corresponding civil procedure, even if we had not the fact, **[416]** to which I have already alluded, that our present Rent Law very carefully prescribes the procedure to be followed in suits up to judgment, in execution of decrees, and in appeals from decrees in suits, and also to applications for a re-hearing and for review of judgment. The Bengal Rent Act of 1869 was passed by the Bengal Council, but it must have been known to, and must have been before, the Supreme Council which passed our Rent Act of 1873, and it cannot, I think, be supposed that the latter Council intended to effect by their silence the same purpose which was accomplished by the Bengal Council by means of express words. I think that in all probability the framers of the three Chapters I have mentioned, VI, VII and VIII, had in their minds and were in fact very much guided by corresponding provisions in the Code of Civil Procedure. But it is to be observed that throughout these procedure Chapters the Code of Civil Procedure is never once named or referred to under that designation, with one or two peculiar exceptions, which only, to my mind, still more clearly show that there was no intention to import other provisions of the Code as such. These exceptions are to be found in ss. 92, 96 (*d*), 132, 139, 145 and 162 of the Rent Act. Section 92 prescribes the punishment for resisting the process of the Revenue Court, this punishment being "according to the provisions of the law for the time being in force for the punishment of resistance or opposition to the processes of Courts of civil justice." Then s. 96 (*d*) provides that :—"In cases wherein possession of immoveable property is adjudged, the officer making the award may

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deliver over possession in the same manner, and with the same power, in regard to contempts, resistance and the like, as may be lawfully exercised by the Civil Courts in execution of their own decrees." Then again, s. 132 provides for the examination of parties or their agents, which examination "shall be according to the law for the time being in force relative to the examination of witnesses in the Civil Courts." Then s. 139 provides that the law and rules for the time being in force relating to the evidence of witnesses, etc., "in cases before the Civil Courts, shall, except so far as may be inconsistent with the provisions herein contained, apply to suits under this (the Revenue) Act." Then the second clause of s. 145 provides that the orders in force in the "Civil Courts relative [417] to local inquiries by Amins or Commissioners shall apply to any local inquiry made by any officer under this section," but in the next sentence of this section it is significantly added, "and *so far as they* (that is, the rules of the Civil Courts as to inquiries by Amins or Commissioners) *are applicable* to inquiries made by the presiding officer of the Court in person." The only other section of the Rent Act I can find which specially adopts the procedure of the Civil Code is s. 162, by which it is provided that no process of execution shall be issued after the lapse of three years from the date of the judgment, unless the judgment be for a sum exceeding Rs. 500, "in which case the period within which execution may be had shall be regulated by the general rules in force in respect to the period allowed for the execution of decrees of the Civil Court."

There are also corresponding provisions in the Revenue Act XIX of 1873, with likewise special adoption of the enactments of the Civil Procedure Code, such, for example, as are to be found in ss. 113, 114, 115, 212 and 233. These sections of the Revenue Act, as well as those I have referred to in the Rent Act, are instances and illustrations of the exceptional adoption of the procedure of the Civil Courts, and I think that, by reason of their specially supplementary character, they lend considerable force to the opinion that Chapters VI, VII and VIII embody the main procedure rules contemplated by the Rent Act, and that there was no intention to import, and certainly not in any absolute or binding form, the whole of the other provisions of the Code of Procedure.

Let me ask those who maintain the opposite opinion, how the Code of Civil Procedure is to be *enforced* in the Revenue Courts? For, excepting as to the extent and effect of the adoption of the provisions of the Civil Procedure Code to which I have adverted, there is not a word throughout the Act which could warrant a Revenue Court, in making any coercive use of such procedure. Nay, could this Court, even in cases where we can be appealed to, *compel* the Revenue Courts to conduct their business in such a manner? We could not, and for the very simple reason that we have no machinery for the purpose, that is, there is no coercive machinery in that behalf common to both the Revenue and Civil Courts, and this Court could not enforce its orders on the Revenue Courts without [418] coming into collision with the Board of Revenue as the superior revenue authority. And as to any argument in favour of the importation into the practice of the Revenue Courts of the Civil Code in its entirety, or in any supplementary sense, to be derived from the circumstance that in certain cases there is an appeal to the District Judge and to the High Court, I would suggest that, in regard to such appeals, the Courts referred to are not merely Civil Courts, but in such cases they are rather Courts acting within their revenue jurisdiction, and when so acting of course carrying with them their own procedure, although even then I doubt very much whether the

High Court could, to the extent suggested, introduce, by force of its own authority, any portion of the Code of Procedure which is not clearly incorporated in the Rent Act. But be that as it may, it is a very different thing to hold that the effect of there being an appeal in certain cases to the District Civil Court and the High Court is necessarily to make the Code of Civil Procedure part and parcel of the procedure of the Revenue Courts. To conclude so would be to reason in a manner too high-handed and arbitrary.

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The considerations which I have thus explained are to my mind most convincing, and I do not hesitate to answer these references in the negative—that is, that the procedure provided by ss. 43 and 373 of the Civil Procedure Code, and by the Code of Civil Procedure generally, is not applicable to suits triable under the Rent Act. That is my undoubted and most decided opinion as matter of law, but of course the revenue authorities may adapt the practice of their Courts to the procedure of the Civil Code, and so far as our judicial authority is concerned, we shall only be too glad to encourage them in such orderly practice, but we cannot *compel* them, and that is the test. I have only to add that the authorities on which my colleagues appear to rely do not in my opinion apply to the present case, and the judgment of the Privy Council from which they so largely quote has to mind no bearing on this reference. The mischief and its consequences dealt with in that judgment require no consideration in the present case, and the expression "Civil Court" in s. 284 of Act VIII of 1859 is perhaps large enough to include Revenue Courts, or any other Courts adjudicating in civil matters, as distinguished from military or other similar tribunals.

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[419] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell

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MAHTABKUAR (*Defendant*) *v.* THE COLLECTOR OF SHAHJAHANPUR AS MANAGER OF THE ESTATE OF FAKHR-UD-DIN KHAN, DECEASED, ON BAHALF OF AJUB-UN-NISSA AND OTHERS (*Plaintiff*).*
[2nd February, 1883.]

Mortgage—Usufructuary mortgage—Redemption — Interest—Regulation XV of 1793, ss. 3, 4, 10, 11—*Stat.* 13, *Geo. III, c.* 63, *s.* 30—*Act XXVIII of* 1855, *s.* 7—*Novation of contract—Recital of mortgage.*

J, the usufructuary mortgagee for Rs. 1,250 of certain land, of one-ninth of which he had purchased the equity of redemption, in 1854 gave a usufructuary mortgage of the land to *N* for Rs. 2,700, of which Rs. 1,950 represented the mortgage-money of the land he held as mortgagee, and Rs. 750 of the land he held as proprietor. By the instrument of mortgage it was provided that the mortgagee should take all the profits in lieu of interest and the mortgage should be redeemable on payment by the mortgagor of the principal money. In 1880 *F*, the representative of the original mortgagor in respect of eight-ninths of the land sued, with reference to Regulation XV of 1793, for possession of the land, on the ground that the mortgage had been redeemed, as the principal money and interest at twelve per cent. had been received out of the profits, and claimed an account. *N* set up as a defence that the provisions of that Regulation were not applicable, as after its repeal by Act XXVIII of 1855 the mortgagor had agreed not to claim an account. This agreement, he alleged, was contained in the *wajib-ul-arz* of 1871.

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* First Appeal No. 131 of 1880, from a decree of Maulvi Zain-ul-abdin Khan, Subordinate Judge of Shahjahanpur, dated the 30th July, 1880.

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Held that the *wajib-ul-arz* did not contain a new contract, or ratification of the old contract of 1854, between the parties, but merely a recital of the mortgage and therefore *F* was entitled to an account.

Held also that the account should be calculated on eight-ninths only of the land.

Observations by STUART, C.J., on Regulation XV of 1793 and Stat. 13, Geo. III, c. 63, *Shah Makhan Lal* v. *Srikrishna Singh* (1) and *Badri Prasad* v. *Murlidhar* (2), referred to.

THIS was a suit for redemption of mortgage. On the 17th December, 1844, Usan Singh, the owner of one-third, Gauhar Singh and Hulasi Singh, the owners of one-third, and Dharmi, the owner of one-third of twenty biswas of a certain village, situated in the Shahjahanpur district, gave Zalim Singh and Jiwan Singh in equal moieties a usufructuary mortgage of the village for Rs. 3,900 for a term of fourteen years. Under the terms of the instrument of [420] mortgage, the mortgage was redeemable on payment of the principal sum without interest on the expiration of the term. On the 30th October, 1846, Zalim Singh sub-mortgaged ten biswas of the village to Muhammad Fakhr-ud-din, for Rs. 1,950, for the unexpired term of the principal mortgage, *viz.*, twelve years, and gave the sub-mortgagee possession. After this the village was partitioned by Jiwan Singh, the original mortgagee of ten biswas, and Muhammad Fakhr-ud-din, the sub-mortgagee of ten biswas, and the northern patti of the village fell to the share of Jiwan Singh, and the southern to that of the sub-mortgagee, and both parties obtained separate possession. Subsequently Jiwan Singh and Zalim Singh each acquired by purchase a one-ninth share of the northern patti. On the 27th October, 1854, Jiwan Singh sub-mortgaged the northern patti of the village and his one-ninth share of that patti to one Nanku Lal for a term of three years for Rs. 2,700. The material portion of the instrument of mortgage was as follows :—" I have mortgaged and pawned for three years, for Rs. 2,700, half of which is Rs. 1,350, as per detail given below, *viz.*, the right of a mortgagee in lieu of Rs. 1,950, and the right of a purchaser in lieu of Rs. 750, to Nanku Lal, banker at Shahjahanpur. I have received the whole of the mortgage-money from the aforesaid mortgagee, and having appropriated and taken the same, I have put the mortgagee in possession and occupancy of the mortgaged property. The whole of the profits of the mortgaged property I have set apart as interest or the mortgage consideration, so that, up to the term of mortgage, I, the mortgagor, shall not have claim to profits, nor the mortgagee a claim to interest. After the expiry of the term, I shall pay the whole of the mortgage-money to the said mortgagee, and having obtained the redemption of the mortgaged property, take possession."

Subsequently Muhammad Fakhr-ud-din, the sub-mortgagee of the southern patti of the village, purchased the whole of Zamin Singh's interest in the village, and the remaining proprietary right in the village. The proprietary right in the village acquired by Jiwan Singh by purchase was subsequently put up for sale in execution of a decree and was purchased by one Madho Singh. Thus at the time of the framing of the *wajib-ul-arz* of the northern patti of the village in 1871 Muhammad Fakhr-ud-din had become owner of eight-ninths [421] of that patti and the representative of Zalim Singh one of the original mortgagees of the village. The *wajib-ul-arz* of the northern patti of the village, framed in 1871

(1) 2 B.L.R. P.C. 44.

(2) 2 A. 593=7 I.A. 51.

contained the following clause:—"The entire Mahal is held under a sub-mortgage from Jiwan Singh, original mortgagee, and Muhammad Fakhr-ud-din has become the representative of the original mortgagors in respect of eight-ninths of the mahal and Madho Singh of one-ninth: the mortgage is dated the 27th October, 1854, and is for three years: the terms of the mortgage are that the entire profits of the property have been assigned in lieu of interest, and therefore the mortgagor has no claim to profits or the mortgagee to interest for the term of the mortgage: after the expiration of the term of the mortgage the mortgagor shall pay the mortgage-money and redeem the property." Nanku Lal and Muhammad Fakhr-ud-din were, apparently, parties to this *wajib-ul-arz*. In May 1880, Muhammad Fakhr-ud-din having in the meanwhile died, and the estates left by him having been taken under the superintendence of the Court of Wards, the Collector of Shahjahanpur, as manager of the estates, instituted the present suit on behalf of the widow and sons and daughters of Muhammad Fakhr-ud-din, against Jiwan Singh, one of the original mortgagees, and Mahtab Kuar, widow of Nanku Lal, who had also died in the meantime. The suit was based on the mortgage of December 1844. The plaintiff claimed possession of eight-ninths of the northern patti of the village, as proprietor, and of one-ninth as mortgagee, alleging that the principal amount of the mortgage, Rs. 1,950, together with interest at Rs. 12 per cent. per annum, had been satisfied out of the profits of the property, and that a certain sum as the profits for six years previous to the institution of the suit were payable to him, and praying that an account might be taken, and whatever sum might be found payable to him for those years might be awarded to him, or if anything was found due by him, a decree for redemption might be passed in his favour, subject to the payment of whatever might be found to be due by him. The defendant Mahtab Kuar set up as a defence that, although the mortgages of December 1844 and October 1854, were made before the passing of Act XXVIII of 1855, yet the plaintiff was not entitled to an account, inasmuch as after the passing of that Act the [422] mortgagor had entered into an agreement, contained in the *wajib-ul-arz* of the patti, that the usufruct of the property should be allowed in lieu of interest. The Court of first instance disallowed this defence, holding that the *wajib-ul-arz* did not contain any such agreement as set up by the defendant, but merely a recital of the terms of the mortgage of October, 1854; and it gave the plaintiff a decree for possession of the property and for certain mesne profits. The defendant Mahtab Kuar appealed to the High Court, contending that according to the agreement contained in the *wajib-ul-arz* the plaintiff was not entitled to an account; and that the Court of first instance, in making up the account, had erred in calculating profits on the whole ten biswas of the patti, inasmuch as one-ninth of the patti had become the property of Jiwan Singh.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

The Court (STUART, C.J., and TYRRELL, J.) delivered the following judgments:—

JUDGMENTS.

TYRRELL, J.—The first plea cannot be allowed to prevail. I have given mature consideration to the terms of the *wajib-ul-arz* of 1871, read with the original deed of mortgage executed by Jiwan Singh on the 27th October, 1854; and I am satisfied that no new contract, or ratification of

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an old contract, was therein intended to be made, or was in fact made in the sense contended for by the appellant. That is to say, I cannot hold that the parties to that administration-paper agreed in 1871 to set up and give validity to the terms of the mortgage-deed of 1854, providing that the mortgagor could not claim an account, which were invalid under the law then in force, and which were to the effect that all the profits of the mortgaged estate, how-much-so-ever they might be, should be taken by the mortgagee in lieu of interest. The paragraph of the *wajib-ul-arz* on which the appellant relies, beginning with the words "the mortgage is for three years with this declaration," and ending with "nor the mortgagee to interest," is, in my judgment, no more than a recitation of the terms of the old deed by way of description and identification of that deed. It was not seriously contended that without novation or ratifica-[423]tion of this portion of the contract of 1854, its terms could now have valid operation under the relief afforded in such matters by Act XXVIII of 1855; and indeed the 7th section of that Act is conclusive against any such suggestion. That section provides that "nothing hereinbefore contained shall prejudice or affect the rights or remedies of any person, or alter the liabilities of any person, in respect of any act done or contract entered into previously to the passing of this Act."

The second plea has force in so far as it questions the correctness of the account adopted by the Court below in respect of the amount of profits to be taken into account to the credit of the loan of Rs. 1,950 with regard to which the present suit is brought. It is obvious that when Jiwan Singh purchased the rights and interests of his mortgagors in the one-ninth of the ten biswas which he held in mortgage from them he became absolute owner of the profits of that one-ninth portion of the ten biswas, and the sum total of the profits available for the payment of lawful interest and for reduction of the principal debt of the mortgage became to that extent diminished. In other words one-ninth of the profits went into the pocket of Jiwan Singh and after him into that of his alienee the ancestor of the defendants Bhup Singh, Kunjan Singh and Bhola Singh, while eight-ninths remained to the credit of the mortgage account. This being so, it is plainly improper and unjust to the appellant, who holds that one-ninth share of Bhup Singh and his brothers as her sole security for her advance thereon of Rs. 750 under the deed of the 27th October, 1854, that all the profits of the ten biswas should be appropriated to the account of the Rs. 1,950 debt secured on Jiwan Singh's mortgagee estate alone in the ten biswas. Indeed this position was admitted in terms by the plaintiffs-respondents in their petition filed in this case in the Court below on the 28th June, 1880, when they pleaded that "Bhup Singh being the purchaser of the right of Jiwan Singh mortgagor is bound by the terms of the mortgage made by Jiwan Singh, while the plaintiffs are not bound by the mortgage-deed of Mahtab Kuar, wherein the own proprietary right of Jiwan Singh has been specifically mortgaged for Rs. 750 in 1854;" and again, "the plaintiffs have demanded from the defendant-mortgagee the mesne profits of their share only, and they have not claimed those [424] of the share of Bhup Singh defendant, and if Bhup Singh is included among the plaintiffs, then the claim for the mesne profits of this share must be added."

On this principle the decree of the Court of first instance must be amended: and so far allowing this appeal I would direct that an account be made in this office calculated on eight-ninths only of the ten biswas in

question, and that a decree be framed accordingly with costs in proportion to the result.

STUART, C.J.—This is an appeal from a decree of the Subordinate Judge of Shahjahanpur in a suit for redemption from mortgage, dated 27th October, 1854. This decree so far as it allows the rate of interest to be charged in the account between the parties, as to which we were much pressed on behalf of the appellant, is, as I shall presently show, clearly right, although in other respects it must be corrected.

The case is as follows:—One Jiwan Singh, who was the mortgagee of a ten-biswas share in a certain patti, and also the owner by purchase of another share in another patti, made on his part on the 27th October, 1854, a mortgage of such his mortgage and purchased rights in these terms:—

"I have mortgaged and pawned for three years, for Rs. 2,700, half of which is Rs. 1,350, as per detail given below, *viz.*, the right of a mortgagee in lieu of Rs. 1,950 and the right of a purchaser in lieu of Rs. 750 to Nanku Lal, banker at Shahjahanpur: I have received the whole of the mortgage-money from the aforesaid mortgagee, and having appropriated and taken the same, I have put the mortgagee in possession and occupancy of the mortgaged property. The whole of the profits of the mortgaged property I have set apart as interest of the mortgage consideration, so that, up to the term of mortgage, I, the mortgagor, shall not have claim to profits nor the mortgagee a claim to interest. After the expiry of the term, I shall pay the whole of the mortgage-money to the said mortgagee, and having obtained the redemption of the mortgaged property, take its possession." The relative position of the parties thus determined appears, notwithstanding the term of three years agreed on, to have continued till the 15th January, 1871, when the *wajib-ul-arz* was verified and recorded; the portion of that administration-paper [425] relied on by the appellant being as follows:—"The mortgage is for three years with this declaration as to mortgage, that the entire profits of the mortgaged property have been assigned in lieu of interest on the mortgage-money, so that up to the term of mortgage, I, the mortgagor, shall have no claim to profits nor the mortgagee to interest." The mortgage, it will be observed, was made before the change of the law as to interest effected by Act XXVIII of 1855, the legal rate at the date of the mortgage being one per cent. per mensem, or 12 per cent. per annum, and it is therefore claimed by the plaintiff not only that the principal mortgage-debt had been paid off, but that a large sum of surplus money remains to be accounted for by the defendant-appellant. It is contended, however, in support of the first reason of appeal, that the effect of the above entry in the *wajib-ul-arz* was to create a novation of contract, and as that novation took place in 1871 the law abolishing the usury laws applies, and that therefore the defendant was not bound to account for any portion of the profits which, as evidenced by the *wajib-ul-arz*, were wholly assigned in lieu of interest on the mortgage-money. This, however, is to take an entirely mistaken view of the meaning and effect of the *wajib-ul-arz*. An extract from that paper is printed on page 4 of the appendix of evidence on behalf of the appellant, and it contains a reference to the mortgage in the following terms:—"Whereas the entire property in this mahal is held under a sub-mortgage by me on behalf of Jiwan Singh, the first mortgagee, and now under equity of redemption of the original owners, Fakhr-ud-din Khan, son of Kalai Khan, owns eight shares, and Madho Singh, son of Gyan Singh, one share, as representatives

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of the original mortgagors, (and) under the mortgage-deed, dated the 27th October, 1854, and registered on the same date, which the agent of the landlord, the mortgagee, has produced, the mortgage is for three years with this declaration as to mortgage, that the entire profits of the mortgaged property have been assigned in lieu of interest on the mortgage-money, so that up to the term of mortgage, I, the mortgagor, shall have no claim to profits nor the mortgagee to interest. After the expiry of the term of mortgage, I shall pay the whole of the mortgage consideration and obtain the redemption of the mortgage property." It is quite clear that this is a mere recital of the mortgage made in 1854 as [426] still existing and operative and not in the least intended as a new or revised contract in any sense; the words "I shall pay" meaning I shall continue to pay as heretofore, and then the reason of the recital of the mortgage in this *wajib-ul-arz* is shown by the following sentence, which comes immediately after the extract I have read:—"So long as the property is under mortgage, proceedings shall be taken according to the conditions contained in paragraph 2 of the village administration-paper of mauza Udhohra, pargana Jamore. After redemption of the mortgage, we, Fakhr-ud-din Khan and Madho Singh, mortgagors, shall pay, out of the entire income of the *khalisa* mahal, the revenue assessed by Government, in the Government treasury, through our agent, by fixed and usual instalments. In the event of failure to recover Government arrears, we shall recover, under the provisions of the law in force, by means of auction-sale, &c." It is thus quite clear that these provisions in the *wajib-ul-arz* were intended as a mere engagement on the part of the mortgagors for the Government revenue, and that the mortgage of 1854, which still formed a charge upon the estate, the only mortgage it refers to, had to be taken into account in the recorded arrangement. There is nothing therefore to interfere with the computation of interest as interest legally chargeable by law previous to the Act of 1855 coming into force, which was not until the 1st of January, 1856. We have then to consider what was the law respecting interest in mortgage transactions when this mortgage was made; that appears to have been the law provided by Regulation XV of 1793. Reference was made at the hearing, on behalf of the respondent, to s. 30 of the English Act of Parliament, 13 Geo. III, c. 63, passed in 1773, and it was suggested that under that enactment, the mortgage in the present case was absolutely null and void, and could not therefore be the foundation of any suit. And no doubt it would have been so if the parties to that contract had been British subjects of the English Crown, for to persons who answer to that description, s. 30 of the Act in question alone applies, natives of India being at that time only such subjects in an indirect and modified sense, although it is different now; all persons, whether European or Native, in what are now Her Majesty's Indian dominions, and of which she is Empress, being directly amenable to the English Crown and [427] Government. But it was not quite so in 1773, and the expression in s. 30, "no subject of Her Majesty," can only mean no British subject.

We must therefore find the law in operation as to interest in such a case as the present elsewhere. Notwithstanding the Act of Geo. III no change appears to have been made in the law as to interest among natives of the country till 1793, the people up to that time being left free to their contracts in this respect. But by Regulation XV of 1793, s. 10, it was provided as follows:—"In cases of mortgages of real property, executed prior to the 28th day of March, 1780, in which the mortgagee may have

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had the usufruct of the mortgaged property, whether he shall have held it in his own possession or not, the usufruct is to be allowed to the mortgagee in lieu of interest, agreeably to the former custom of the country (provided it shall have been so stipulated between the parties), until the above-mentioned date, subsequent to which the same interest is to be allowed on such mortgage-bonds and also on all bonds for the mortgage of real property which have been entered into on or since that date, or that may be hereafter executed, as is allowed on all other bonds which have been and may be granted on or posterior to such date, and no more; and all such mortgages are to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum, with the simple interest due upon it, shall have been realized from the usufruct of the mortgaged property subsequent to the 28th day of March, 1780, or otherwise liquidated by the mortgagor." And then by s. 11 of the same Regulation it is provided, in regard to the accounts that are to be taken in cases of mortgages specified in s. 10, that "the mortgagee is to be required to deliver in the accounts of his gross receipts from the property mortgaged, and also of his expenditures for the management or preservation of it. The mortgagee is to swear, or (if he be of the description of person whom the Courts are empowered to exempt from taking oaths) to subscribe a solemn affirmation that the accounts which he may deliver in are true and authentic. The mortgagor is to be permitted to examine the accounts, and after hearing any objections he may have to offer, or any evidence that either party may have to adduce respecting them, the Court is to adjust the account." There cannot be a doubt that such is the law to be applied **[428]** to the present case, the words "simple interest" meaning, according to ss. 3 and 4 of the same Regulation, interest at the rate of twelve per cent. per annum, the meaning of the Regulation being thus briefly summed up in the judgment of the Privy Council in the case of *Shah Makhan Lal* v. *Srikrishna Singh* (1). "The mortgagee may retain his pledge until he has received out of it his debt with interest at twelve per cent.," the contract not being absolutely invalid, much less void, but its legal effect as to the interest being to reduce the amount of the rents and profits received by the mortgagee to an allowance of twelve per cent. out of such rents and profits, the excess in that respect being imputable towards payment of the principal sum. An illustration supporting this view of the law will be found in the judgment of the Privy Council in *Badri Prasad* v. *Murlidhar* (2), affirming a judgment by OLDFIELD, J., and myself. We had held in that case that there was no contract, nor anything in the nature of a contract, for interest at all, but merely for a particular sum which was to go towards the expense of collections, and that there was to be no account of mesne profits during the time of the mortgagee's possession. This view was affirmed by their Lordships of the Privy Council who, in their judgment remarked :—"Their Lordships must by no means be taken to decide that if the amounts received by the mortgagees had been fluctuating, they might not have been bound to file the statutory accounts. Those accounts might have been necessary to enable the Court to decide on the validity of the contract set up." The validity of the contract in the present case could only be so ascertained, that is to say, the profits are to be allowed so far as they are below or do not exceed twelve per cent.; but, *quoad ultra*, they must be disallowed,

(1) 2 B.L.R.P.C. 44. (2) 2 A. 593=7 I.A. 51.

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the excess being imputed towards the principal debt, and the Subordinate Judge, taking this view of the law, has given a decree to the plaintiff for redemption of mortgage without payment of any portion of the mortgage consideration, by dispossession of the defendant-appellants. So far as to interest, with respect to which it is sufficient to add that the Subordinate Judge is clearly right.

But another question has been raised also bearing on the account to be taken in this case, and this question is stated in the [429] second reason of appeal before us, in which it is contended that the lower Court was wrong in crediting the profits of the whole ten biswas towards the discharge of only Rs. 1,950, leaving out the item, of Rs. 750, and that therefore the whole sum total of these two items, amounting to Rs. 2,700, should be taken into account. It is further contended in this plea that deduction should also be allowed on account of Bhup Singh and others in the same right. All this must be allowed, and so far the decree appealed against must be amended, and an account taken and a decree prepared as proposed by TYRRELL, J., with proportionate costs.

Decree modified.

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5 A. 429=3 A.W.N. (1883) 67.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice, Oldfield.

MAHIP SINGH AND ANOTHER (*Defendants*) *v.* CHOTU (*Plaintiff*).*
[6th March, 1883.]

Landholder and tenant—Perpetual injunction to restrain ejectment of tenant—Jurisdiction—Act XII of 1881 (*N.-W.P. Rent Act*), *s.* 95—*Act I of* 1877 (*Specific Relief Act*), *s.* 56 (*b*) *and* (*f*).

A tenant, on whom a notice of ejectment had been served under the N.-W.P. Rent Act, 1881, and whose suit to contest his liability to ejectment, brought under that Act, had failed, sued in the Civil Court for a perpetual injunction to prevent his ejectment, basing his suit on an agreement that he should not be ejected so long as he paid a certain rent. *Held* that the suit was not maintainable, the jurisdiction of the Civil Court being excluded by s. 95 of the Rent Act and by s. 56 (*b*) and (*f*), of the Specific Relief Act.

THIS was a suit for a perpetual injunction to restrain the defendant from ejecting the plaintiff from certain land. The suit was instituted in the Court of the Munsif of Jaunpur. It appeared that the land was cultivated by the plaintiff, Chotu, as a sub-tenant of one Ram Ratan, the tenant of the land. The latter distrained the crops on the land, Chotu contested the legality of the distraint in the Revenue Court, and an agreement was entered into by the parties, by which, it was alleged, Ram Ratan agreed not to eject Chotu so long as he paid Rs. 14 per annum as rent. After the death of Ram Ratan his heirs mortgaged the land to Mahip Singh and Bhola Singh. The mortgagees served a notice of ejectment on Chotu under s. 36 of the N.-W.P. Rent Act, 1881. Chotu objected, and his objection was disallowed under s. 39 on the 18th [430] August, 1881. The effect of the order under s. 39 was to determine the tenancy unless the landlord authorized the tenant to continue in occupation of the land. Chotu subsequently brought the present suit against the heirs of Ram Ratan and the mortgagees for a perpetual injunction to

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* Second Appeal No. 959 of 1882, from a decree of W. Barry, Esq., Judge of Jaunpur, dated the 16th May, 1882, affirming a decree of Babu Lalta Prasad, Munsif of Jaunpur, dated the 11th March, 1882.

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restrain them from ejecting him from the land, basing the suit on the agreement mentioned above. The Court of first instance gave the plaintiff a decree, which, on appeal by the mortgagees, the lower appellate Court affirmed. The mortgagees thereupon appealed to the High Court, contending that under the circumstances the Civil Courts were not competent to grant the injunction sought.

Munshi *Kashi Prasad*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

The judgment of the Court (STUART, C.J. and OLDFIELD, J.) after stating the facts, continued as follows :—

JUDGMENT.

We are of opinion the appeal must prevail. Whether we consider the terms of the Specific Relief Act on the subject of perpetual injunctions or those of the Rent Act, it is clear that the Civil Court cannot give an injunction of the nature sought. It has not jurisdiction over the subject-matter to which the injunction refers, its jurisdiction being excluded by s. 95 of the Rent Act, and expressly or impliedly by (*b*) and (*f*) of s. 56 of the Specific Relief Act. We reverse the decrees of the lower Courts and decree the appeal, and dismiss the suit with all costs.

Appeal allowed.

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5 A. 430 (F.B.) = 3 A.W.N. (1883) 102 = 8 Ind. Jur. 149.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

JOGUL KISHORE (*Plaintiff*) v. SHIB SAHAI AND ANOTHER (*Defendants*).*
[6th March, 1883.]

Hindu Law—Grandson—Interest in ancestral property—Right to enforce partition.

In a joint Hindu family governed by the Mitakshara Law a grandson has by birth a vested interest in ancestral property, which entitles him to enforce parti-[431]tion in the lifetime of his father and grandfather; and such interest is saleable in execution of decree.

Deendyal Lal v. *Jugdeep Narain Singh* (1), *Laljeet Singh* v. *Rajcoomar Singh* (2), and *Nagalinga Mudali* v. *Subbiramaniya Mudali* (3).

[F., 31 C. 111 (129); 18 M. 179 (183); 7 C.W.N. 688 (695); R., 7 Bom. L.R. 232 (234); 2 N.L.R. 52 (53); Cons., 16 B. 29 (68) (F.B.).]

THIS was a reference to the Full Bench by BRODHURST and MAHMOOD, JJ. The facts of the case and the point of law referred are stated in the order of reference, which was as follows :—

MAHMOOD, J.—The following table shows the relative position of the persons to whom reference is necessary in this case :—

Mathru.
|
Nathan Singh
|
Shib Sahai (defendant No. 1).
|
Ganga Sahai (defendant No. 2).

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* Second Appeal No. 395 of 1882, from a decree of H. G. Keene, Esq., Judge of Meerut, dated the 13th January, 1882, affirming a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 10th November, 1881.

(1) 3 C. 198. (2) 12 B.L.R. 373. (3) 1 M.H.C.R. 77.

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5 A. 430 (F.B.) = 3 A.W.N. (1883) 102 = 8 Ind. Jur. 149.

The property in suit has been found by the Subordinate Judge to have been the property of Mathru, and this finding does not appear to have been questioned by the defendants in the lower appellate Court, and the judgment of that Court proceeds on the assumption of the correctness of that finding. Mathru died some years ago, but all the other persons whose names appear in the above table are alive. On the 18th August, 1880, Nathan Singh executed a deed of gift, whereby he conveyed the property in suit, along with other properties, to his son Ganga Sahai, but the deed was not registered till the 11th November, 1880. In the meantime, on the 24th September, 1880, Shib Sahai executed a simple money-bond in favour of Jogul Kishore, plaintiff. The money due on the bond not having been paid, the plaintiff sued Shib Sahai and obtained a decree against him for Rs. 1,400, on the 17th January, 1881. On the 14th June, 1881, the plaintiff, in executing his decree, applied for the attachment and sale of Shib Sahai's rights and interest in the ancestral property. Thereupon Ganga Sahai preferred objections, on the ground that his son Shib Sahai had no saleable interests in the property. The objections were allowed on the 26th July, 1881, and the property was released from attachment.

[432] The present suit was commenced by the plaintiff on the 3rd September, 1881, having for its object a declaration to the effect, that Shib Sahai possesses a saleable interest in the property to the extent of a 5-anna 4-pie or one-third share, by setting aside the order of the 26th July, 1881, and by avoidance of the deed of gift, dated the 18th August, 1880, so far as that deed affects the alleged share of Shib Sahai in the property in dispute.

Shib Sahai does not appear to have defended the suit, but his father, Ganga Sahai, defendant No. 2, resisted the claim, on the ground that the property in question was acquired by Nathan Singh, who conveyed it to him by the deed of gift of the 18th August, 1880, and placed him in possession, and that Ganga Sahai had no rights and interests in the property as against Nathan Singh, the donor, and Ganga Sahai, the donee. Nathan Singh was not impleaded in the suit.

Both the lower Courts have found that the deed of gift of the 18th August, 1880, could not operate in defeasance of Shib Sahai's rights in the property in suit, which was ancestral, but that his rights and interests, during the lifetime of his father and grandfather, were not such as could be sold in execution of decree. In upholding this view, the lower appellate Court has relied upon the provisions of s. 266 of the Civil Procedure Code, and has held, that the rights and interests of Shib Sahai could not be called "saleable property belonging to the judgment-debtor, or over which he has a disposing power which he may exercise for his own benefit;" that those rights and interests were in the nature of "an expectancy of succession by survivorship or other merely contingent or possible right or interest;" and that, therefore, they were especially exempted from sale under cl. (*k*) of the section above referred to. Both the Courts therefore concurred in dismissing the suit.

The present second appeal has been preferred by the plaintiff and the main grounds of appeal impugn the view of law taken by the lower Courts. The case is admittedly governed by the Mitakshara school of Hindu Law. The appeal has been argued before us with considerable ability and force by the learned Pandits who appear for the parties in this Court, and we

have been referred to [433] many authorities (1), which however do not seem to us to place the matter beyond doubt. We have been unable to find any reported case in which the matter has been directly considered. Perhaps, the case reported at p. 77 of the first volume of the Madras High Court Reports is the nearest approach to the question now before us, but in that case it appears, that the question arose in respect of the rights of a grandson whose father had predeceased the grandfather who was still alive.

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The argument on behalf of the appellant may be briefly stated to be, that the rights of a son and a grandson in the ancestral property originate in their birth; that the rights of the latter are therefore of the same nature as those of the former; that the rights of the son being vested and saleable in execution of decree, the rights of the grandson must also be held to be so saleable. On the other hand, it is contended on behalf of the respondent, that whatever the rights of a grandson, in the absence of a father may be, his rights during the lifetime of both the father and the grandfather do not constitute a vested interest even in the property inherited from the great-grandfather, and that those rights are therefore not capable of sale in execution of decree. As a reason for this distinction, it is suggested that the existence or non-existence of the father is an essential element in ascertaining the extent of the shares of grandsons, and that therefore so long as the father is alive, the grandson has no right to enforce a partition against the will of his father and grandfather.

This contention raises the following question for determination:—Under the Mitakshara law, does a grandson, in the lifetime of his father and grandfather, possess such rights in the property inherited from the great-grandfather, as can be attached and sold in execution of decree.

[434] Considering the great importance of this question, and in view of the absence of rulings upon the point, we are of opinion, that it is very desirable, that the question should be settled by an authoritative ruling of the whole Court. We accordingly refer the question to the Full Bench.

Mr. *Colvin* and Pandit *Nand Lal*, for the appellant.

Pandit *Bishambhar Nath*, for the respondents.

The following opinions were delivered by the Full Bench:—

OPINIONS.

STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ.—It is now settled law that the father and son have by birth equal vested rights in undivided ancestral immoveable property, and that the son can enforce a partition of his interest against the father's wish, and that the same is saleable in execution of a decree, the purchaser having it in his power to enforce partition,—*Deendyal Lal* v. *Jugdeep Narain Singh* (2).

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(1) Mitakshara; Vyavastha Chandrika; Viramitrodaya (G. Sarkar), p. 90; Mayne's Hindu Law; West and Bühler, Bk. II, p. 7; *Suraj Bunsi Koer* v. *Sheo Persad Singh*, 5 C. 148-165; *The Collector of Manghyr* v. *Hurdai Narain Sahai*, 5 C. 425; *Deendyal Lal* v. *Jugdeep Narain Singh*, 3 C. 198; *Muddun Thakoor* v. *Kantoo Lall*, 14 B.L.R. 187; *Goor Surun Dass* v. *Ram Surun Bhukut*, 5 W.R. 54; *Raja Ram Tewary* v. *Luchmun Pershad*, 8 W.R. 15; *Luchmun Pershad* v. *Debee Pershad*, 1 W.R. 317; *Kureem Chand Gurain* v. *Oodung Gurain*, 6 W.R. 158; *Nagalinga Mudali* v. *Subbiramaniya Mudali*, 1 M.H.C.R. 77; *Goor Pershad* v. *Sheodeen*, N.-W.P.H.C.R. 1872, 137, disapproved by the Privy Council—see *Suraj Bunsi Koer's Case*, 5 C. 148; S.A. No. 573 of 1869 decided by the Allahabad High Court (unreported).

(2) 3 C. 198.

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5 A. 430 (F.B.) = 3 A.W.N. (1883) 102 = 8 Ind. Jur. 149.

An examination of the text-books on Hindu law shows that a grandson also has by birth a vested interest in ancestral immoveable property in a similar way. It will be sufficient to refer to the following texts from the Mitakshara and Viramitrodaya as being the principal authorities in this part of India.

Mitakshara, ch. I, sec. 1, verse 21.—"Neither the father nor the grandfather is master of the whole immoveable estate. When the grandfather dies, his effects become the common property of the father and sons." Verse 24.—"This maxim, that the grandfather's own acquisition should not be given away while a son or grandson is living, indicates a proprietary interest by birth." And verse 23, after refuting the proposition that the estate becomes the property of the son by the father's decease, says:—"The right of sons and the rest by birth is most familiar to the word, as cannot be denied." And in Viramitrodaya, ch. II, part 1, verse 23, treating of partition, it is stated:—"Partition at the desire of the sons, whether in the lifetime of the father or after his demise, may take place by the choice of a single co-parcener, since there is no distinction." And verse 23*a*:—"This distribution amongst sons extends equally to them and to grandsons and great-grandsons in the male line. There is not here an order of succession **[435]** following the order of proximity according to birth. For the three descendants, namely, the son, the grandson, and the great-grandson are competent to offer oblations in the *parva* occasions............Thus the competency being equal, and the right by birth also being equal, equal participation would have followed, but is prevented by the text—"Among grandsons by different fathers the allotment of shares is according to the fathers?"

The above passages are on the subject of the law of partition of heritage; and the texts may be taken to show that grandsons have by birth vested interests in the ancestral estate of a similar character to that of a son, which entitle them to enforce partition, the allotment of shares being according to the fathers. The cases of *Laljeet Singh* v. *Rajcoomar Singh* (1) and *Nagalinga Mudali* v. *Subbiramaniya Mudali* (2) are in support of this view, and the interest of the grandson will be, like that of a son, saleable in execution of a decree.

It has, however, been contended that there is a distinction between the interest which grandsons hold while their fathers are alive, and that which they possess after their deaths, and that in the former case they cannot enforce partition against the grandfather, and in consequence their interest is not such an interest as can be sold in execution of a decree.

In support of this contention we have been referred to West and Bühler, p. 298, where it is stated that "a grandson living in union with his grandfather may similarly demand a partition, provided his own father, or his father and grandfather, be dead; till then he cannot demand a partition notwithstanding his right in the property, because the intervening heir obstructs his complete title." We are, however, unable to find authority for drawing this distinction under the law of the Mitakshara. It is difficult to see how the fact that the father is living can obstruct the complete title. If the grandson takes a vested interest by birth, so far as that interest is concerned, there can be no obstruction, for it is not dependent on the death of the father or grandfather. But there appears to us authority for the contrary view in verses 3 and 5, ch. I, sec. 5 of the Mitakshara.

(1) 12 B.L.R. 373. (2) 1 M.H.C.R. 77.

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[436] The author begins by stating a doubt in verse 3, the purport of which is explained in the Subodhini, in a note thus :—"If the father be alive, and separated from his own father, or if, being an only son with no brothers to participate with him, he be alive and not separated from his own father, then, since in the first-mentioned case he is separate, no participation of the grandson's own father, in the grandfather's estate, can be supposed, and therefore, as well as because he is surviving, the grandson cannot be supposed entitled to share the grand-father's property, since the intermediate person obstructs his title: and in the second case, although the grandson's own father has pretensions to the property, since he is not separated, still the participation of the grandson in the grandfather's estate cannot be supposed, for his own father is living: hence no partition of the grandfather's effects, with the grandson whose father is living, can take place in any circumstances: or, admitting that such partition may be made, because he has a right by birth; still, as the father's superiority is apparent (since a distribution by allotment to him is directed, when he is deceased, and that is more assuredly requisite, if he be living), it follows that partition takes place by the father's choice, and that a double share belong to him."

Having thus stated the difficulty, the author proceeds :—"To obviate this doubt the author says: 'for the ownership of father and son is the same in land;'" and in verse 5 he concludes :—"In such property which was acquired by the paternal grandfather, &c., the ownership of father and son is notorious: the right is equal or alike; therefore partition is not restricted to be made by the father's choice, nor has he a double share." And the same question is also disposed of in the Viramitrodaya, ch. II, part I, verse 23*a*.

The author cites Jimutavahana in the Dayabhaga, where that author, treating of the law of partition which he had stated intended to give a right of partition to grandsons and great-grandsons, goes on to limit the exercise of the right to those whose fathers are dead. Thus Jimutavahana says:—"The grandsons and the great-grandsons whose fathers are alive cannot offer oblations in the *parva* occasions, they are not therefore entitled to the estate of [437] their grandfather and great-grandfather respectively." This he proceeds to refute, and after remarking that in the grandfather's property grandsons acquire ownership by birth, proceeds :—"As for what has been said, namely, 'the grandsons and the great-grandsons whose fathers are alive, etc.,' that too is wrong. For the capacity of presenting funeral oblations is not alone the criterion of the right to heritage, since the younger brothers are entitled to the heritage, although they are not competent to offer oblations while there is the eldest brother. And the fitness for presenting oblations (which the younger brothers have) is not wanting in grandsons too (while their father is alive)." The conclusion therefore which must be arrived at is, that the grandson can enforce partition of the ancestral estate in the lifetime of his father and grandfather; and though the contrary proposition may be consonant with the principles of the law in Bengal, expounded by the author of the Dayabhaga, it is opposed to the law of the Mitakshara, which recognizes a vested interest in the grandson by birth.

The answer to the reference will be that the grandson in the lifetime of his father and grandfather has an interest in the undivided immoveable ancestral property which can be attached and sold in execution of a decree.

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STUART, C.J.—I have anxiously considered the opinion recorded by my colleagues in this reference. After repeated perusal and study of the Mitakshara, I have not been able to satisfy myself as to the true meaning and scope of the texts referred to. A grandson may at his birth take an interest in immoveable ancestral property, but I doubt whether he can use, enjoy, or in any way deal with it in the lifetime of his father and grandfather—at least in that of the latter. The better view I think would be that for the purposes of use and enjoyment, or of any negotiation, the right of the grandson is in the meantime suspended, and if so, it is not such a right as can be attached and sold in execution of a decree; for his creditor or decree-holder could not of course do more in respect of the property than he could himself. But the whole Hindu law on the subject is difficult and doubtful, and it is sufficient for me to say so without recording any dissent from the opinion of the other Judges of the Court.

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5 A. 438 (F.B.)=3 A.W.N. (1883) 69.

[438] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

AHMAD-UDDIN KHAN AND OTHERS (*Plaintiffs*) *v.* MAJLIS RAI AND OTHERS (*Defendants*).* [9th March, 1883.]

Suit by heirs of deceased co-sharer against heirs of deceased lambardar for profits—Jurisdiction—Act XII of 1881 (*N.-W.P. Rent Act*), ss. 93 (*h*), 208.

A suit by the heirs of a deceased co-sharer against the heirs of a deceased lambardar for money claimed as profits due to the deceased co-sharer by the deceased lambardar is a suit which is cognizable in the Civil Courts and not the Revenue.

Mata Deen Doobey v. *Chundee Deen Doobey* (1), *Mata Deen* v. *Chundee Deen* (2), and *Bhikhan Khan* v. *Ratan Kuar* (3), observed on by STUART, C.J.

Where a suit instituted in the Revenue Court is dismissed by the Court of first instance on the ground that it should have been instituted in the Civil Court, and the appellate Court affirms the decision of the first Court, the appellate Court should, under s. 208 of the N.-W.P. Rent Act, 1881, remand the case to the Civil Court competent to entertain it for disposal on the merits.

[R., 14 A. 381 (394) (F.B.); 8 O.C. 206 (207); D., 11 A. 31 (32).]

THE facts of this case were as follows:—One Aftab Begam, a recorded pattidar in a mahal, sold her share to her husband, Ahmad-uddin Khan, on the 23rd May, 1878. On her death, which occurred shortly afterwards, Ahmad-uddin Khan was recorded as pattidar in her place. She left three sons and four daughters as her heirs in addition to her husband. These persons joined with Ahmad-uddin Khan in bringing the present suit against the defendants, the heirs of one Sohan Lal, a deceased lambardar of the mahal, for a certain sum of money, claiming the same as profits due to Aftab Begam by Sohan Lal. The defendant Majlis Rai was a lambardar of the mahal at the time the suit was brought, having been appointed in succession to Sohan Lal. The suit was instituted in

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* Second Appeal No. 1182 of 1881, from a decree of C. J. Daniell, Esq., Judge of Moradabad, dated the 30th June, 1881, affirming a decree of Raja Jai Kishen Das, C.S.I., Assistant Collector of Bijnor, dated the 29th March, 1881.

(1) N.W.P.H.C.R. (1874), 118. (2) N.W.P.H.C.R. (1870), 54. (3) 1 A. 512.

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the Revenue Court, ostensibly under s. 93 (*h*) of the Rent Act, 1873. The Court of first instance held that the suit was not cognizable in the Revenue Court, but in the Civil Court, and dismissed it. On appeal the District Judge affirmed the decision of the first Court. On appeal by the plaintiffs to the High Court, the Divisional Bench before which the appeal came (STUART, C.J. and BRODHURST, J.) referred the following questions to the Full Bench :—(1) **[439]** Whether a suit between the heirs of a deceased pattidar and the heirs of a deceased lambardar will lie in the Civil or in the Revenue Court ?—(2) Whether, if the suit had been brought in the wrong Court, ss. 206, 207 and 208 of the Rent Act cure the error ?

Babu *Aprokash Chandar Mukarji*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondents.

The following opinions were delivered by the Full Bench :—

OPINIONS.

STRAIGHT, BRODHURST, and TYRRELL, JJ.—In reply to the first question put to us by this reference we would say, that a suit between the heirs of a deceased pattidar and the heirs of a deceased lambardar lies in the Civil and not in the Revenue Court. No provisions are to be found in either of the Rent Acts of 1873 and 1881, in the chapter relating to "Procedure in suits up to judgment," authorizing the institution of suits by or against the representatives of deceased persons, who, had they survived, would have been amenable to the jurisdiction of the Revenue Court. On the contrary, it would seem that suits under the "Rent Act" are of a purely personal kind, in which the parties must respectively fill either one or other of the characters in whose special behoof that law was passed. The plaintiffs referred to in the question put to us, on the one hand, are not co-sharers suing for *their* share of the profits of a mahal, but the heirs of a deceased co-sharer claiming a debt due to his estate, while on the other, the defendants are not lambardars who have failed to pay over profits or to make collections, but the heirs of a deceased lambardar, who, in that character, are sought to be made liable, as being in possession of his assets. Such a suit is obviously not for the Revenue but for the Civil Court, and such, as we have already remarked, must be our answer to the first question of the reference. We may add that s. 93 of the "Rent Act, 1881," cl. (*h*), only contemplates suits by *recorded* co-sharers for their *recorded* share of the profits.

As regards the second matter upon which our opinion is asked in the referring order, we have to say that s. 208 of the Rent Act, which seems to have been overlooked by the District Judge, exactly meets the circumstances of the present case. The Assistant Collector, before whom the suit came in the first instance, dismissed it on the ground, that it did not lie in the Revenue Court, and it therefore **[440]** came before the Judge in appeal, as having been disposed of on a preliminary point in the manner contemplated by s. 562 of the Civil Procedure Code. As the Judge was of opinion that the Assistant Collector's view of the law was correct, he should, under the powers given him by s. 208 of the Rent Act, have remanded the case to the Civil Court competent to entertain it for disposal on the merits. With these replies to the reference, the appeal will remain for determination by the Division Bench making it.

OLDFIELD, J.—I concur in holding that the suit which is the subject of this reference is cognizable by the Civil and not by the Revenue Court.

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It is in some points distinguishable from that reported at p. 512, vol. 1, All. Series, I.L.R. The error of jurisdiction is, however, cured by ss. 206, 207, 208, Rent Act.

STUART, C.J.—I am glad that this Court has at last adopted the opinion which I have held ever since I had a seat in it, that a suit of the nature mentioned in the reference lies in the Civil and not in the Revenue Court. I expressed this opinion very strongly in the first case of the kind which came before me, *viz.*, *Mata Deen Doobey* v. *Chundee Deen Doobey* (1), where, differing from SPANKIE, J., my colleague in the Division Bench, I held that the suit there had been improperly brought in the Revenue Court. I went on to say:—"The plaintiffs do not sue in their own right as co-sharers, but in right of their father while he was alive, and entitled, and in possession as co-sharer; in other words, they sue as his heirs by virtue of their right of succession to him, and they ought, therefore, to have filed their suit in the Civil Court. I hold this opinion, and would be content to decide this case entirely on the legal principle so indicated. But there was a case cited before us—*Mata Deen* v. *Chundee Deen* (2), decided by Sir WALTER MORGAN, Chief Justice, and ROSS, J., the *ratio* of which appears to support my view. There it was held that a lambardar could not be sued in the Revenue Court in respect of profits payable at a time prior to his appointment, although he succeeded his father in office, and that his liability in such a case, if any, arose, not by reason of his official character, but as one of his father's heirs and representing his estate, and that the suit against him therefore ought to have been brought in the [441] Civil and not in the Revenue Court. Other cases were referred to in the argument before us, but they went entirely on the question of possession, without reference to that of right and title. Here the plaintiffs plead a derivative right and title as the heirs and successors of their father, and their only remedy against the defendant was in the Civil Court. It matters not that they were recorded co-sharers when they instituted this suit, they were not co-sharers when the profits claimed accrued; their father was then co-sharer, and the profits simply formed a portion of his estate which the plaintiffs, his sons, could only recover as his heirs and successors in the Civil Court." The present case is, if possible, a still stronger one for the application of the same principle by which the Civil Court has exclusive jurisdiction. The above case before SPANKIE, J., and myself, was referred to at the hearing before the Full Bench of another similar case, and the other Judges of the Court agreed with SPANKIE, J., on grounds which I was never able to appreciate. It is very much to be regretted that this Full Bench case has not been reported, but a foot-note of it is given in the report of the case of *Bhikhan Khan* v. *Ratan Kuar* (3), and we are there told that the other Judges concurred in the following opinion:—"When the cause of action survives, the nature of a suit is not changed by reason that the plaintiff or defendant is not the person to or against whom the cause of action has accrued, but his legal representative; and this being so, it would seem to follow that, where a special Court has been constituted for the trial of suits of a particular nature, the Court has cognizance of suits of that nature, whether they be brought against the person to or against whom the cause of action accrued, or his legal representative. Thus, in the case out of which this reference has arisen,

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(1) N.W.P.H.C.R. (1874), 118. (2) N.W.P.H.C.R. (1870), 50.
(3) 1 A. 512.

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if the suit has been brought against the defendant as the legal representative of the deceased, it cannot be argued that, except in the circumstance that the representative is sued instead of the deceased, there is any feature in the suit other than would have been present had the suit been brought in the lifetime of the deceased. The circumstance that a legal representative is substituted for one of the parties, is an accident to, rather than a property of the suit. Of course, when a legal representative appears as defendant, the decree cannot be [442] executed against him personally, but only against the estate of the deceased. If, however, a claim be brought, not against the legal representative to obtain relief out of the estate of the deceased, but against an heir or stranger, on the ground that he has taken and converted to his own use assets of the deceased, and so rendered himself personally liable for the debts of the deceased, the suit is not a mere suit for profits, but a suit which differs in an essential point from the suit which would have been brought against the deceased had he survived; a liability has been created by the act of the heir or stranger attaching to such heir or stranger personally, and on that liability the right of suit is founded. If then a suit be brought against an heir or stranger to recover from him personally a debt due to the plaintiff in respect of his profits as co-sharer, on the ground that the defendant has intermeddled with the estate of the person who collected the profits, the suit lies, not in the Revenue, but in the Civil Court."

In answer to this view of the law I expressed myself in these terms: "I concur in the last case suggested in the above answer, but I cannot accept as law what is laid down in the first part of it; and generally I remain of the opinion explained in my judgment in *Mata Deen Doobey* v. *Chundee Deen Doobey* (1). The heir of a deceased lambardar may succeed to the cause of action, or rather to the subject-matter of the cause of action, but it does not therefore follow that the heir can sue in the Revenue Court. That which is here called a cause of action is really a right to recover a portion of the deceased's estate, and can only be sued for in a Civil Court. Again, the circumstance that a legal representative is substituted for a deceased party, may be an accident rather than a property of the suit; but it is an accident, in my opinion, which determines the *forum* where the suit may be prosecuted to decree. I have only to add that Act XVIII of 1873 does not affect the question submitted to us, the principle, so far as the legal position of the heir is concerned, being the same as under Act XIV of 1863."

To this opinion I have all along adhered, and we are now, I am glad to say, applying the same principle of judgment in the reference now before us. I may add that the judgment of the Full [443] Bench in that case caused great surprise, and the Government of India, by its Legal Member, wrote to me for an explanation, and particularly for the reason why my judgment in the case of *Mata Deen Doobey* v. *Chundee Deen Doobey* (1) before referred to had been dissented from. In reply I could only refer them to the judgment of the Full Bench itself, and to the argument maintained by my colleagues in *Mata Deen Doobey* v. *Chundee Deen Doobey* (1), and the other members of the Court of course declined, and very properly declined, to discuss the matter further. However, this Court has at last by its Full Bench now placed the law on a sound footing.

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(1) N.W.P.H.C.R. (1874) 118.

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In answer to the first question before us, I have simply to repeat that the jurisdiction in the case stated would lie in the Civil and not in the Revenue Court; but in answer to the second question I agree with my colleagues as to the effect of s. 208 of the Rent Act, and the appeal will now be finally disposed of by the Division Bench.

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5 A. 443 = 3 A.W.N. (1883) 68 = 8 Ind. Jur. 154.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

PRINGLE (*Defendant*) *v.* JAFAR KHAN (*Plaintiff*).* [9th March, 1883.]

Money paid—Betting on a horse-race—Entrance-money for horse-race—Agreement by way of wager—Act IX of 1872 (*Contract Act*), *ss.* 23, 30.

Where a person who had lost a bet on a horse-race requested another to pay the amount of such bet, agreeing to repay him, and the latter paid such amount. *Held*, that the money so paid was recoverable from the person for whom it was paid, the consideration for the agreement not being unlawful within the meaning of s. 23 of the Contract Act, 1872, and the agreement not being one by way of wager, within the meaning of s. 30 of the same Act.

Knight v. *Fitch* (1), *Knight* v. *Cambers* (2), *Jessopp* v. *Lutwyche* (3) and *Beeston* v. *Beeston* (4), referred to.

THE facts of this case are sufficiently stated for the purpose of this report in the judgment of the High Court.

Mr. *Howard*, for the appellant.

[444] Mr. *Ross*, for the respondent.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—The plaintiff in this suit, Jafar Khan, was a jockey of Mr. Collins, who died on the 12th January, 1879, and he has brought this suit against Mr. Collins' executor for the recovery of certain sums of money alleged to have been due by Mr. Collins. The Courts below have decreed the claim. The defendant has appealed in respect of three items of the claim,—(i) a sum of Rs. 1,005 which the plaintiff avers was due by Collins to the Honorary Secretary of the Calcutta Races on a lottery account, and which he, acting on the authority and by the request of Collins, paid through Mr. Kelly Maitland—(ii) a sum of Rs. 74, which was due by Collins to the Honorary Secretary of the Calcutta Races for the horse-racing account of the horse "Mars," which he discharged for Collins after his death on the 19th April, 1879—(iii) a sum of Rs. 100 paid by him on the 31st December, 1878, on account of Collins and with his authority for the entries of the horse "Mars" at the Dacca Races.

The appellant contends that there was no authority on Collins' part to pay any of the above sums; that the payment of them is not proved; that they are sums claimed in respect of wagering transactions which the plaintiff cannot recover at law; and that an item of Rs. 1,000, which the plaintiff received from the defendant, should be set off against his

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* Second Appeal No. 1501 of 1881, from a decree of H. G. Keene, Esq., Judge of Meerut, dated the 6th September, 1881, affirming a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 9th April, 1881.

(1) 24 L.J.C.P. 122. (2) 24 L.J.C.P. 121.
(3) 10 Exch. 614 = 24 L.J. Exch. 65. (4) L.R. 1 Ex. D. 13.

demand; also that the debt must be held to be satisfied by the legacy left by Collins to the plaintiff in his will. In regard to the questions of fact which the appeal raises we find that the Courts below have held that the sum of Rs. 1,005 was due by Collins on a lottery account in connection with the Calcutta Races, in which the plaintiff had no personal concern, and that he had the authority of Collins to satisfy the debt, which as a matter of fact he did; the sum was in the first instance paid by Mr. Maitland and recovered from the plaintiff.

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In regard to the other sums it is found that they were due by Collins for entries at the races for his horse "Mars," and that they were paid by the plaintiff and on Mr. Collins' authority and request.

[445] With these findings of fact we are precluded from interfering in second appeal, but as the point was much pressed on us by the counsel for appellant, that the findings proceed on no evidence, and as the character for integrity of the plaintiff is at issue, we think it right to state that in our opinion the findings are based on adequate evidence, and we see no reason to doubt their correctness or the *bona fide* character of the claim, nor are we of opinion that the claim is one which is legally unsustainable.

In respect of the item of Rs. 1,005, that no doubt was a debt due by Collins on a race-lottery account, and an action could not have been maintained for its recovery against him, with reference to s. 30 of the Contract Act, being an agreement by way of wager and void at law. But the agreement between Jafar Khan and Collins is of a quite different character. There is nothing illegal in the consideration of the agreement, whereby Collins promised to repay Jafar Khan the money he paid to satisfy his liabilities on the lottery account. It is not made illegal by the provisions of s. 23, Contract Act; the provisions of s. 294-A of the Penal Code do not apply to a lottery of this kind; nor is the consideration otherwise unlawful under s. 23 of the Contract Act; the agreement is only void under s. 30 of the Act. When money has been paid at the request of a person it can be recovered if the contract is void and not illegal,—see *Knight* v. *Fitch* (1), *Knight* v. *Cambers* (2), *Jessopp* v. *Lutwyche* (3), *Beeston* v. *Beeston* (4). In the last case there was an agreement that plaintiff should pay defendant certain moneys, and defendant should employ them, with certain moneys of his own, in making bets on the results of horse-races, and should pay plaintiff a proportion of the winnings. He gave a cheque to plaintiff, which was dishonoured, and plaintiff brought an action. It was held that the action was not an attempt to recover under a contract by way of wagering, but for money received by the defendant for which he ought to account to plaintiff. There was nothing illegal in the contract; betting at horse-races could not be said to be illegal in the sense of tainting any transaction connected with it. This distinction between an agreement which is only void and one in which the consideration is also unlawful is **[446]** made in the Contract Act. Section 23 points out in what cases the consideration of an agreement is unlawful, and in such cases the agreement is also void, that is, not enforceable at law. Section 30 refers to cases in which the agreement is only void, though the consideration is not necessarily unlawful. There is no reason why the plaintiff should not recover the sum paid by him on this lottery account at the request of Collins.

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(1) 24 L.J.C.P. 122. (2) 24 L.J.C.P. 121.
(3) 10 Exch. 614 = 24 L.J. Exch. 65. (4) L.R. 1 Ex. D. 13.

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The next item is Rs. 74, which was paid to the Honorary Secretary of the Calcutta Races by plaintiff for Collins for his horse "Mars," entries for the Calcutta Races. This transaction is open to no objection, either under s. 23 or s. 30 of the Contract Act, coming as it does under the exception of the latter section; and it is found that it was paid at the request of Collins, in consequence of which the plaintiff took upon himself the liability for it, and had been compelled to pay that sum which Collins would have had to pay. The fact that it was paid after Collins' death will not, under such circumstances, affect the plaintiff's right to recover it from the estate.

The last item is Rs. 100, a sum found to have been paid by the plaintiff, at Collins' request, prior to his death, for entry of his horse "Mars" for the Dacca Races. This was a sum which under the circumstances found is clearly recoverable by the plaintiff.

The appellant's claim as to the sum of Rs. 1,000, by way of set-off, in our opinion, fails. There is a finding of fact by the Court below (and one which we see no reason to interfere with), that this money was paid over to the plaintiff and expended for Collins on quite a different account, and had been adjusted, and does not affect this claim.

The plea that the legacy left to the plaintiff by Collins in his will is a satisfaction of any debt owing by the testator to the plaintiff is met by the provisions of s. 164 of the Indian Succession Act. We affirm the decree and dismiss the appeal with costs.

Appeal dismissed.

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5 A. 447 (F.B.) = 3 A.W.N. (1883) 87 = 8 Ind. Jur 152.

[447] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

HABIB-ULLAH (*Plaintiff*) *v.* NAKCHED RAI AND OTHERS (*Defendants*).*
[19th March, 1883.]

Mortgage—Registration—Act III of 1877 (*Registration Act*), ss. 17, 50—*Act VIII of* 1871 (*Registration Act*), s. 17—*Registered and unregistered documents.*

Held, by the majority of the Full Bench (STRAIGHT and OLDFIELD, JJ., *dissenting*) that the principal sum secured by a mortgage of immoveable property is alone to be considered for the purpose of deciding whether the registration of the instrument of mortgage is optional or compulsory under the Registration Act, 1877.

The ruling of the Full Bench in *Himmat Singh* v. *Sewa Ram* (1), overruled.

Held, therefore, where an instrument of mortgage by way of conditional sale, dated the 2nd July, 1871, secured the payment of a principal sum of Rs. 72, with interest at Rs. 2 per cent. per mensem, on the 12th May, 1873, the whole amount thus secured exceeding Rs. 100, that the registration of such instrument was optional and not compulsory.

Held, by the Divisional Bench (STUART, C.J. and BRODHURST, J.) that, under s. 50 of the Registration Act, 1877, an instrument the registration of which under the Registration Act, 1871, was compulsory and which was registered under that Act took effect, as regards the property comprised therein, as against an instrument relating to the same property, the registration of which under the Registration Act, 1871, was optional and which was not registered under that Act.

[R., 23 M. 105 (111, 113); 4 N.L.R. 90 (93).]

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* Second Appeal No. 1360 of 1881, from a decree of T. Benson, Esq., Judge of Azamgarh, dated the 3rd August, 1881, reversing a decree of Munshi Mata Din, Munsif of Nagra, dated the 12th April, 1881.

(1) 3 A. 157.

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THERE were two questions raised in this appeal, *viz.*,—(i) whether an instrument of mortgage by conditional sale, bearing date the 2nd July, 1871, by which the payment of Rs. 72, with interest at Rs. 2 per cent. per mensem on the 12th May, 1873, was secured by a mortgage of certain immoveable property, required to be registered; and (ii) whether an instrument of simple mortgage, bearing date the 12th May, 1872, the registration of which was compulsory, and which was registered under the Registration Act, 1871, took effect, as regards the property comprised therein, against the deed of conditional sale above-mentioned, which related to the same property, and had not been registered under that Act. The latter instrument ran as follows :—" We (mortgagors) have borrowed Rs. 72 of the current coin from (mortgagee) at **[448]** the rate of Rs. 2 per cent. per mensem : we shall repay the principal with interest on the 12th May, 1873 : we have for the satisfaction of the said creditor pledged (certain immoveable property) : should we fail to pay the money with interest on the expiration of the term (fixed), he (creditor) may enter into possession of the said property, neither we nor our heirs shall have any claim to the property : the said creditor shall have power to get our names expunged and his name entered in the official papers, and remain in possession as proprietor and zemindar ; neither we nor our heirs have and shall have objections in this respect : that before the repayment of this money, should we execute a deed of mortgage or pledge of any nature whatever to any one, such deed shall be invalid as against this deed." The Divisional Bench before which the appeal came for hearing (STUART, C.J. and BRODHURST, J.) referred the first question to the Full Bench for determination, the order of reference being as follows :—

STUART, C.J.—In this case the question is again raised as to how the value in an instrument is to be considered with reference to its optional or compulsory registration. The course of decisions by this Court, differing from that of all the other High Courts, has been to the effect that the principal sum alone is not to be considered, but that the value may include with the principal sum the addition of interest to a certain amount according to the terms of the deed. I have taken occasion to express my doubts as to the soundness of that reading of the Registration Law, see *Basant Lal* v. *Tapeshri Rai* (1) and *Himmat Singh* v. *Sewa Ram* (2) in which I reconsidered the law and went very fully into the subject, quoting judgments by the Madras and Bombay Courts. I arrived at the conclusion that the course of decisions in this Court of late years was altogether mistaken, and being still of that opinion and holding it very strongly and clearly, I am desirous that this Court, which is differently constituted now from what it was when the last Full Bench ruling was made, should have an opportunity of reconsidering the question.

The question then I would refer to the Full Bench and ask my colleagues to reconsider is, whether the value in such an instrument as the present is for the purpose of its registration to be taken **[449]** to be the principal sum alone or that sum with the addition of any interest or other increment ?

BRODHURST, J., concurred in the reference being made.

Mr. *Spankie*, for the appellant, contended that the instrument came within the terms of s. 17 (*b*) of the Registration Act, 1871, and therefore

(1) 3 A. 1. (2) 3 A. 157.

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its registration was compulsory. He relied on the ruling of the majority of the Full Bench in *Himmat Singh* v. *Sewa Ram* (1).

Mr. *Conlan* and Munshi *Sukh Ram*, for the respondents.

The following opinions were delivered by the Full Bench :—

OPINIONS.

STUART, C.J.—Having fully reconsidered the question submitted by this reference, I adhere, without doubt or hesitation, to the views and conclusions stated in my judgment in *Himmat Singh* v. *Sewa Ram* (1) where, in agreement with the rulings on the same question by the other High Courts, I held the principal sum alone was, for the purpose of the question of registration, to be taken to be the value. In the present case the consideration stated in the conditional sale-deed of the 2nd July, 1871, was Rs. 72, and under s. 18 of the Registration Act then in force, Act VIII of 1871, its registration was optional and not compulsory in order to make the document evidence. I may add that s. 59 of the Transfer of Property Act, IV of 1882, which was referred to at the hearing, plainly supports my opinion. The first part of that section is in these terms :—" Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses." The second part of the section almost in terms describes the present case, it being there provided that " where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property." But without reference to the Transfer of Property Act of 1882, or any consideration other than the actual Registration Law, my answer to this reference is, that the value to be taken into account is the principal sum alone, and that having been only Rs. 72, the conditional sale-deed, in order to be received [450] as evidence of the contract which it records, did not require registration.

BRODHURST, J.—On the question referred to us, I am of opinion that, for the purpose of registration, the value of a deed should be estimated merely by the principal amount secured by it; and sound reasons for thus estimating the value are, I think, given in the judgment of the learned Chief Justice, reported on page 157, vol. 3, All. Series, I. L. R., and in the judgments of the High Courts of Calcutta, Madras and Bombay therein alluded to. The mortgage or conditional sale-deed referred to in the case before us bears a date corresponding to the 2nd July, 1871, and the principal amount is Rs. 72, and registration of the deed was therefore optional. Section 59 of the Transfer of Property Act has no bearing upon the present case, but no deed of mortgage executed since the 1st July, 1882, the date on which the Act came into force, will be admissible in evidence unless it has been registered.

TYRRELL, J.—I have always held the opinion that the language of the Indian Registration Acts is legitimately susceptible of the reading that the principal sum alone is to be considered as the sum secured by a deed on the date of its execution. Holding this opinion then the arguments *ab convenienti* in favour of the learned Chief Justice's view are more than sufficient to outweigh the considerations on which the opposite opinion is founded. I may add as an illustration of the inconveniences besetting this latter reading of the law, that if the instrument in the case before us

(1) 3 A. 157.

be carefully scrutinized, it will be found that it undoubtedly does not secure with certainty or even with approximate probability any interest in excess of the principal sum; for while it gives the debtor a fixed period, short of which the terms of the contract cannot be enforced against him, it does not contain a word to hinder the debtor from paying off the principal and interest at any time within that period. The obligee could make no demand till the arrival of a fixed date, but the obligor might repay his debt at any time. It is obvious that a principal debt of Rs. 72 with a monthly interest of Rs. 2 might run for many months without reaching the sum of Rs. 100; and that therefore it would be impossible for the parties to this instru-[451]ment to know on the date of its execution what sum was secured on it. An interpretation of the Registration Act in this respect which gives occasion to, if indeed it does not necessitate, researches and speculations of this sort in the case of every instrument of this character which approaches the limit of Rs. 100, seems to me eminently inconvenient and unpractical.

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STRAIGHT and OLDFIELD, JJ.—We have heard nothing to induce us to alter the opinion expressed by us, after full and careful consideration of the question and the authorities bearing upon it, in *Himmat Singh* v. *Sewa Ram* (1) as to the construction to be placed on s. 17 of the Registration Act, 1877. We may add that any doubt or difficulty upon the point seems, so far as mortgages and charges upon immoveable property are concerned, to have been set at rest by the plain terms of s. 59 of the Transfer of Property Act, 1882.

On the case being returned to the Divisional Bench (STUART, C.J. and BRODHURST, J.), the second question raised in the appeal was disposed of, the judgment of the Bench being as follows:—

STUART, C.J.—This case has come back to us from the Full Bench of the Court for final disposal. The Full Bench has ruled that the Registration of the conditional sale-deed of the 2nd July, 1871, the consideration for which was Rs. 72 was, under Act VIII of 1871, the Act then in force, read with the *Explanation* to s. 50 of Act III of 1877, optional and not compulsory in order to be evidence. The first and second reason of appeal urging the contrary must therefore be rejected. The fourth reason of appeal is not maintained. But we must allow the third reason of appeal by which it was contended that the mortgage-deed of the 12th May, 1872, being registered, takes effect in priority over the unregistered conditional sale-deed of July, 1871. The (District) Judge in his remarks on this subject appears to have overlooked the *Explanation* at the end of s. 50 of Act III of 1877, which distinctly provides that "where the document is executed after the 1st day of July, 1871, [452] 'unregistered' means not registered under Act VIII of 1871," and the result is that the mortgage-deed of 1872 takes effect as regards the property comprised therein in preference to the unregistered document of July, 1871.

Appeal allowed.

(1) 3 A. 157.

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5 A. 452 (F.B.)= 3 A.W.N. (1883) 79.

5 A. 452 (F.B.)=3 A.W.N. (1883) 79.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

JAGAT NARAIN AND ANOTHER (*Defendants*) *v.* JAG RUP AND OTHERS (*Plaintiffs*).* [19th March, 1883.]

Mortgage—First and second mortgagees—Sale of property in execution of decree obtained by second mortgagee for sale of property—Holder of prior decree enforcing first mortgage, how to proceed—Execution of decree—Fresh suit—Civil Procedure Code, s. 244 (c)—Meaning of "representative" of judgment-debtor.

A decree enforcing a first mortgage of certain property not being satisfied, the property was sold in execution of a decree of a later date enforcing a second mortgage of the property.

Per STUART, C.J., that the decree enforcing the first mortgage could not be executed against the property, but the holder of such decree was bound to bring a fresh suit against the purchaser of the property to enforce his decree.

Per STRAIGHT, BRODHURST and TYRRELL, JJ., that a fresh suit was the most convenient and expeditious remedy.

Per OLDFIELD, J., that, the purchaser not being the "representative" of the judgment-debtor, within the meaning of s. 244 (c) of the Civil Procedure Code, the holder of such decree must bring a fresh suit to enforce it.

[R., 13 B. 34 (38); 15 B. 290 (292); 24 C. 62 (72) **(F.B.)**; 20 M. 378 (382)=7 M.L.J. 89 (92); 8 O.C. 370 (378) **(F.B.)**; **Disappr.**, 26 A. 447 (462)=1 A.L.J. 65=A.W.N. (1904) 61; **D.**, 18 M. 13 (18).**]**

THIS was a reference to the Full Bench by STRAIGHT and MAHMOOD, JJ. The facts of the case and the point of law referred are stated in the order of reference, which was as follows:—

MAHMOOD, J.—On Jaith Sudi 7th, 1281 fasli (22nd May, 1874), Salig, defendant No. 1, executed a bond in favour of the plaintiffs, whereby he hypothecated his six-pie share in lieu of a loan of Rs. 191. Again, on Phagun Badi 13th, 1282 fasli (5th March, 1875), he and his co-sharers, Jag Mohan, Sheo Nath, and Murli, jointly executed a bond for Rs. 48 in favour of Shankar, defendant No. 2, hypothecating their one-anna share, which included three pies out of the six-pie share which Salig, defendant No. 1, had previously hypothecated to the plaintiffs. On the 29th March, 1877, the **[453]** plaintiffs obtained a decree against Salig, defendant No. 1, on their hypothecation-bond above referred to. Similarly, on the 25th March, 1878, Shankar, defendant No. 2, obtained a joint decree against Salig, defendant No. 1, and his three co-sharers abovenamed, on the hypothecation-bond of 5th March, 1875. In execution of his decree, Shankar, defendant No. 2, brought the hypothecated property to sale on the 20th June, 1878, when it was purchased by Jagat Narain, defendant No. 3, and Sri Kishen, defendant No. 4, who appear to be brothers.

On the 20th April, 1880, the plaintiffs made an application for execution of their decree of 29th March, 1877, for realization of Rs. 375-7-0 by sale of the property of Salig, defendant No. 1, which had been hypothecated by him under the deed whereupon the decree was passed. That property, as has already been shown, included the three-pie share purchased by defendants Nos. 3 and 4 on the 20th June, 1878,

* Second Appeal No. 1345 of 1881, from a decree of R. J. Leeds, Esq., Judge of Gorakhpur, dated the 15th August, 1881, modifying a decree of Maulvi Muhammad Kamil, Munsif of Basti, dated the 27th April, 1881.

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in execution of the decree obtained by Shankar, defendant No. 2. On the 30th July, 1880, the Court ordered the pleader for the decree-holder to put in *talbana* for issue of notices to the opposite party. Nothing appears to have occurred in furtherance of the execution proceedings, and it may be taken that matters stood *in statu quo* when the present suit was brought.

The present suit was commenced on the 26th March, 1881, having for its object the recovery of the sum of Rs. 375-7 (being the amount stated in the application of 20th April, 1880), and of Rs. 21, interest thereon, at six per cent. per annum, for 11 months and 6 days, total Rs. 396-7 (said to be still due to the plaintiffs under their decree), by sale of the six-pies share aforesaid, and by avoidance of the auction-sale of 20th June, 1878. Salig, defendant No. 1, did not defend the suit, but Shankar, defendant No. 2, and the purchasers, Jagat Narain, defendant No. 3, and Sri Kishen, defendant No. 4, set up various pleas in defence, which, however, need not be noticed in detail. The Munsif, overruling the pleas in defence, decreed the claim as brought. On appeal by the defendants the Judge modified the decree of the Munsif in the following terms :— 1st.—The decree will be for the cancelment of the sale so far only as it affects the six-pie share hypothecated to the [454] plaintiffs. 2ndly.—The decree instead of being for the recovery of a certain sum, by re-sale of the share, will simply be declaratory of the plaintiff's right to re-sell the property in satisfaction of his prior lien.

The present appeal has been preferred by Jagat Narain, defendant No. 3, and Sri Kishen, defendant No. 4 (auction-purchasers at the sale of 20th June, 1878), but their pleader has abandoned all the grounds of appeal, except the first, which raises the question, whether the present suit was maintainable at all, and whether or not the only remedy open to the plaintiffs was to proceed with the execution of their decree of 29th March, 1877.

In regard to this question, our attention has been drawn to three rulings which lay down contradictory rules of law. In the case of *Pahar Singh* v. *Jai Chund* (1), it was held that, where property hypothecated as security for the debt of a prior judgment-creditor is sold in the execution of the decree of another party, the remedy of the judgment-creditor lies in a regular suit against the auction-purchaser of the hypothecated property, and the sale to the latter cannot be set aside by an order in the miscellaneous department, in execution of a decree in a suit to which he was no party, between the creditor and the debtor, whose property is hypothecated. An opposite view appears to have been taken by a Full Bench of the same Sadr Diwani Adalat, in the case of *Munglo* v. *Rugoonath Dass* (2), wherein the ruling in the first case above cited was noticed.

Again in the case of *Gajadhar Pershad* v. *Daibee Pershad* (3) a Division Bench of this Court, consisting of PEARSON and TURNER, JJ., without noticing either of the two rulings above mentioned, held that hypothecation of property as security for a debt gives the party so secured a right to the application of such property, or its sale-proceeds, in satisfaction of his claim ; but if such property has been sold under execution of another decree, the secured party cannot cause re-sale without obtaining a decree for that purpose in a fresh suit.

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(1) N.W.P.S.D.A.R. (1864), Vol. I, 543. (2) N.W.P.S.D.A.R. (1866) 72. (3) N.W.P.H.C.R. (1869) 29.

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[455] This ruling appears to favour the view taken in the case of *Pahar Singh*, which, as has already been observed, was modified by the Full Bench of the late Sadr Diwani Adalat of these Provinces.

The question, therefore, does not appear to be a settled one, and is, no doubt, involved in some difficulty. We refer the following question to a Full Bench :—

A decree enforcing a prior lien against certain property having remained unsatisfied, the property is sold in execution of a subsequent decree enforcing a subsequent lien against the same property : can the prior unsatisfied decree be executed against the said property, notwithstanding the sale ; or is the holder of the prior unsatisfied decree bound to obtain a fresh decree for enforcement of his decretal charge against the property, by impleading the original judgment-debtor, the subsequent decree-holder, and the auction-purchaser, as defendants, to the fresh suit ?

Mr. *Simeon* and Babu *Jogindro Nath Chaudhri*, for the defendants (appellants) Jagat Narain and Sri Kishen.

Lala *Lalta Prasad* and Munshi *Sukh Ram*, for the plaintiffs (respondents).

The following opinions were delivered by the Full Bench :—

OPINIONS.

Stuart, C.J.—My answer to this reference is that a fresh suit is the only remedy.

Straight, Brodhurst, and Tyrrell, JJ.—It seems to us a sufficient answer to this reference to say, that we find nothing in the law to prohibit a suit of the kind mentioned in the referring order : indeed, it would appear to be the most convenient and expeditious remedy.

Oldfield, J.—The decree-holder can only proceed to execute his decree against the property in the hands of an auction-purchaser, if the latter can be held to be a representative of his judgment-debtor within the meaning of cl. (*c*) of s. 244, Civil Procedure Code, so as to make the question one between the parties to the suit or their representatives and relating to the execution of the decree, for there are no direct provisions of the Code on the subject. Otherwise the decree-holder's only remedy is by [456] suit against the auction-purchaser, for it would not avail him to attach the property in execution of his decree against his judgment-debtor, since, if the auction-purchaser resisted the attachment, questions would be raised which could not be disposed of by the Court executing the decree. In my opinion the word "representative" used in s. 244 was not intended to include purchasers of a judgment-debtor's property. We find special provisions in the Code for enabling transferees of decrees by assignment or operation of law to execute their decree (s. 232), and for a decree-holder to execute a decree against the legal representatives of a deceased judgment-debtor (s. 234). Had it been intended to give power to execute a decree against an assignee of a judgment-debtor, as representative of a judgment-debtor, some similar provision to that in s. 234 would probably have been made to effect that object, and its omission, coupled with the fact, which is significant, that "legal representative," as used in s. 234, is confined to the heirs of a deceased judgment-debtor, may lead to the inference that the word "representative" in s. 244 has no more extended meaning than heir, devisee, or executor, which also is the proper signification.

I would reply to the reference, that the decree-holder's remedy in the case referred is by suit for the enforcement of his decretal charge against the property.

5 A. 456=3 A.W.N. (1883) 99.

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APPEL-LATE CIVIL.

5 A. 456= 3 A.W.N. (1883) 99.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

HAMILTON (*Defendant*) v. THE LAND MORTGAGE BANK OF INDIA (*Plaintiff*).* [21st March, 1883.]

Practice—Conversion of character of suit—Remand.

A Bank sued *H*, its agent, who had appointed *N* to act in the matter of the agency, for money belonging to it which *H* had paid *N* for the purposes of the agency and which was not accounted for by *N*, claiming the same on the ground that *N* had been appointed to act as a sub-agent without authority. The lower appellate Court found that *N* had been appointed by *H* to act in the matter of the agency with authority, but, instead of dismissing the suit with reference to this finding gave the plaintiff Bank a decree against *H* cn the ground that he had not exercised ordinary prudence in selecting *N* as an agent for his principal. *Held*, that, inasmuch [457] as the plaintiff Bank had not claimed relief on the ground that *H* had failed in his duty in naming *N* as an agent for his principal, but on the ground that *N* had been appointed without authority, and had failed to prove its case, the suit should have been dismissed.

[Appr., 2 Pat. L.J. 69; R., 26 A. 447=A.W.N. (1904) 61; 12 C.L.J. 556 (560)= 8 Ind. Cas. 79 (81); 12 K.L.R. 314.]

THE plaintiff in this case, the "Land Mortgage Bank of India" sued the defendant for Rs. 1,000, principal, and Rs. 412-8-0 interest. The defendant, J. M. Hamilton, was the agent of the plaintiff Bank at Allahabad, and as such negotiated a loan by the Bank to certain persons on the security of a village situated in the Banda district. The Bank having sued to recover the money lent by it to those persons, obtained a decree for the same and for the sale of the security. The village was brought to sale in execution of this decree and was purchased by the Bank. The defendant appointed one Niaz Ali to manage the property, and gave him certain moneys belonging to the Bank for the payment of Government revenue and other purposes. Out of these moneys a sum of Rs. 1,000 was alleged by Niaz Ali to have been paid on account of Government revenue. It was eventually discovered that no such sum had been paid by Niaz Ali on that account; and such sum was not accounted for by him. The Bank accordingly brought the present suit against the defendant to recover the Rs. 1,000 which he had paid to Niaz Ali, together with interest, on the ground that such payment was unauthorized. The defendant set up as a defence to the suit that Niaz Ali was the plaintiff's agent, and therefore the payment to him of the money in suit was not unauthorized. The Court of first instance found that Niaz Ali had not acted for the plaintiff in the matter of the agency, but for the defendant, and that the defendant's selection of Niaz Ali to act in the matter of the agency was a selection wanting in discretion, and in the event gave the plaintiff a decree. On appeal by the defendant the lower appellate Court (District Judge) found that Niaz Ali had acted for the plaintiff in the matter of the agency, and remanded the case for trial of the issues, whether the defendant, in selecting Niaz Ali in the matter of the agency, had or had not exercised due discretion; and whether the defendant had or had not participated or co-operated with Niaz Ali in the act by which the Bank was defrauded. The Court of first instance found the first issue against

* Second Appeal No. 859 of 1882, from a decree of W. Duthoit, Esq., D.C.L., Judge of Allahabad, dated the 25th April, 1882, affirming a decree of Babu Pramoda Charan Banarji, Subordinate Judge of Allahabad, dated the 23rd August, 1881.

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the defendant and the second [458] in his favour. The lower appellate Court affirmed these findings, and, having regard to the first, affirmed the decision of the first Court.

On second appeal by the defendant to the High Court, it was contended on his behalf that the lower appellate Court should have dismissed the suit when it found that Niaz Ali had acted for the plaintiff in the matter of the agency, inasmuch as the plaintiff had come into Court, seeking relief on the ground that the payment by the defendant, to Niaz Ali of the money in question was unauthorized, and had failed to establish such ground, and that, in remanding the case as it had done, and in affirming the decree of the first Court on grounds other than those on which the plaintiff had sought relief, the lower appellate Court had acted erroneously in law.

Messrs. *Colvin* and *Ross*, and Munshi *Ram Prasad*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondent.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—We are very clearly of opinion that this appeal must prevail. It seems to us that the Judge, in remanding the issues he did to the Subordinate Judge for findings under s. 566 of the Code, and deciding the case from the point of view disclosed in his judgment, lost sight of the form of the plaint and the grounds set out therein upon which relief was prayed. The obvious position taken up by the plaintiff Bank on the pleadings is, that Niaz Ali never was an agent of the Bank, and that the payment of Rs. 1,000, if ever made to him in fact by the defendant, was a gratuitous and unauthorized one, and therefore that the latter was liable to make the amount good. The Judge, very properly, as we think, held the agency of Niaz Ali to be satisfactorily proved, and upon that view of the matter it is plain that the suit as brought failed, and as for money had and received to the use of the plaintiff could not be maintained. The Judge, however treating Niaz Ali as an agent of the Bank, and apparently regarding its claim as preferred *ex delicto*, proceeded to remit issues to the [459] first Court for the purpose of having the question determined as to whether, in making the selection of Niaz Ali as agent for the Bank, the defendant exercised the reasonable care and caution of an ordinarily prudent man; and upon the findings being returned to him, virtually disposed of the suit as if it were one for damages. It seems to us sufficient to say that this was not the footing upon which the Bank came into Court, nor, looking to all the circumstances, do we think it should be permitted to make such a complete change of front, and to obtain relief upon grounds, not only that it did not set up, but by the very plaint itself controverted. Some regard must be paid to the form of pleadings, and though the circumstances out here are such that it would be unwise to test them by very strict or technical rules, we cannot countenance the notion, that a plaintiff, coming into Court with one case, and hopelessly failing to prove it, should be permitted to succeed upon another, and that directly in antagonism with his primary allegations. The plaintiff Bank never claimed to make the defendant liable for the Rs. 1,000 instead of Niaz Ali, on the ground that he had been wanting in diligence and care

in selecting that person as an agent: on the contrary, the terms of the plaint repudiate such a notion: yet it is on this footing that relief has been granted to the plaintiff.

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APPELLATE CIVIL.

5 A. 456 = 3 A.W.N. (1883) 89.

We are of opinion that the agency of Niaz Ali having been abundantly established as declared by the Judge, the foundation upon which the claim of the plaintiff rested crumbled away and the suit failed. The appeal is decreed with costs and the suit must stand dismissed.

Appeal allowed.

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5 A. 459 = 3 A.W.N. (1883) 89 = 8 Ind. Jur. 156.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

BUTI BEGAM AND ANOTHER (*Judgment-debtors*) *v.* NIHAL CHAND AND ANOTHER (*Decree-holders*).* [22nd March, 1883.]

Execution of decree—Stay of execution—Revival of execution-proceedings—Act XV of 1877 (Limitation Act), sch. ii, No. 178.

A decree was made against *B*, *K*, and *Z*. On the 13th May, 1879, application was made for execution of the decree against *B* and *K*. In August, 1879, *Z*, who had preferred an appeal in the suit, applied on that ground for the stay of execu-[460]tion, and on the 22nd August, 1879, the Court on the same ground ordered execution to be stayed. On the 16th December, 1879, *Z's* appeal was dismissed. On the 24th June, 1882, an application for execution of the decree against *B* and *K* was made. *Held*, that such application might be regarded as one for revival of the proceedings in execution which had been stayed by injunction, to which No. 178, sch. ii of the Limitation Act, 1877, was applicable, and such application was therefore within time.

The principle of decision in *Raghubans Gir* v. *Sheosaran Gir* (1) and *Kalyanbhai Dipchand* v. *Ghanashamlal Jadunathji* (2), followed.

[R., 6 P.R. 1895.]

ON the 28th June, 1867, Buti Begam, the mother, and Kaniz Kubra, the wife, of Mahmud Hasan, a lunatic, borrowed Rs. 700 from Nihal Chand and Behari Lal, and gave the lenders a bond for that amount, in which they hypothecated certain immoveable property belonging to the lunatic. In April, 1878, the obligees of the bond sued Buti Begam and Kaniz Kubra upon it in the Munsif's Court. Zamania Begam, a daughter of Mahmud Hasan, applied to be allowed to defend the suit on his behalf. This application was granted, and Mahmud Hasan was made a defendant and Zamania Begam was made his guardian *ad litem*. The Munsif gave the plaintiffs in this suit a decree against Buti Begam and Kaniz Kubra, and the property of the lunatic. Zamania Begam appealed on behalf of the lunatic to the District Judge, and the appeal was dismissed with costs on the 1st March, 1879. On the 13th May, 1879, Nihal Chand and Behari Lal applied for execution of the Munsif's decree against Buti Begam and Kaniz Kubra. In June, 1879, Zamania Begam preferred a second appeal to the High Court on behalf of the lunatic. In August, 1879, the property of the lunatic having been proclaimed for sale, in pursuance of the application for execution of the 13th May, Zamania Begam applied to the Munsif to stay execution on the ground that she had appealed to

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* Second Appeal No. 74 of 1882, from an order of H. G. Keene, Esq., Judge of Saharanpur, dated the 27th September, 1882, reversing an order of Muhammad Sayyid Khan, Munsif of Muzaffarnagar, dated the 31st July, 1882.

(1) 5 A. 243. (2) 5 B. 29.

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the High Court. On her furnishing security execution was ordered to be stayed, and on the 22nd August, 1879, the execution proceedings were struck off the file. On the 16th December, 1879, the High Court dismissed Zamania Begam's appeal with costs, on the ground that Mahmud Hasan was not legally represented by her, as she was a married woman, and set aside the decrees of the lower Courts so far as they affected Mahmud Hasan or his property. On the 24th June, 1882, Nihal Chand and Behari Lal applied for execution against Buti Begam, Kaniz Kubra and Zamania Begam, claim-[461]ing as against the last to recover the costs of the first and second appeals, and as against the others the amount of the decree of the Munsif. The Munsif held that the application was barred by limitation as regards Buti Begam and Kaniz Kubra. The District Judge held on appeal that the case came within the operation of art. 178, sch. ii of the Limitation Act, 1877, and limitation ran from the 16th December, 1879, when the injunction restraining execution was removed.

In second appeal Buti Begam and Kaniz Kubra contended that the application was, as regards them, barred by limitation.

Pandits *Ajudhia Nath* and *Bishambar Nath*, for the appellants.

Munshi *Kashi Prasad*, for the respondents.

The Court (OLDFIELD and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the Judge is right. The present application may be regarded as one for revival of the proceedings in execution which had been stayed by injunction, and art. 178 of the Limitation Act is applicable. The principle is that recognized in *Raghubans Gir* v. *Sheosaran Gir* (1) and *Kalyanbhai Dipchand* v. *Ghanashamlal Jadunathji* (2). We dismiss the appeal with costs.

Appeal dismissed.

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5 A. 461 = 3 A.W.N. (1883) 114.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

RAGHUBAR DAYAL (*Defendant*) *v.* LACHMIN SHANKAR (*Plaintiff*).*
[19th April, 1883.]

Mortgage-suit by mortgagee to recover mortgage-money—Suit for money charged on immoveable property—Relief against the person of mortgagor—Act XV of 1877 *(Limitation Act), sch. ii, Nos.* 116, 132.

In a suit by a mortgagee to enforce the mortgage, No. 132, sch. ii of the Limitation Act, 1877, is not applicable, so far as relief against the mortgagor personally is claimed. *Lalubhai* v. *Naran* (3), dissented from.

[R., 26 M. 686 (F.B.).]

THIS was a suit to recover Rs. 941-13-0, principal and interest, under a registered bond, dated the 5th August, 1872, whereby certain immoveable property was mortgaged as collateral security for the [462] payment

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* Second Appeal No. 1192 of 1882, from a decree of J. M. C. Steinbelt, Esq., Judge of Banda, dated the 2nd August, 1882, affirming a decree of Kazi Wajih-ul-lah Khan, Subordinate Judge of Banda, dated the 30th May, 1882.

(1) 5 A. 243. (2) 5 B. 29. (3) 6 B. 719.

1883 APRIL 19. — APPELLATE CIVIL. — 5 A. 461 = 3 A.W.N. (1883) 114.

of the bond. The bond fell due on the 12th May, 1873. The suit was instituted on the 10th March, 1882. The Court of first instance gave the plaintiff a decree for Rs. 692-13-0, to be enforced against the person of the defendant Raghubar Dayal as well as by enforcement of hypothecation against a part of the property set out in the bond. On appeal by the defendant Raghubar Dayal the District Court affirmed this decree. On second appeal by the defendant Raghubar Dayal, it was contended on his behalf that, so far as his person was concerned, the claim was barred by the period of six years provided for by No. 116, sch. ii of the Limitation Act, and that consequently so much of the decree as affected his person was bad in law.

Munshi *Ram Prasad* and Babu *Ram Das Chakarbati*, for the appellant.

The respondent did not appear.

The Court (STRAIGHT and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—Although the Bombay Court have expressed a different view (I. L. R., 6 Bom. 719) the current of decisions in this Court, one of which is now in appeal before the Privy Council, has favoured the view enunciated in the first plea. We think it enough to say, that we are not prepared at this moment to depart from those decisions. The appeal must be decreed with costs, and the decree of the plaintiff will be amended by striking out so much of it as relates to the person of the defendant Raghubar Dayal.

Appeal allowed.

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5 A. 462 = 3 A.W.N. (1883) 115.

CIVIL REVISIONAL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

ILAHI BAKHSH (*Defendant*) *v.* SITA AND ANOTHER (*Plaintiffs*).*
[23rd April, 1883.]

Attachment of moveable property—Suit to establish right—Small Cause Court suit—Civil Procedure Code, s. 283.

A suit under s. 283 of the Civil Procedure Code by a party against whom an order under s. 281 has been passed to establish his right to moveable property [463] attached in execution of a decree passed by a Civil Court and for such property, the same being less than Rs. 500 in value, is not a suit cognizable in a Court of Small Causes.

[D., 39 M. 219 (F.B.).]

THE plaintiffs in this suit claimed certain moveable property, or Rs. 80 its value, on the ground that it belonged to them; that the defendant had caused it to be attached in execution of a decree as the property of his judgment-debtor; and that an objection which they had preferred to the Court executing the decree to the attachment of the property had been disallowed. The suit was instituted in a Court of Small Causes, which gave the plaintiffs a decree.

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* Application No. 312 of 1882, for revision under s. 622 of Civil Procedure Code of a decree of J. R. Shircore, Esq., Judge of the Court of Small Causes at Agra, dated the 24th April, 1882.

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The defendant applied to the High Court for revision on the ground that the suit was not cognizable in a Court of Small Causes.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the defendant.

Munshi *Kashi Prasad*, for the plaintiffs.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—This is a suit brought with reference to the provisions of s. 283, Civil Procedure Code, to have a right declared to property under attachment by a Civil Court, and for its recovery by removal of attachment. It is not in our opinion a suit cognizable by a Court of Small Causes. We set aside the proceedings and direct the plaint to be returned to be presented in a proper Court. The petitioner will have his costs in all Courts.

Application allowed.

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5 A. 463 = 3 A.W.N. (1883) 27.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

SURJU PRASAD (*Defendant*) *v.* MANSUR ALI KHAN (*Plaintiff*).* [23rd January, 1883.]

Mortgage—Redemption—Interest—Construction of deed.

In Chait 1275 fasli (March 1868) *M*, having borrowed Rs. 11,200 from *S*, gave him a mortgage by way of conditional sale of certain immoveable property for a term of seven years, that is to say, extending over the years 1276, 1277, **[464]** 1278, 1279, 1280, 1281 and 1282 fasli. The sum payable as the interest of each of these years was fixed at Rs. 1,680. The mortgagee obtained payment of his interest for four years from 1276 to 1279 fasli inclusive by bringing suits against the mortgagor. The interest for 1280, 1281 and 1282 fasli, as well as the principal sum, remaining unpaid, the mortgagor sued for redemption of the mortgaged property on payment of the principal sum, and the interest of the last year, 1282 fasli, only, contending that the interest of the other years, 1280 and 1281 fasli, was not secured on the mortgaged property, but was, under the terms of the instrument of mortgage, realizable by suit from his non-hypothecated property and person.

Held, on the construction of the instrument of mortgage, that the mortgage was not redeemable on payment of the last year's interest only, but on payment of the interest of the other years as well.

[Affirmed on appeal, 9 A. 20 (P.C.) = 13 I.A. 113.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of TYRRELL, J.

Mr. *Conlan*, Munshi *Hanuman Prasad*, and Lala *Lalta Prasad*, for the appellant.

Mr. *Ross*, the *Senior Government Pleader* (Lala *Juala Prasad*), and Maulvi *Mehdi Hasan*, for the respondent.

The Court (STUART, C.J., and TYRRELL, J.) delivered the following judgments:—

JUDGMENTS.

TYRRELL, J.—The questions raised in this appeal depend for their solution on the right construction to be put on the instrument which

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* First Appeal No. 68 of 1881, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 9th April, 1881.

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forms the basis of the transaction between the parties out of which this litigation has arisen. The defendant, a Gorakhpur banker, lent the plaintiff's brother, since deceased, Rs. 11,200 under a deed of mortgage executed in Chait 1275 fasli, corresponding with 14th March, 1868. This is the deed, the interpretation of which is at issue. It is admitted on both hands that the term of the loan was seven years: that is to say, that it was to extend over the years 1276, 1277, 1278, 1279, 1280, 1281 and 1282 fasli, and that the sum payable as the interest of each of these years was fixed at Rs. 1,680. It is also certain that the defendant obtained payment of his interest for the four years from 1276 to 1279 fasli inclusive, by bringing suits against the plaintiff, and that the interest for 1280, 1281 and 1282 fasli remains still unpaid, as well as the principal sum lent under the mortgage.

The defendant applied for foreclosure of his mortgage, and for payment of the interest due for the last three years of the term, [465] with costs, and interest on such interest and costs. This sum amounted on the 30th January, 1880, to Rs. 33,046-3-0. The plaintiff on the other hand, while not denying his liability for the interest due under the bond, maintains that such interest was not secured on the mortgaged property, but was realizable under the terms of the instrument in question by suit from the non-hypothecated property and from the person of the plaintiff; and therefore that to avoid foreclosure it was necessary for the plaintiff to pay the defendant the sum of Rs. 12,880 only, being the principal debt of Rs. 11,200 *plus* the interest (Rs. 1,680) due for the last year (1282 fasli) of the mortgage term. Taking this view of the mortgage contract, the plaintiff brought into Court Rs. 12,880 on the 17th January, 1881, being three days before the expiry of a twelve month from the date of the defendant's foreclosure notice of the 20th January, 1880; and on his latter date he filed the present suit for redemption of his village properties mortgaged to the defendant in the conditional sale-deed of the 14th March, 1868. The main question between the parties is, then, whether the plaintiff can redeem his property by the mere payment of the principal debt with the interest of one, that is, the last year only: or whether he is bound to pay the interest due for the years 1280 and 1281 fasli also, with additional interest on the aggregate of these sums from the date of the expiry of the term of the mortgage onward. The Court of first instance decided this issue in favour of the plaintiff and the defendant appeals to us against this decree. The reasons which led the Subordinate Judge to his decision are as follows:—

"The property in dispute has been conditionally sold for Rs. 11,200 for a term of seven years on condition that 'I shall pay annually Rs. 1,680, interest at Rs. 1-4-0 per cent. per mensem, from my pocket and my property, with this detail—Rs. 1,680 on Chait Badi 6th, 1276 fasli; Rs. 1,680 on Chait Badi 6th, 1277 fasli; Rs. 1,680 on Chait Badi 6th, 1278 fasli; Rs. 1,680 on Chait Badi 6th, 1279 fasli; Rs. 1,680 on Chait Badi 6th, 1280 fasli; and Rs. 1,680 on Chait Badi 1281 fasli.'

"It should be observed here that by the word '*Jeadad*' (property) is meant property other than the one under mortgage; because the mortgagee himself has written in his application for fore-[466]closure, filed on the 23rd April, 1877, that the mortgagor has promised, that in the event of his not paying the yearly interest, the amount should be realized from his person and other property. It must also be mentioned here that the defendant, having instituted two suits, has realized interest for four

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years from the plaintiff or the person whom he represents (*vide* the two decrees produced by the plaintiff). The words that follow the above quotation are these :—'After paying Rs. 11,200 principal, and Rs. 1,680 interest for the last year, on Chait Badi 6th, 1282 fasli, I shall take back this document: the amount of interest paid shall be indorsed on the deed.' On reading these words—'In case of failure to pay Rs. 11,200 principal and Rs. 1,680 interest for the last year payable on Chait Badi 6th, 1282 fasli, in all Rs. 12,880, the mortgaged share shall be absolutely sold'—I am of opinion that the amount fixed for converting the mortgage into an absolute sale is the sum of Rs. 12,880. Besides that, the sale is not to become absolute either for interest or compound interest or interest for the year of grace. Therefore when the mortgagor has deposited the said amount, he is entitled to redeem the mortgage. This opinion of the Court is based on the following grounds :—(i) It should be seen as to what was the intention of the parties at the time of the execution of the document. Two respectable officials, witnesses to the document, one a pleader and the other a mukhtar, testify on oath that the payment of interest at the time of redemption was not stipulated. (ii) The act of the defendant, *viz.*, his realization of interest by bringing a suit, goes to show that the liability of interest, of whatever kind it may be, will not interfere with the redemption of mortgage. (iii) The above-mentioned application for foreclosure of the defendant goes to show that the person and other property of the mortgagor were already held liable for every kind of interest. The property in question is free from that liability and should be redeemed on the payment of Rs. 12,880 only. (iv) When there is no such condition in the deed that the estate should be foreclosed for the principal and interest in addition to the interest for one year, then how can the defendant charge other interest also on the property in question besides the interest for that one year. (v) It is pointed out that the last clause is—'*Jab zar asl mai sud ki ada karen, to hissa mar-* [467] *huna infikak kara len.*' 'The share mortgaged shall be redeemed on payment of principal with interest.' The condition is by no means detrimental to the plaintiff; because this condition clearly relates to the redemption within seven years, the appointed term. After seven years the same remainder, Rs. 11,200 principal, and interest Rs. 1,680, interest for the last year, have been fixed for redemption of mortgage."

The deed of mortgage in question runs as follows :—

"I, Zahur Ali Khan...............hereby declare that, whereas the sum of Rs. 5,100 is due by me under the decrees dated the 19th March, 1862, and 28th June, 1865, of the Court of the Subordinate Judge, and 2nd July, 1866, of the appellate Court, together with interest and costs, to Surju Prasad, banker,............and in addition to the above sum, I have borrowed in cash Rs. 6,100.........from the said banker, the aggregate amount of the sums due under the decrees and the sum borrowed now being Rs. 11,200, half of which is Rs. 5,600, I have, in lieu of this money, made a temporary sale for seven years of a five annas four pies share in each of the villages Sainduria, Bhagna, and Birakalian, and the eight annas share of the village Birsa, tappa Khera, pargana Haveli, Gorakhpur, which is under my proprietary possession, together with all the produce of water and forest, &c., *i.e.*, all my rights and interests, on this condition, that I shall pay Rs. 1,680 a year as interest of the aforesaid money, at the rate of Re. 1-4-0 per mensem, with this detail—that I shall pay Rs. 1,680 on Chait Badi 6th, 1276 fasli; Rs. 1,680 on Chait Badi 6th, 1277 fasli; Rs. 1,680 on Chait Badi 6th, 1278 fasli; Rs. 1,680 on Chait Badi 6th, 1279

fasli; Rs. 1,680 on Chait Badi 6th, 1280 fasli; Rs. 1,680 on Chait Badi 6th, 1281 fasli, from my person and property; that I shall pay Rs. 11,200 on account of principal and Rs. 1,680 as interest for the last year on Chait Badi 6th, 1282 fasli, and take back the deed; that any sum that I shall pay in part or whole of the annual interest, I shall cause to be entered on the back of this deed; that should I make objection of payment having been made without being entered on the back of this deed, it shall be held invalid and inadmissible; that should I fail to pay on the promised date Rs. 1,680, on account of the annual interest agreed [468] and detailed as above, then I shall pay interest to the mortgagee from the date of the default in payment, *i.e.*, from Chait Badi 6th of each year, also on this item of Rs. 1,680, at the rate of Re. 1-4-0 per mensem up to the day of realization. The mortgagee shall have power to recover from my person and property, in any manner he likes, the interest agreed to for the past years, together with interest thereon also, within the term of seven years, according to my promise. I further promise, that in case a suit is preferred in Court for the interest agreed upon, I shall then be bound to pay interest thereon from the date of the decree up to the day of realization also, at the rate of Re. 1-4-0 per mensem. Should I succeed in arranging for the money within the promised date, I shall then pay up the principal amount also, and cause a receipt to be entered on the back of this deed, and a reduction shall be made in the sum of Rs. 1,680, in the proportion of the interest of the principal paid by me at the rate of Re. 1-4-0 per cent. per mensem. If any sum remains unpaid, after deducting the payments made in Rs. 11,200 principal and Rs. 1,680 the interest for the last year, *i.e.*, Chait Badi 6th, 1282 fasli, or altogether Rs. 12,880, the sale of the mortgaged shares shall then, regardless of the circumstance that anything has been paid, become absolute in lieu of the said money. After that, I shall have no connection left, and the aforesaid banker, the mortgagee, having duly obtained the mutation of names in his favour in reference to the mortgaged property, shall take possession as proprietor. Should I, the declarant, pay the principal with interest at any time within the term of seven years, I shall take back this deed. In this I or my heirs have no objection, nor shall we have any. I have accordingly executed this deed of temporary sale, in order that it may be of use in time of need. Dated the 14th March, 1868, corresponding with Chait Badi 6th, 1275 fasli. Drawn up at the *kothī* of the aforesaid banker."

It was pleaded for the appellant "that the Subordinate Judge is wrong in holding that the payment of Rs. 12,880 is sufficient to save the equity of redemption; that according to the terms of the deed and to law the appellant is entitled to get principal and interest (after deducting payments) till the end of the year of grace, and as respondent has not paid it, the suit should have [469] been dismissed; and that the lower Court was not right in holding that from the wording of the contract or otherwise the interest was claimable only from the person and other property of the mortgagor, and the heirs of the mortgagor can sue for redemption without paying all the interest due to the mortgagee."

In support of these pleas the learned counsel for the appellant argued that the plain object of the deed of conditional sale was to secure the full and punctual payment of the principal and interest due on the contract, the villages hypothecated being security for both charges alike, and that this part of the bond is not to be avoided or defeated by the mere circumstance that the creditor enjoyed under it the additional power of suing year by year for intermediate arrears of interest, if any

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occurred, during the currency of the term of the mortgage, the person and whole estate of the debtor being liable for the payment of such claims for interest. No doubt the creditor would not in his own interest, if for no other cause, execute decrees he might obtain for intermediate interest against the property conditionally sold to him, for he might thereby depreciate the value or even deprive himself of the property which he had conditionally purchased, and possibly hoped to acquire under the sale-deed before us. But not the less on this account was the mortgaged property liable for interest due in years other than the last year of the term specified in the deed. Much stress was laid on the concluding provision of the deed that "should I, the declarant, pay the principal with interest at any time within the term of seven years, I shall take back this deed," that is to say, shall redeem the villages conditionally sold. But it is inconsistent with common sense and fairness to suppose that it was intended by the parties, that if the debtor acted with extreme promptitude and punctuality in paying up his debt, he could not redeem his property except by paying the whole principal debt with all the interest due on it at the moment of payment, while if he neglected to pay a single rupee for the first six years of the term, he could rid himself of his liabilities, *quoad* the hypothecated estate, by the mere payment of the principal debt with the last year's interest only added thereto. It was further urged that the parties, or at least the creditor, could not have intended that the interest payable under the deed **[470]** should be recoverable only by separate suit, and not as a charge on the hypothecated property, or he would not have forborne for many years to apply that, his sole remedy, and thus precluded himself by limitation from recovering more than an inconsiderable portion of his large claim on this account. And lastly, it was contended on this part of the subject that, even accepting the debtor's reading of the bond, the deposit by him of the principal debt, with Rs. 1,680 only as interest, is insufficient to entitle him to redemption; for there is no misconception or controversy about the fact that compound interest on this last year's Rs. 1,680 was due under the bond on the date of the deposit, by virtue of the provision that "should I fail to pay on the promised date Rs. 1,680 on account of the annual interest agreed and detailed as above, then I shall pay interest to the mortgagee from the date of the default in payment, *i.e.*, from Chait Badi 6th of each year, also on this item of Rs. 1,680, at the rate of Re. 1 4 per mensem up to the date of realization." It cannot be pretended that this provision did not apply to the interest due for the last year of the term as much as to the interest for any other year of the seven, and it is indisputable that Rs. 1,680 payable for 1282 fasli was not paid on the Chait Badi 6th of that year; compound interest was therefore plainly payable on this sum for all the time that intervened between Chait Badi 6th, 1282 fasli, and the 17th January, 1881, when the plaintiff deposited Rs. 11,200 *plus* Rs. 1,680 only as redemption money for his conditionally sold estate. There could be no doubt that all the interest for the last year (1282) was charged on the hypothecated estate, but there is no express condition to the contrary to be found in the deed with respect to the interest for other years of the term. Finally, on behalf of the appellant attention was directed to the evidence on the record showing that the conditional vendee applied to the District Court for foreclosure promptly after the expiry of the term of the deed in April, 1875, a month after Chait Badi 6th, 1282 fasli. But he was defeated by the mortgagor in all his repeated attempts to effect a valid service of notice

on them till January, 1880. The mortgagors, on the other hand, made no attempt to pay up any portion of their debt till 1881, as mentioned above.

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[471] In reply for the respondent it was contended that the gist of the contract between the parties on the subject of redemption and foreclosure of the estate lies in the paragraph beginning on the 13th line from the end of the bond, and running "if any sum remains unpaid, after deducting the payments made in Rs. 11,200 principal and Rs. 1,680 interest for the last year, *i.e.*, Chait Badi 6th, 1282 fasli, or altogether Rs. 12,880, the sale of the mortgaged shares shall then, regardless of the circumstance that anything has been paid, become absolute in lieu of the said money." This implies, it was urged, that non-payment of any part of the definite sum of Rs. 12,880, being the principal debt *plus* the last year's simple interest only, would alone and of itself entitle the vendee to claim the estate as absolutely purchased: and equally that the payment of this sum alone would suffice to redeem the estate before final foreclosure by the vendee.

The learned counsel for the respondent also laid much stress on a petition filed by the appellant on the 23rd April, 1875, the first of a long series of similar petitions, in which he sought for foreclosure on the terms of his sale-deed of the 14th March, 1868, and explained his view of its purport and conditions. This petition ran as follows:—"Petition of Babu Surju Prasad, banker, dated 23rd April, 1875:—Application for foreclosure in respect of 5 annas 4 pies share in each of the mauzas Sainduria, Bhagna, Birakalian and 8 annas share in mauza Birsa, pargana Haveli, Gorakhpur, together with water and forest produce, &c., the zemindari rights appertaining thereto, in lieu of Rs. 17,304-7-0 being the principal, interest, and costs of Court, on the basis of a conditional sale-deed dated 14th March, 1868, under s. 8 of Regulation XVII of 1806. On 14th March, 1868, the defendant executed a conditional sale-deed in respect of the aforesaid shares for Rs. 11,200 in favour of the plaintiff, and got the same registered. It was stipulated in the deed that Rs. 1,680 on account of yearly interest shall continue to be paid up to 6 years, on Chait Badi 6th of each year. The defendant shall pay Rs. 11,200 principal and Rs. 1,680 yearly interest on account of the 7th year, total Rs. 12,880, on Chait Badi 6th, 1282 fasli, and get the deed returned. If he does not pay the yearly interest, or portion of it remains unpaid, [472] the mortgagee shall be empowered to realize, even within 7 years, the yearly interest together with interest at Re. 1-4-0 per cent. from the date of the expiry of the term of payment of interest from the defendant and his other properties. In case of the principal or interest remaining unpaid at the end of the year, the sale of the shares shall become absolute. Notwithstanding the expiry of the term and the making of demand the defendant has not paid a single pice on account of principal or interest. The plaintiff has realized from defendant, by means of a suit, yearly interest, from 1276 to 1279 fasli, and the balance has not yet been realized. He (plaintiff) therefore presents this petition and prays that the Court will issue usual orders. If the defendant shall not pay within one year, the term fixed by the Court, the mortgage amount together with interest and costs of Court and interest up to the date of depositing the money, the plaintiff shall be entitled to get a foreclosure certificate."

In this petition it was contended the creditor himself explained the stipulations of the deed to be that the interest for the first six years was

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to stand on a different footing from that of the last year: that the interest for six years, if unpaid, was to be realized, by suits brought "even within 7 years, from the defendant and his *other* properties;" whereas "the defendant was to pay Rs. 11,200 principal and Rs. 1,680 yearly interest on account of the 7th year, total Rs. 12,880, on Chait Badi 6th, 1282 fasli, and get the deed returned." It was also argued that this condition as to redemption by payment of the specified and limited sum of Rs. 12,880 is a sufficient answer, as the Subordinate Judge held it to be, to the appellant's contention on the subject of the compound interest payable on the Rs. 1,680 for 1282 fasli: that charge, the respondent says, may have been legitimately exigible from him, but by way of suit, and chargeable on his "other property," not secured on the conditionally sold estate. The word "other" as qualifying "estate" does not stand in the deed of sale and is for the first time imported in this petition.

It cannot be denied that the deed, the subject of so much controversy, contains passages which seem to involve almost necessary inconsistencies in their application, and is marked by ambi-[473]guities which it is hard to regard as other than intentional on the part of the framer, if not of the executant of the document. But having given our best consideration to all the contents of the instrument, and looking to the obvious practical absurdity that would result from our adopting the respondent's reading, and having regard to the probabilities as well as the plain equities of the case, we have come to the conclusion that the Court below has misconstrued the instrument, and that the appellant's contention must be allowed. We think that the provision that redemption was obtainable by payment of the principal, or such part of it as might be due, with the seventh year's interest thereon, was based on the hypothesis that the conditions as to antecedent payments had been duly fulfilled, whether by voluntary payment made by the debtor, or under decrees obtained in that behalf against him by the creditor in the exercise of the special and additional powers secured to him to that effect under the deed. And we pay little heed to the appellant's petition of the 23rd April, 1875, the terms of which cannot operate to estop him from pleading now a different view of the terms of his bond, and are quite immaterial to us in our task of ascertaining the true meaning and force of the document in question. Indeed, if the language of this document is to be held to be on its face ambiguous, we would be precluded from using the appellant's petition or any other evidence to show the meaning of the document in dispute, or supply its defects. In this view of the true meaning and effect of the conditional deed of sale, and of the merits of the case, we must, I think, hold that the deposit made by the plaintiff-respondent was insufficient to redeem the property, the subject of that deed, and dismiss his suit, setting aside the decree of the Court below, and decreeing this appeal with costs of both the Courts.

STUART, C.J.—This case has been very carefully examined by my colleague, Mr. Justice TYRRELL, and I substantially concur in his views of the facts and of the deed in suit, which is in form of a deed of conditional sale. The appeal is from the decree of the Subordinate Judge of Gorakhpur in the suit instituted in his Court for redemption from mortgage in the form of a conditional sale dated the 14th March, 1868. The suit is resisted by the defen-[474]dant on the ground that the full debt, including interest acknowledged by the mortgage-deed, has not been satisfied, and he had therefore applied for a foreclosure. The Subordinate

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Judge allowed the plaintiff's contention, and gave him a decree of redemption with costs, and from this decree the present appeal has been preferred.

The dispute between the parties depends on the construction to be put upon the conditional sale or mortgage, the material question being whether the property charged was meant to secure the payment of all the interest detailed in the deed as well as the principal sum, or whether, as acknowledged by the plaintiff, and found by the Subordinate Judge, payment of the principal sum of Rs. 11,200, together with Rs. 1,680, being the seventh or last year's interest of the mortgage term, these two sums, in fact, amounting altogether to Rs. 12,880, having been deposited by the plaintiff, was sufficient to warrant a decree of redemption in the suit.

The structure of the deed is very peculiar. It begins thus:—"I, Zahur Ali Khan........................do declare that Rs. 5,100, on account of certain decrees, with interest and costs, are due and payable by me to Surju Prasad, banker............That in addition to this I borrowed Rs. 6,100 for necessities and payment of the debts due.........from the said banker. That the decretal amount together with the money borrowed in cash at present amounts to Rs. 11,200, half of which is Rs. 5,600, and is due to and payable by me to Surju Prasad, the aforesaid banker. That in lieu of this amount I have made a conditional sale for a term of seven years (of property in land, and rights and interest therein) on condition that I will pay Rs. 1,680 on the 6th Badi Chait, 1276 fasli; Rs. 1,680 on 6th Badi Chait, 1277 fasli; Rs. 1,680 on 6th Badi Chait, 1278 fasli; Rs. 1,680 on 6th Badi Chait, 1279 fasli; Rs. 1,680 on 6th Badi Chait, 1280 fasli; and Rs. 1,680 on 6th Badi Chait, 1281 fasli; *that I will pay the principal Rs.* 11,200 *and Rs.* 1,680 *on account of interest for the last year on* 6*th Badi Chait*, 1282 *fasli, and take back the document*............Should I fail to pay Rs. 1,680, the annual interest detailed above at the stipulated period, I shall pay interest to the mortgagee on this Rs. [475] 1,680 also at Re. 1-4-0 per cent. per mensem, from the date of the expiry of the term, *i.e.*, 6th Badi Chait of every year to the date of payment. The mortgagee shall be at liberty to realize in any way he pleases interest calculated for the past years with interest thereon (*i.e.*, compound interest) from my person and property within the term of seven years also. I, the executant, do further declare that *if a suit be instituted for the interest* agreed upon, I and my property shall be liable to pay interest at Re. 1-4-0 per cent. per mensem from the date of the decree to that of realization."

It is unnecessary to make any remark on the distinct charge thus made on the property for the principal sum Rs. 11,200, but I agree with Mr. Justice TYRRELL, that the interest stipulated to be paid is also similarly covered. I have, however, arrived at such a conclusion respecting the interest not without considerable doubt and difficulty. The mortgage-deed is a very loosely expressed and a very inartificial document, and it is only by importing into it the well recognized principles of law applicable to such transactions that we can make it consistent with itself. It will thus be seen that while the principal sum is *per expressum* distinctly charged on the land, two remedies are given for the stipulated interest; in the contingency doubtless of the land proving insufficient for the recovery of both principal and interest. In the first place, although the interest is not so distinctly and unequivocally charged on the land as the principal sum undoubtedly is, I think that the legal effect of the

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structure of the deed is to secure the interest in a similar manner, and that it is therefore also an incumbrance on the property ; but, for a reason which is not stated, but which I have suggested, another remedy is given by the deed for the interest, and that remedy is to be available against the plaintiff's "person and property." The Subordinate Judge points out that the word "property" here is denoted in the deed by the word "*jaedad*," a term which I believe I am right in saying applies to property generally, moveable as well as immoveable. I have looked into the vernacular deed on the record, and the words there are "*apni za to jaedadse ada kiya karengen*"—that is, literally in English, "from my person and (other) property shall continue to pay." The word "other" in connection with "property" does not appear in the [476] vernacular, but there can be no doubt that the term "*jaedad*" means property of any kind, and not merely property in land. The double remedy therefore placed in the hands of the mortgagee for the interest is thus apparent; the land is a good security for the principal sum, and it is also intended to cover the interest, but it should be insufficient for that purpose, recovery against the "*jaedad*" is given by a separate suit. This is not in so many words set out in the deed itself, but it is in my judgment the resulting effect of its entire provisions on the subject of interest taken together. This conclusion sufficiently appears from the following clauses in the deed. After explaining what the principal sum of Rs. 11,200 is made up of, it proceeds to state "that in lieu of this amount I have made a conditional sale for a term of seven years................*on condition* that I will pay" the interest as before shown. This undertaking does, as a matter of contract, in my judgment, extend the land security over all the interest, making it recoverable under the deed along with the principal debt. There is however, a stipulation afterwards that "the mortgagee shall be at liberty to realize in any way he pleases interest, calculated for the past seven years, with interest thereon (*i.e.*, compound interest), from my person and property within the term of seven years also, I, the executant, do further declare, that *if a suit be instituted for the interest agreed upon*, I and my property shall be liable to pay interest at Re. 1-4-0 per cent. per mensem from the date of the decree to that of realization." This is clearly a separate remedy provided for the interest, or any portion of it, that may remain due, and is to be available, as I have before explained, against the mortgagor's "*jaedad*," not in supersession of the remedy against the land, but as an addition or supplement to that remedy, the intention being that the whole debt, including principal and interest, along with compound interest, shall be paid before the conditional vendor can be relieved of his mortgage liability, the deed in conclusion stipulating that "on payment of the principal with interest within the term of seven years, I shall take back this deed." Such is the only reading I can put on the contract so as to make it workable in any reasonable sense. In fact separate suits were instituted, and recovery by them had, for the interest respectively due for the four years from 1276 fasli to 1279 fasli inclusive, there remaining [477] outstanding the interest for 1280, 1281, and 1282 fasli. The only other stipulation in the deed that might be argued to throw any doubt on the construction we have put upon its terms is that which provides for the payment of the principal sum and the last year's interest in these words:—"That I will pay the principal Rs. 11,200, and Rs. 1,680 on account of interest for the last year, on 6th Badi Chait, 1282 fasli, and take back the document." This stipulation has so seriously affected the mind of the Subordinate Judge that,

disregarding all the other considerations to which we have adverted, he has given the plaintiff a decree for redemption in respect of it alone. being of opinion that the last year's interest was on a different footing from the other interest previously detailed in the deed. This may be to some extent a plausible, but it is merely a superficial, view of the contract. It may have been so intended and desired, at least, by the plaintiff, although why it is not easy to understand, for it is not easy to understand why the last year's interest should be on a different footing from that payable for the preceding six years; or to be more exact, for the two years immediately preceding the payment for the seventh year, 1282 fasli. Such last interest, however, was on the terms of the deed no more a charge on the mortgaged land than the interest for the previous years. The deed, as I have already observed, is very inartificially and unskilfully prepared, and it is difficult to unravel its real meaning on ordinary principles of interpretation. But I think that the stipulations in it respecting interest were framed on the assumption that such interest would be punctually paid at the periods mentioned in the deed, and that being so the provision respecting the last year's interest was only then to operate, and that it was not intended that the last year's interest should be on a different footing from the other interest, the true intention being that all the interest having been paid together with the principal sum the transaction would be closed, and the conditional vendor might then, but only then, "take back his document."

The result is that, differing from the Subordinate Judge, we must allow this appeal, with, I regret to say, costs of both Courts, for considering the peculiarity of the case and the difficulty attending the consideration and construction of the deed, I would have [478] been glad to have relieved the plaintiff of the defendant's costs; but under the circumstances of the case, and having regard to our own practice, I am reluctantly obliged to consent that our order should be made in the usual term as to costs.

Appeal allowed.

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FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

ALDWELL (*Plaintiff*) v. ILAHI BAKHSH AND ANOTHER (*Defendants*).*
[5th February, 1883.]

Benami purchase—Suit against certified purchaser—Grant of sale-certificate after institution of suit—Civil Procedure Code, s. 317—Certified purchaser.

A sued *K*, the purchaser of certain immoveable property sold in execution of a decree under Act VIII of 1859, for a declaration that *K* had purchased such property on her behalf. The suit was instituted after Act VIII of 1859 was repealed and Act X of 1877 came into force. When the suit was instituted *K* did not hold a sale-certificate. After it was instituted he applied for and obtained a sale-certificate under s. 317 of Act X of 1877. *Held*, that, when the suit was instituted, it was maintainable, as, the defendant not being a certified purchaser under s. 260 of Act VIII of 1859, that section did not apply; and that when the

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* First Appeal No. 107 of 1881, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 17th September, 1881.

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defendant obtained a certificate under s. 317 of Act X of 1877, he became a certified purchaser, and the suit would only be maintainable if the plaintiff made out a case falling within the provisions of the last part of s. 317.

[R., 23 A. 175 (177) = A.W.N. (1901) 44; 17 M. 282 (284).]

THIS was a reference to the Full Bench by BRODHURST and MAHMOOD, JJ. The facts of the case and the points of law referred are stated in the order of reference, which was as follows:—

MAHMOOD, J.—On the 15th January, 1869, the plaintiff-appellant executed a usufructuary mortgage of her share in four villages in favour of Ilahi Bakhsh, defendant, for a consideration of Rs. 20,000. The term of the mortgage was two years, and the mortgagee is said to be in possession under the mortgage. Subsequently, in execution of decrees held by third parties against the plaintiff, mortgagor, her rights and interests in the mortgaged villages were sold by public auction, and purchased by Abdul Karim, defendant (brother of defendant Ilahi Bakhsh), on the 20th August, 1869, and 20th March, 1871, and the sales were confirmed on the [479] 26th November, 1869, and 21st April, 1871, respectively. It also appears that in virtue of the sales mutation of names was effected in the Government revenue records, substituting the name of the auction-purchaser, Abdul Karim, for that of the plaintiff.

The present suit was instituted by the plaintiff on the 27th June, 1881, on the allegation that the full consideration of the mortgage was not paid to her by the mortgagee-defendant Ilahi Bakhsh; that he only paid Rs. 10,352 and retained the balance of the consideration-money; that out of such balance (Rs. 9,648) he expended Rs. 1,950 in purchasing the equity of redemption, ostensibly in the name of his brother, Abdul Karim, defendant, but in reality for the plaintiff herself; that she had thus received only Rs. 12,302 out of the Rs. 20,000 consideration-money of the mortgage; that so far as she was aware, the mortgagee-defendant Ilahi Bakhsh had, during this possession, realized profits from the mortgaged property sufficient to pay off the mortgage-debt; and that she was, therefore, entitled to obtain possession of the mortgaged property. On these allegations, the plaintiff prayed for two reliefs:—*first*, that the purchases made ostensibly by Abdul Karim, defendant, might be declared to have been made for her benefit and in her favour; and *secondly*, to obtain possession of the property in suit, by redemption of mortgage, on payment of such sum, if any, as might be found due by her to the defendant Ilahi Bakhsh the mortgagee—the term of the mortgage having expired two years after its execution.

Among other pleas urged in defence, it was pleaded by defendant Ilahi Bakhsh that the plaintiff's rights and interest having been purchased by defendant Abdul Karim, she had no right to maintain the suit. Defendant Abdul Karim also set up many pleas, but the one with which we are at present concerned is the plea based upon the provisions of s. 260, Act VIII of 1859, and s. 317 of the present Civil Procedure Code, which he contended barred the suit. He further pleaded that the purchases were made on his own behalf and with his own money.

The lower Court held that the plaintiff in her plaint implied that she had acquiesced in the purchases made in the name of Abdul Karim defendant; that she did not allege that his con-[480]duct was fraudulent, or that "he caused his own name to be recorded without her knowledge." On these grounds, the lower Court, without going into the merits of the case, dismissed the suit, as barred by s. 260 of Act VIII of 1859, and s. 317 of the present Civil Procedure Code.

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The grounds of appeal impugn the view of the law on which the lower Court's judgment is entirely based.

When the case was first argued before us, the record of the case as well as the judgment of the lower Court failed to show whether Abdul Karim defendant, held any such certificates of sale, in respect of the purchases of 20th August, 1869, and 20th March, 1871, as are provided by s. 259 of Act VIII of 1859, which was then in force. We, therefore, by our order of 22nd May, 1882, remanded the case for determination of the question, and the lower Court has found that no certificates of sale were ever obtained by the defendant Abdul Karim. It appears, however, that since our order of remand defendant Abdul Karim made an application to the Court, by whose order the sales in question had taken place, for obtaining certificates of sale, and that Court, relying upon a ruling of the Madras High Court in *Kylasa Goundan* v. *Ramasami Ayyan* (1), passed an order on the 7th July, 1882, granting the certificates prayed for. Those certificates were subsequently registered, and at the last hearing an application was made to us on behalf of defendant Abdul Karim praying that the certificates might be admitted and placed on the record, as they did not exist when the case was tried in the lower Court. In view of the ruling of the Calcutta High Court in the case of *Bunda Ali Khan* v. *Bibee Ameerun* (2), we granted the application, and directed the certificates, and an attested copy of the order of the Court granting them, to be made part of the record.

On the authority of the ruling above referred to, it is contended on behalf of defendant Abdul Karim, respondent, that he must be regraded as a "*certified purchaser*," within the meaning of s. 260 of Act VIII of 1859, as well as of s. 317 of the present Civil Procedure Code, although the certificates now produced were not obtained till after the suit had been disposed of by the Court of [481] first instance, and the case had been remanded by this Court. It is further contended by the learned counsel for the respondent, that the certificates now produced, having been granted under s. 316 of the present Civil Procedure Code, "the date of the confirmation of the sale" must be taken to be the date of the certificates, and "the title to the property sold" should be taken to have vested in the purchaser from such date, and that the suit, being governed by s. 317 of the Civil Procedure Code, must be held to have been rightly dismissed by the lower Court as barred by that section. On the other hand, the plaintiff, in her second ground of appeal, has urged the contention, that the lower Court was wrong in applying s. 260 of the old Civil Procedure Code, which has long since been repealed by Act X of 1877.

We do not consider the determination of the question thus raised to be of any consequence in this case, for we are of opinion that, so far as the point now before us is concerned, s. 317 of the present Civil Procedure Code has not altered in principle the rule of law contained in s. 260 of the old Code. However, as the argument upon this point has been pressed upon us, we express our opinion, that the present suit, so far as the plea in bar is concerned, must be held to be governed by s. 317 of the present Code, although the auction-sales, at which defendant Abdul Karim purchased the property, took place when Act VIII of 1859 was in force. The rules of law which bar the entertainment of suits are matters of procedure, relating to the remedy, *ad litis ordinationem*, and not to the merits, *ad litis decisionem*. Such

(1) 4 M. 172. (2) 25 W.R. 493.

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rules are binding upon the Courts of Justice, only so long as they are not repealed by the Legislature. Once they are repealed they no longer govern the procedure of the Courts, and cannot effect the hearing of suits or of any other form of litigation, unless the new statute has especially saved the operation of the repealed statute. There is, however, no such saving clause in the present Civil Procedure Code, as would render s. 260 of the old Code applicable as a matter of procedure to suits instituted since the repeal of the old Code. The question raised in this case, so far as it relates to the plea in bar of the suit, must be determined according to the provisions of s. 317 of the present Code.

[482] The principle of the ruling of the Calcutta High Court in the case of *Bunda Ali Khan* (1), if followed to its full extent, would lead to the conclusion, that an auction-purchaser in whose favour the sale has been confirmed, but who has not obtained a certificate according to the provisions of law, can, by obtaining the certificate during pendency of a suit, prevent the trial of the suit on the merits, even though such suit be one in which the entire question as to the rights derived under the auction-purchase is the subject of controversy. This, however, seems to us a doubtful extension of the rule contained in s. 317 of the present Civil Procedure Code, which in all essentials lays down the same rule as s. 260 of the old Code.

Another point, not noticed in the lower Court's judgment and urged but faintly on behalf of the respondent in this Court, seems to us to involve some difficulty. In ordinary cases of this nature, which have come before the Courts, the person claiming to be the real purchaser of the property sold in execution of a decree is usually a stranger claiming the benefit of the purchase, and alleging the ostensible purchaser to be a mere "*benamidar*." In the present case, the plaintiff herself was the judgment-debtor, and it was her own property, which was sold in the auction-sales at which defendant Abdul Karim purchased. This being so, the claim could proceed only on the allegation that, under an arrangement between the parties, the plaintiff (judgment-debtor) purchased her own rights and interests in the name of defendant Abdul Karim, *benami*, a transaction which could have no other object than fraud upon the judgment-creditors, in execution of whose decrees the property was sold. The question, therefore, arises, whether even if the plaintiff's allegations be accepted to be true, she can seek the aid of the Courts of Justice to remove an impediment created by her own fraud. The tendency of the earlier rulings to be found in the published reports seems to be "that no title could be founded upon fraud, and that if a man chose to convey his property to another, admittedly for the purpose of deceiving the public, defrauding his creditors, and avoiding the ends of justice, he disentitled himself to any relief, even though no person had been [483] defrauded." In later cases, however, these principles do not appear to have been followed, and "the original owner of property has been allowed to plead that the transaction was fraudulent, the reason being that the real rights of the parties are to be ascertained, and if the plea were disallowed, the Courts would assist the *benamidar* to obtain property by means of fraud." The reported cases, however, relate to *benami* alienations, privately executed, but the principle of equity upon which the rule is based would seem to be applicable also to purchases in which the judgment-debtor himself has purchased

(1) 25 W.R. 493.

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his own property in the name of another *benami*, the reason of the rule, *viz.*, fraud, being common to both classes of cases. This distinctive feature in this case, no doubt, makes the case much stronger against the plaintiff than it would otherwise have been. In connection with this subject, we may notice the observations of the Lords of the Privy Council in the case of *Buhuns Kowur* v. *Buhooree Lall* (1), in which the provisions of s. 260 of the old Civil Procedure Code were considered. Those observations, however (*vide* page 525), were apparently meant to apply to cases in which the defendant is the *certified* auction-purchaser in possession at the date of the suit, whilst in the present case the question is, whether defendant Abdul Karim is such *certified* purchaser.

We think that both the points above noticed are of considerable importance, and it is desirable that they should be settled by an authoritative ruling of the whole Court. We refer the following questions to the Full Bench :—

(i) Is an auction-purchaser, in whose favour the sale was confirmed, but who did not obtain a certificate of sale till after the commencement of a suit, concerning the title to the property under the purchase, a "certified purchaser" within the meaning of s. 317 of the Civil Procedure Code, so as to bar the entertainment of the suit against such purchaser? (ii) If not, can the judgment-debtor, whose rights and interests were sold in execution of decree, maintain a suit against such auction-purchaser on the ground that the purchase was made *benami* and on behalf of such judgment-debtor?

[484] We may add that it will perhaps be convenient to consider this reference along with the reference to the Full Bench made by us in Second Appeal No. 190 of 1882 (2).

Mr. *Saunders*, for the appellant.

Mr. *Conlan* and Pandit *Bishambhar Nath*, for the respondents.

The Full Bench delivered the following opinion :—

OPINION.

STUART, C.J., and STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ.—When the suit was instituted it was maintainable as against defendant, for s. 260, Act VIII of 1859, did not apply, as the purchaser was not a certified purchaser under that section. When defendant duly obtained a certificate under s. 317, Act X of 1877, he became a certified purchaser, and the suit will only be maintainable if the plaintiff makes out a case falling within the provisions of the last part of s. 317. With these remarks the case will go before the Division Bench for disposal.

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(1) 14 M.I.A. 496.

(2) 5 A. 305.

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5 A. 484 = 3 A.W.N. (1883) 62 = 8 Ind. Jur. 204.

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APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Brodhurst.

NAND RAM AND ANOTHER (*Defendants*) *v.* SITLA PRASAD (*Plaintiff*).*
RAM PRASAD (*Defendant*) *v.* SITLA PRASAD (*Plaintiff*).†
[1st March, 1883.]

Transfer of hundi—Accommodation bill—Transferees for value—Liability of party accommodated.

P drew a hundi on *S* (which *S* accepted for *P*'s accommodation), which he transferred for value to *B*, who transferred it for value to *C*, who transferred it for value to *R*. *N*, at *R*'s request, and on his behalf, presented the hundi to *S* for payment, and *S* paid it. *Held* that *S* was entitled to recover the amount of the hundi from *P*, but not from *N*. *Reynolds* v. *Doyle* (1), referred to.

THE facts of these cases appeared to be that the partners of a firm known as Bachi Lal Sheorakhan Lal applied to the defendant Ram Prasad, the owner of a firm known as Bhaya Ram Chutta Ram, for a hundi for Rs. 800. Ram Prasad accordingly **[485]** drew a hundi for the required amount, payable to bearer eleven days after date, on Suraj Prasad, the plaintiff in this suit, by whom the hundi was subsequently accepted. The defendant Ram Prasad handed over the hundi to Bachai Lal and Sheorakhan Lal who paid him the money for it. Bachai Lal and Sheorakhan Lal sold the hundi to a firm known as Chunni Lal Kishen Das, who again transferred it for value received to a firm called Ram Charan Lal Ramphal. Ramphal, as representative of that firm, gave the hundi to the defendants Nand Ram and Babu Ram. The hundi was finally presented by a servant of the defendants Nand Ram and Babu Ram to the plaintiff Suraj Prasad, who paid the amount. Nand Ram and Babu Ram entered this transaction in their books as a payment to the credit of Ramphal. Suraj Prasad presented the hundi to the drawer Ram Prasad; and on his declining to pay the amount, brought the present suit against Nand Ram, Babu Ram, Ram Prasad, Ram Charan Lal and Ramphal for the amount of the hundi. The Court of first instance gave the plaintiff a decree against Nand Ram and Babu Ram only. From this decree Suraj Prasad, Nand Ram and Babu Ram appealed; the lower appellate Court dismissed the appeal of Nand Ram and Babu Ram and gave Suraj Prasad a decree against Ram Prasad. Ram Prasad appealed to the High Court, as did also Nand Ram and Babu Ram. Before the appeals came on for hearing Suraj Prasad died, and his infant son, Sitla Prasad, was made respondent in the appeals in the place of the deceased. The appeals were heard together.

Mr. *Howell* and Munshi *Sukh Ram*, for the appellant Ram Prasad.

Pandit *Ajudhia Nath*, for the appellants Nand Ram and Babu Ram.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the respondent.

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* Second Appeal No. 511 of 1881, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 23rd February, 1881, modifying a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 30th March, 1880.

† Second Appeal No. 558 of 1881, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 23rd February, 1881, modifying a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 30th March, 1880.

(1) 1 M. & G. 2 Scott, N. R. 45.

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The Court (STUART, C.J. and BRODHURST, J.) remanded the case for the trial of the issues mentioned in the order of remand. The order of remand was as follows :—

STUART, C.J. (after stating the facts as set forth above continued) :—Under these circumstances it is clear that no suit will lie against those defendants (Nand Ram and Babu Ram) who are [486] indorsees or holders for value, for they got the hundi into their hands in the way of business, after paying the full consideration for it, and they were thus discharged from all liability in respect of it. We are not, however, sure whether the position of the defendants Nand Ram and Babu Ram is really such as we have explained, but if the facts be as we have stated, then these persons were clearly holders for value, and entitled to act as they did, and to receive the money. It would be satisfactory, however, to have some further information respecting them and their business transactions with Ramphal, so as to make it clear, one way or another, that they were or were not *bona fide* holders of the hundi for Rs. 800. The relative positions in the matter, moreover, of the plaintiff, Suraj Prasad, the drawee, and Ram Prasad, the drawer, is also not clear; and it ought to be ascertained whether the transaction between them was a *bona fide* one for value, or whether the hundi as between them was really in the nature of an accommodation bill. We therefore remand the case for distinct findings on the question whether the plaintiff, as drawee, accepted the hundi for the full value received by him or whether it represented no business transaction between them, and was in fact a mere accommodation bill. Reverting also to the position in the case of Nand Ram and Babu Ram, we must have information as to their dealings with Ramphal, and whether the Rs. 800 which was paid by the plaintiff to their servant for them was due, or any portion of it was due, and how much, in respect of such dealings.

The lower appellate Court found on these issues that the plaintiff did not receive full value for the hundi, which appeared to have been cashed simply as an accommodation to the defendant Ram Prasad; and that the Rs. 800 were not realized by Nand Ram and Babu Ram in payment of any sums due to them by Ramphal, but that they had simply, as bankers, got the hundi cashed at the request of Ramphal, and held the amount for him for about two days.

On the return of these findings the following judgments were delivered in the appeals :—

JUDGMENTS.

STUART, C.J., and BRODHURST, J.—The findings on our remand in this case are against the defendant (appellant) Ram Prasad. His resistance to the plaintiff's claim is not very intelligible, if indeed [487] it was not palpably dishonest, for while the original drawing and accepting of the hundi between the plaintiff and him was of an accommodation character, he yet took the value of it from the first holders, Bachai Lal and Sheorakhan Lal, and kept the money. Therefore, on the plaintiff being ultimately called upon to pay, and paying the value covered by the hundi, he was bound to recoup the plaintiff, whose demand, under the circumstances in this suit, is a perfectly just one. This conclusion is clearly within the principle of the case of *Reynolds* v. *Doyle* (1), referred to on p. 130 of Byles' Treatise on Bills of Exchange, 10th ed., where it

(1) 1 M. & G. 2 Scott, N. R. 45.

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was laid down—" A party who procures another to lend his acceptance, thereby engages either himself to take up the bill, or else within a reasonable time before the bill becomes due, to provide the accommodation acceptor with funds for so doing, or, lastly, to indemnify the accommodation acceptor against the consequences of non-payment." Ram Prasad's appeal is therefore dismissed with costs.

STUART, C.J., and BRODHURST, J.—This appeal must be allowed. Having regard to the findings on our order of remand, the defendants Nand Ram and Babu Ram incurred no liability to the plaintiff. They merely acted as temporary bankers of Ramphal, giving him certain banking facilities for partially cashing the hundi. In fact, they appear to have held the hundi for two days, at the end of which time they returned it to him with the balance of the money. Under these circumstances Nand Ram and Babu Ram cannot be said to have incurred any liability to the plaintiff. This appeal therefore prevails, and the suit against these defendants-appellants Nand Ram and Babu Ram must be, and is, dismissed with costs.

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5 A. 487 = 3 A.W.N. (1883) 63.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

THE COLLECTOR OF BENARES AS MANAGER ON BEHALF OF THE COURT OF WARDS OF THE ESTATE OF MASUMA BIBI (*Defendant*) v. SHEO PRASAD AND ANOTHER (*Plaintiffs*).* [2nd March, 1883.]

Disqualified proprietor—Power to enter into contracts—Act VIII of 1879, ss. 23, 24—*Act XIX of* 1873 (*N.-W P. Land Revenue Act*), s. 205.

A suit was brought against a disqualified proprietor for money due on a bond given while her property was under the superintendence of the Court of Wards. [488] The Collector was made a defendant to this suit " because the property of the defendant obligor had come under the superintendence of the Court of Wards before the execution of the bond. " *Held*, that the Collector's *status* in the suit, namely, as representative *ad litem* of the defendant, was sufficiently described to entitle him to raise the question of the legal capacity of the defendant to enter into the bond.

The mere disqualification of a proprietor to manage his estate does not carry with it a general and absolute disqualification to enter into any contracts at all.

Held, therefore, where a person whose property was under the superintendence of the Court of Wards, borrowed money, and gave a bond for the payment of the same, and was sued on the bond in the name of the Collector, that the Court was competent to make a decree against such disqualified proprietor.

THE plaintiff in this suit, represented by the respondents in this appeal, sued the defendants Nos. 1 to 4, that is to say, Masuma Bibi and Muhammad Hasan Khan, and his wife and son, for the amount of a loan secured by a personal bond, dated the 2nd December, 1876, making the Collector of Benares the 5th defendant, because, as stated in the 3rd paragraph of the plaint, "the property of defendants Nos. 1 to 4 had come under the control of the Court of Wards before the execution of the bond." The defence of the Collector to the suit was that the lands of Masuma Bibi, being under the Court of Wards, could not be made liable for the debt, as the loan had been taken without the knowledge and consent

* First Appeal No. 52 of 1881, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated the 18th March, 1881.

1883 MAR. 2. APPELLATE CIVIL. 5 A. 487 = 3 A.W.N. (1883) 63.

of the Court, and such lands should therefore be exempted from liability for the debt. The Court of first instance held that the question whether the lands of Masuma Bibi were liable for the debt did not arise, as the plaintiff did not make any claim in respect of such lands; and gave the plaintiff a decree against defendants Nos. 1 to 4 personally.

The Collector appealed to the High Court, as manager on behalf of the Court of Wards of the estate of Masuma Bibi, contending that, as Masuma Bibi was a disqualified proprietor when she executed the bond, she was not competent to execute the same, and the claim based thereon could not be enforced; and that the Court of first instance should have determined whether or not the lands of Masuma Bibi should be exempted from the claim or not.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

[489] Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the respondents.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—Although the Collector has not been directly cited in the suit as the representative of the defendant Masuma Bibi, a disqualified proprietor, whose property is now under the superintendence of the Court of Wards, in manner required by s. 23 of Act VIII of 1879, amending Act XIX of 1873, s. 205, we think that paragraph 3 of the plaint may be accepted as sufficiently describing his position and character in the litigation, namely, as representative *ad litem* of Masuma Bibi, and as such entitled to raise on her account the points involved in the second and third pleas in appeal, namely, her legal capacity to contract simple money-debts.

It is conceded, and indeed the language of s. 24 of Act VIII of 1879 leaves no room for doubt upon the matter, that no disqualified person, whose property is under the superintendence of the Court of Wards, can without the sanction of that Court create any charge upon such property, and it is equally clear that such property is not liable to sale in execution of a decree obtained in regard to any contract entered into by such disqualified person during the period his property has been under the superintendence of the Court. Assuming, therefore, that we uphold the decision of the lower Court giving the plaintiff a simple money-decree against Masuma Bibi, he is directly prohibited by law from enforcing it against any portion of her property that is under the Court of Wards, as the contract on which he sues was entered into by her after her estate had come into the custody of that Court. Unless the decretal amount is in some way or another discharged, the plaintiff would seem to have no means of enforcing execution of his decree except by the arrest of the Musammat. This, however, is somewhat beside the question raised by the 2nd and 3rd pleas to which we have already referred. Reading the provisions of the law as contained in Chap. VI of Act XIX of 1873, and the amendments thereof provided in Act VIII of 1879, we are by no means prepared to go the length of holding that the mere disqua-**[490]**lification of persons to manage their estates is to carry with it a general and absolute disqualification to enter into any contract or contracts whatever. Section 24 of Act VIII of 1879 certainly says nothing of the kind; on the contrary, the terms of the second paragraph of s. 205-B seem to contemplate that contracts may in some cases be entered into, but it prevents

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decrees obtained in suits upon them being enforced in execution against the property which is out of the custody and control of the disqualified person and in the hands of the Court of Wards. Such being the view we entertain, we cannot say that Masuma Bibi was incompetent to effect the loan which is the subject of the present suit, and we cannot therefore disturb the decision of the lower Court. The appeal must be dismissed with costs.

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5 A. 490 = 3 A.W.N. (1883) 64.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

RAMAUSAR PANDEY (*Defendant*) *v.* RAGHUBAR JATI AND OTHERS (*Plaintiffs*).* [3rd March, 1883.]

Suit for possession of immoveable property—Suit for cancellation of instrument—Act XV of 1877 (*Limitation Act*), *sch. ii, Nos.* 91, 142.

The plaintiff sued to set aside a mortgage by conditional sale of certain immoveable property belonging to him, made on his behalf during his minority, and for possession of the property. *Held*, that the suit was one as described in No. 142, sch. ii, Limitation Act, 1877, and not in No. 91 of that schedule.

[F., 6 A. 260 (262); D., 24 Ind. Cas. 110; R., 6 A. 75 (76); 28 A. 30 (32) = 2 A.L.J. 507 = A.W.N. (1905) 176; 14 B. 279 (281); 21 B. 424 (446) (F.B.); 26 Ind. Cas. 813 (815) = 10 N.L.R. 133.]

THE plaintiffs in this suit alleged that one Srinath Jati died leaving the plaintiff Raghubar Jati as his successor to 24 bighas 11 biswas of land, the latter being a minor at the time; that on the 27th October, 1865, Raghubar Jati being still a minor, Alia, styling herself widow of Srinath Jati, and mother of Raghubar Jati, had mortgaged the land by conditional sale to the defendant Ramausar Pandey, ostensibly for the benefit of the minor; that Alia, not being the widow of Srinath Jati, was not competent to make such mortgage, and the same had not been made for the benefit of the minor; that in 1871, Raghubar Jati being still a minor, the defendant, Ramausar Pandey, had applied for foreclosure, but the foreclosure proceedings were invalid, as the notice of foreclosure had issued under the signature of the Munsarim of the District [491] Judge, and not of the Judge; that Raghubar Jati became of age in November 1878, and had obtained possession of 8 bighas, 3 biswas, 14 dhurs of the land in question; that the remainder of the land was in possession of the defendant Ramausar Pandey; and that Raghubar Jati had sold half the land in question to the other plaintiffs to raise money for the institution of this suit, and they had therefore joined in the suit. Upon these allegations the plaintiffs claimed to be maintained in possession of 8 bighas, 3 biswas, and 14 dhurs of the land, and for possession of the remaining 16 bighas, 7 biswas, 6 dhurs, by the setting aside of the deed of conditional sale in favour of the defendant Ramausar Pandey, and the foreclosure proceedings had thereon.

The Court of first instance dismissed the plaintiffs' claim in respect of the land of which they sought possession, holding that the claim in respect of that land was barred by limitation under No. 44, sch. ii of the

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* Second Appeal No. 583 of 1882, from a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 14th February, 1882, modifying a decree of Maulvi Muhammad Bakhsh, Subordinate Judge of Ghazipur, dated the 13th September, 1881.

Limitation Act, 1877, but gave them a decree in respect of the land of which they sought to be maintained in possession. On appeal by the plaintiffs it was urged on their behalf, *inter alia*, that the setting aside of the deed of conditional sale was subservient to the claim for possession, and therefore art. 142, sch. ii of the Limitation Act governed the case and no other article. The lower appellate Court allowed this contention.

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APPELLATE CIVIL.

5 A. 490 = 3 A.W.N. (1883) 64.

On second appeal by the defendants it was contended on their behalf that the limitation applicable to the suit was that provided by No. 91 of the Limitation Act, and not by No. 142 as held in the Court below.

Messrs. *Howard* and *Simeon*, for the appellants.

Mr. *Conlan* and the *Senior Government Pleader* (Lala *Juala Prasad*), for the respondents.

The Court (STRAIGHT and OLDFIELD, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—We think that the suit in respect of which this appeal has been preferred has been properly treated as one for the recovery of immoveable property to which the limitation of twelve years prescribed in art. 142 of Act XV of 1877 is applicable.

Appeal dismissed.

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5 A. 492 (F.B.) = 3 A.W.N. (1883) 68.

[492] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

SITA RAM (*Judgment-debtor*) v. DASRATH DAS (*Decree-holder*).*
[6th March, 1883.]

Execution of decree—Compromise—Civil Procedure Code, s. 257-A.

The decree-holder and judgment-debtor of a decree filed a petition (*suleh nama*) in the Court executing the decree, praying that the Court would sanction an arrangement providing for the payment of the decree by instalments, and enhancing the rate of interest made payable by the decree. The Court sanctioned the arrangement. *Held*, that the "*suleh nama*" was within s. 257-A of the Civil Procedure Code, and the decree might be executed in accordance with its provisions.

[F., 11 A. 228 (233); R., 12 A. 571 (576); 29 P.R. 1908 = 61 P.L.R. 1907 (F.B.) = 71 P.W.R. 1907; D., 19 A. 186 (187).]

THE facts of this case were that on the 14th day of October, 1879, one Jokhan Das obtained a decree against Sita Ram for Rs. 1,211-5-0, with interest at eight annas per cent. On the 5th of April, 1880, the parties to the decree presented a petition to the Court executing the decree, the terms of which were as follows:—

"That a decree is held by Jokhan Das against the petitioner; that after a mutual arrangement the balance due to the decree-holder, after allowing for payments, is Rs. 1,190-7-6; that the petitioner will pay the same, but cannot pay it now; that the property advertised for sale, which is mortgaged in the deed on which the decree was obtained, would be

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* Second Appeal No. 19 of 1882, from an order of R. J. Leeds, Esq., Judge of Gorakhpur, dated the 12th January, 1882, reversing an order of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 17th September, 1881.

1883 MAR. 6. — FULL BENCH. — 5 A. 492 (F.B.) = 3 A.W.N. (1883) 68.

wasted by auction-sale; that the petitioner has not mortgaged or sold the property either before this or now to any person, nor does he think of making a mortgage, etc.; that on being persuaded by respectable persons the decree-holder has agreed to realize the decretal amount in equal instalments with interest at one rupee per cent. per mensem from this date; that the petitioner (judgment-debtor) will pay the amount of the decree, instalment by instalment, with interest at one rupee per cent. per mensem, without any objection; should the petitioner (judgment-debtor) fail to pay the first instalment with interest on the fixed date, the decree-holder shall be at liberty, without waiting for the unexpired instalments, to realize the entire decretal amount by cancelling the instalments, whether due or otherwise, together with interest at one per cent. per mensem from the mortgaged pro-[493]perty advertised for sale, and also from the other property and the person of the petitioner and his heirs; that in that case neither the petitioner nor his heirs shall raise any objection as regards interest and other matters; should the petitioner put forward any objection, it shall be untenable in any Court; that until the repayment of the entire decretal amount the shares in mauza Khajuria hypothecated in the deed and advertised for sale shall remain as at present under mortgage and attachment for the decretal amount; that the petitioner shall not transfer them to any person until the payment of the entire mortgage-money. The petitioner further covenants and records that if, owing to his action or that of his heirs, the decretal amount or interest agreed herein cannot be realized, damages shall be recoverable from the person of the petitioner and his other moveable and immoveable property with interest at Rs. 2 per cent. per mensem by the decree-holder; that this contract has been accepted by the petitioner (judgment-debtor) without undue influence, willingly and voluntarily, and while in the enjoyment of sound health, and he shall act upon it; that the petitioner prays that this arrangement be allowed; that the payments made shall be certified to the Court; any allegation as to payments out of Court shall be untenable." The petition then proceeded to specify the amounts of the instalments and the dates when the same were payable.

The Court sanctioned the arrangement and ordered that the sale of the judgment-debtor's immoveable property should be postponed. On the 20th May, 1881, the decree-holder applied for execution of the whole decree, on the ground that the judgment-debtor had not paid a single instalment, and claiming interest at one rupee per cent. per mensem according to the arrangement embodied in the petition set forth above.

The judgment-debtor objected to the payment of interest according to that arrangement. The Court of first instance allowed the objection, being of opinion that "no agreement as to interest could be admitted at variance with the terms of the decree." From this order Dasrath Das, who represented the original decree-holder, appealed. The lower appellate Court (District Judge of Gorakhpur), by an order dated the 12th January, 1882, held that the agreement as to interest was of the character contemplated by [494] s. 257-A, Act X of 1877, as amended by Act XII of 1879, and that having been certified to the Court and formally acknowledged thereby, the decree-holder was entitled to have the decree executed in accordance with its conditions. Against this order the judgment-debtor Sita Ram appealed to the High Court. The same question, *viz.*, whether the decree could be executed in accordance with the terms of the agreement was raised by this appeal. This question was referred to the Full

1883 MAR. 6. FULL BENCH. 5 A. 492 (F.B.) = 3 A.W.N. (1883) 68.

Bench by BRODHURST and TYRRELL, JJ., before whom the appeal came for hearing, the order of reference being as follows :—

TYRRELL, J.—A novel question is raised in this case. The decree-holder and judgment-debtor of a decree filed a petition in the Court executing the decree, praying that the Court would accept and give effect to a certain new arrangement governing the time when satisfaction of the judgment-debt should be made, and also enhancing the rate of interest made payable by the decree. The Court appears to have sanctioned these proposals, and it must be assumed to have done so under the new rules of law embodied in s. 257-A of the Civil Procedure Code of 1877, which was in force when this "*suleh nama*" was made. It is unquestionable that, prior to the addition of the terms of s. 257-A, to the rules of the Civil Procedure Code contained in the Chapter on the execution of decrees, the Civil Courts were debarred from giving effect, by way of execution, to an arrangement by which the terms of the decree were in any substantial respect altered. But the question is now raised, whether the effect of s. 257-A, may not be to modify that general rule, and to give the Courts power to execute a decree as altered or modified in the terms of that section, when such alteration or modification has received the sanction of the Court. We refer this question to a Full Bench.

Lala *Lalta Prasad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

The following opinion was delivered by the Full Bench :—

OPINION.

STUART, C.J., and STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ.—Having regard to all the circumstances disclosed, we [495] are of opinion that the *suleh nama* was within s. 257-A of the Civil Procedure Code, and that the order of the Judge of Gorakhpur of the 12th January, 1882, is a legal and proper one. With these remarks in reply to the reference made to us we leave the appeal for disposal to the Division Bench.

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5 A. 495 (F.B.) = 3 A.W.N. (1883) 89.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

GANGA DIN AND ANOTHER (*Defendants*) v. DHURANDHAR SINGH (*Plaintiff*).* [21st March, 1883.]

Landholder and tenant—Usufructuary mortgage by occupancy-tenant—"Transfer"—Act XII of 1881 (*N.-W.P. Rent Act*), s. 9.

A mortgage with possession by an occupancy-tenant of his cultivatory holding is a "transfer" within the prohibition of s. 9 of the N.-W.P. Rent Act, 1881.

[R., 7 A. 557 (559) (F.B.); 10 A. 130 (131); 26 A. 78 (80) = A.W.N. (1903) 192; 10 C.P.L.R. 53 (54); **Disappr.**, 15 A. 219 (227) (F.B.).]

THE facts of this case were that some time prior to 1873, Babadin and Sahai, defendants in this suit, who were occupancy tenants of certain

* Second Appeal No. 342 of 1882, from a decree of J. M. C. Steinbelt, Esq., Judge of Banda, dated the 16th January, 1882, reversing a decree of Kasi Wajeh-ullah Khan, Subordinate Judge of Banda, dated the 10th September, 1882.

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land, mortgaged it to Pragdin, also a defendant in this suit, giving him possession. By a deed, dated the 17th September, 1873, Pragdin sub-mortgaged a portion of the land to Tulshi, also a defendant in this suit, and gave him possession thereof. The material portion of that deed was as follows:—"The said Tulshi shall remain in possession of the mortgaged land, and pay the rent thereof; I shall redeem the mortgaged land at the end of the month of Jaith in any year I pay in a lump sum Rs. 150 in cash to the aforesaid Tulshi; the mortgagee shall have no claim to the interest nor I to the profits." On the 19th June, 1880, the defendants Babadin and Sahai transferred for a period of ten years their right to redeem the mortgage in favour of Pragdin to the plaintiff in this suit, Dhurandhar Singh. The material part of the deed of the 19th June, 1880, was as follows:—"We have received the full and complete mortgage-money from the said mortgagee: we therefore covenant and record that the mortgagee shall, by paying Rs. 72 in the month of Jaith of the current year to Pragdin, mortgagee, obtain redemption of the mortgaged cultivatory holding: that by obtaining possession thereof as a mortgagee he may **[496]** cultivate it himself or get it cultivated by some other tenant and pay its rent and enjoy its profits and bear the loss or may sub-mortgage it if he likes: we or our heirs shall have no objection: that after expiry of ten years we will redeem our mortgaged cultivatory land at the latter end of the month of Jaith in any year that we pay in a lump sum Rs. 150 in cash to the mortgagee aforesaid: the mortgagee shall not claim interest, nor shall we claim mesne profits." Dhurandhar Singh brought this suit against Babadin (1), Sahai (2), Pragdin (3), Ganga (4), nephew of Tulshi, and Tulshi (5), claiming possession of the land as mortgagee. The first three defendants did not appear. Ganga and Tulshi defended the suit, their defence raising the question whether, with reference to the provisions of s. 9 of the N.-W.P. Rent Acts, 1873 and 1881, the mortgage by the defendants Babadin and Sahai to the plaintiff of their occupancy holding was valid or not. This question raised the point whether a usufructuary mortgage is a transfer within the meaning of s. 9 of the Rent Acts, XVIII of 1873 and XII of 1881. The lower appellate Court held on this question that "a mortgage was a temporary and not a permanent transfer," and therefore did not come within the prohibition contained in the above-named section. On second appeal by the defendants Ganga and Tulshi the same point was raised. The Divisional Bench before which the appeal came for hearing (STRAIGHT and BRODHURST, JJ.) referred the point to the Full Bench, the order of reference being as follows:—

STRAIGHT, J.—The Full Bench reference in *Badri Nath* v. *Parbat* (1) and *Gopal Pandey* v. *Parsotam Das* (1) does not cover the point raised by this appeal. We therefore refer to the Full Bench the following question:—Is a mortgage of a cultivatory holding by an occupancy-tenant under which possession is given to the mortgagee for a term of years within the prohibition of s. 9 of the Rent Acts of 1873 and 1881?

Babu *Beni Prasad* and Munshi *Kashi Prasad*, for the appellants.

Mr. *Howell*, for the respondent.

[497] The following opinions were delivered by the Full Bench:—

OPINIONS.

STUART, C. J.—In the order of reference in this case it is stated that the Full Bench reference in *Badri Nath* v. *Parbat* (1) and *Gopal Pandey*

(1) 5 A. 121.

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v. *Parsotam Das* (1) did not cover the point raised in the case then referred. I suggested at the hearing that the reasoning used by our answers in those cases appeared to me equally to apply to the present reference, the only difference being that in the former the transfer was a simple mortgage, whereas in the present case it is a mortgage for a term of years, or, in other words, a usufructuary mortgage for such a period. In fact, in my remarks proposing the reference in *Badri Nath* v. *Parbat* (1), I said : "It was admitted at the hearing before BRODHURST, J., and myself that a usufructuary mortgage by an occupancy-tenant to a stranger mortgagee was as a transfer bad under s. 9 of the Rent Act." That is exactly the state of things expressed in the referring order now before us, and my answer is that a mortgage of a cultivatory holding by an occupancy-tenant is within the prohibition of the Rent Acts of 1873 and 1881.

STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ.—We are of opinion that a mortgage with possession by an occupancy-tenant of his cultivatory holding is a transfer within the prohibition of s. 9 of the Rent Act, 1881.

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5 A. 497=3 A.W.N. (1883) 91.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Brodhurst.

ZAFARYAB ALI AND OTHERS (*Plaintiffs*) *v.* BAKHTAWAR SINGH (*Defendant*).* [27th March, 1883.]

"Wakf" *property—Suit relating to public charity—Civil Procedure Code, s. 539—Religious endowment—"Religious institution"—Act VI of* 1871 (*Bengal Civil Courts Act*), *s.* 24*—Muhammadan Law.*

Certain Muhammadans sued to set aside a mortgage of endowed property belonging to a mosque, the decree enforcing the mortgage, and the sale of the mortgaged property in execution of that decree, and for the demolition of buildings erected by the purchaser, and the ejectment of the purchaser. *Held*, that [498] the plaintiffs, as Muhammadans entitled to frequent the mosque and to use the other religious buildings connected with the endowment, could maintain the suit, and s. 539 of the Civil Procedure Code had no application to the case, the endowment being a religious institution, within the meaning of s. 24 of Act VI of 1871 and therefore governed by Muhammadan Law.

[F., 32 A. 284 (286)=7 A.L.J. 233=5 Ind. Cas. 547 ; 32 A. 631=7 A.L.J. 797=6 Ind. Cas. 835 ; **Appr.**, 20 C. 810 (816) ; **R.**, 24 B. 170 (175)=1 Bom. L.R. 649 ; 2 C. L.J. 460 (470) ; A.W.N. (1893) 71 ; **D.**, 23 M. 99 (100).]

THE plaintiffs, Muhammadans, sued for possession of a "takia," known by the name of Najuf Ali Shah, "by cancellation of an hypothecation thereof, dated the 28th May, 1877, and of a decree dated the 18th May, 1880, as well as of a judicial sale dated the 30th May, 1881 ; by the demolition of two walls ; and by the ejectment of the defendants." They alleged in their plaint that the property in suit was "*wakf*" or a charitable endowment, including a mosque (*imambara*), and a grave-yard, in which there were many tombs ; that the wood of the trees standing on the property was always used to roof the charitable buildings ; that

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* Second Appeal No. 914 of 1882, from a decree of H. G. Keene, Esq., Judge of Saharanpur, dated the 16th May, 1882, reversing a decree of Maulvi Muhammad Said Khan, Munsif of Muzafarnagar, dated the 17th March, 1882.

(1) 5 A. 121.

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there was a house on the property for the residence of the custodian; that defendant 1, the manager of the property, and the ancestors of defendants 2, 3 and 4 hypothecated the premises to defendant 5, who, having obtained a decree enforcing hypothecation, caused the property to be brought to sale, and it was purchased by him and defendants 6 and 7; that defendant 5, having obtained possession of the property, erected two walls on the land, thereby interfering with the purposes for which the property was originally intended; and that the plaintiffs became aware of all these proceedings on the 24th January, 1882, and in consequence brought the present suit. The defendants set up as a defence to the suit that the plaintiffs were not competent to sue. The Court of first instance held that the plaintiffs were competent to sue, observing as follows:—"It is a rule of daily practice that every aggrieved party is entitled to get his grievance remedied. On the same principle certain set of the interested Muhammadans in this case have come forward to bring this suit against the defendants to get their complaint redressed by the Courts of Justice. The Muhammadan Law sanctions the course of action by the plaintiffs in this case. Every Muhammadan, according to the tenets of his religion, is entitled to get public charitable property protected from the hands of strangers." On the same point the lower appellate Court held that the plaintiff had no right to sue, observing as follows:—"Referring to a recent [499] and closely analogous case decided by the Presidency Court in August last—*Jan Ali* v. *Ram Nath Mundul* (1). I am of opinion that the plaintiffs have no right to bring the present suit, which is to have the property declared *wakf* and made over to them as such. They do not, however, pretend to be the trustees, or to have any special interest in the alleged endowment, nor do they bring forward any deed creating it. I do not think that this brings the suit under Act XX of 1863, for they do not really mean to sue the manager for misfeasance, although they have included him in the prayer to set aside his conveyance. But even if it did, the suit is out of rule, as there was no application made to this Court or to any other for permission to sue. If it be alleged that there has been a breach of trust regarding a charitable endowment, then the leave of the Collector ought to have been obtained under s. 539, which has not been done. The plaintiffs, moreover, have not made any assertion in any part of their plaint as to any special right of suit as to their being persons attending or having a right to attend the alleged mosque, but simply state their ground of action to have arisen when they heard of the alienation to the defendants. Were this suit brought by the latter, the Courts could deal with it, but a question (such as lies at the root here) of whether a place was one of public worship, &c., would be more appropriately settled by the Municipal Commissioners of the town, as it certainly would be more legal to adopt such a course. For this reason I dismiss the suit."

In second appeal the plaintiffs contended (i) that being members of the Muhammadan community, they were legally competent to maintain the suit; (ii) that they were not bound to observe the preliminary procedure enjoined by s. 539 of the Civil Procedure Code, that section having no bearing on the suit; and (iii) that the lower appellate Court had misapprehended the scope of the suit, which did not seek any of the remedies provided for by that section.

Mr. *Amiruddin* and Shaikh *Maula Bakhsh*, for the appellants.

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(1) 8 C. 32.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondent (defendant 5).

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[500] The Court (STUART, C.J., and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

STUART, C.J.—The preliminary pleas raised in this case must be allowed, and it will go back for trial on the merits. The plaintiffs, as Muhammadans entitled to frequent the mosque and to use the other religious buildings connected with the endowment, can clearly maintain the present suit, and s. 539 of the Procedure Code has no application to such a case, the endowment in question being, in our opinion, a religious institution within the meaning of s. 24 of Act VI of 1871, and therefore governed by Muhammadan Law. We therefore remand the case under s. 562 of the Code of Procedure for trial on the merits.

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5 A. 500 = 3 A.W.N. (1883) 100.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

KALIAN DAS (*Defendant*) v. GANGA SAHAI AND OTHERS (*Plaintiffs*).*
[1st April, 1883.]

Suit for dissolution of partnership—Jurisdiction—Arbitration—Finality of decree in accordance with award—Civil Procedure Code, s. 215, Chap. XXXVII—Act IX of 1872 (Contract Act), s. 265.

A suit for dissolution of a partnership, taking the accounts of the firm, and a declaration of the plaintiff's right to a certain share in the debts due to the firm, was, with reference to the value of the subject-matter of the suit, instituted in the Court of a Munsif. The matters in difference in the suit were eventually referred to arbitration under Chap. XXXVII of the Code of Civil Procedure, and an award was made declaring the plaintiff entitled to recover a certain sum from the defendant. Judgment and a decree were given in accordance with the award. *Held* that, the award notwithstanding, the question whether the suit was cognizable in the Munsif's Court was entertainable. *Bhagirath* v. *Ram Ghulam* (1), referred to.

Held, also, that the suit was not an application of the nature mentioned in s. 265 of the Contract Act, 1872, but a suit of the nature mentioned in s. 215 of the Civil Procedure Code, and was therefore not cognizable in the District Court, but in the Court of the Munsif. *Prosad Dass Mullick* v. *Russick Lall Mullick* (2) and *Ram Chunder Shaha* v. *Manick Chunder Banikya* (3), dissented from.

THE facts of this case are fully set out in the judgment of the High Court. The main question raised by the appeal was whether, regard being had to s. 265 of the Contract Act, 1872, a suit for [501] dissolution of partnership, instituted in the Court of a Munsif, had been instituted in a Court of competent jurisdiction.

Pandit *Nand Lal* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *Conlan*, for the respondents.

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* Second Appeal No. 1188 of 1882, from a decree of E. Rose, Esq., Judge of Meerut, dated the 26th August, 1882, reversing a decree of Babu Birj Pal Das, Munsif of Ghaziabad, dated the 20th March, 1882.

(1) 4 A. 283. (2) 7 C. 157. (3) 7 C. 428.

1883 APRIL 1.

APPELLATE CIVIL.

5 A. 500 = 3 A.W.N. (1883) 100.

The Court (STRAIGHT and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—The suit as originally instituted in the Court of the Munsif was for dissolution of partnership, taking the accounts of the firm, and declaration of the plaintiff Ganga Sahai's right to a one-fourth share in debts due to it. Before any statement of defence had been filed, the matters in difference between the parties, upon consent of all of them, were referred to arbitration under the provisions of Chap. XXXVII of the Code. In due course the arbitrators made their award, by which the plaintiff Ganga Sahai was declared entitled to the sum of Rs. 236-12-0 from the defendant Kalian Das. Objections were thereupon submitted by the plaintiff and Jamna Das, the latter contending that, under s. 265 of the Contract Act, the suit, out of which the arbitration had arisen, was not entertainable by the Munsif, but should have been brought in the Court of the District Judge. The Munsif overruled all the objections, and gave judgment and a decree in accordance with the award. From this decision the plaintiff Ganga Sahai appealed to the Judge, urging, among other matters, the plea to the Munsif's jurisdiction. The Judge, adopting his contention, allowed the appeal, and held that all the proceedings in the first Court were void. The defendant Kalian Das in his turn now appeals to this Court, and maintains two positions: 1st, that it was incompetent for the lower appellate Court to go behind the award, and in support of this view his pleader quotes the case of *Bhagirath* v. *Ram Ghulam* (1); 2nd, that s. 265 of the Contract Act does not prohibit a suit of the present description, and in favour of this view refers to some remarks of STRAIGHT, J., in *Harrison* v. *The Delhi and London Bank* (2); *Luchman Lall* v. *Ram Lall* (3); *Javali Ramasami* v. *Sathambakam Theruvengadasami* (4); as also to an unreported ruling [502] of STRAIGHT and BRODHURST, JJ. In reference to the second point, the judgment of the Judge and the counsel for the respondent Kalian Das rely on two Calcutta judgments—*Prosad Doss Mullick* v. *Russick Lall Mullick* (5) and *Ram Chunder Shaha* v. *Manick Chunder Banikya* (6).

With regard to the first contention, as the plea directly goes to the jurisdiction of the Munsif to entertain the suit and to give a decree, we cannot say that it is incompetent for us to consider it; nor is there anything in the judgments of the Chief Justice and STRAIGHT, J., in *Bhagirath* v. *Ram Ghulam* (1), which supports such a view. No consent between the parties could give jurisdiction to the Munsif's Court, if that Court was not invested with it by law; and if the suit could only be brought in the Court of the District Judge, all the Munsif's proceedings were *ultra vires* and invalid. It therefore becomes necessary to see whether the claim of the plaintiff, as disclosed on the face of the plaint, was one exclusively cognizable by such last-mentioned Court. With the greatest respect to the two Calcutta cases quoted by the counsel for the respondent, in one of which, by the way, a somewhat hesitating opinion upon the point is expressed by PONTIFEX, J., we see nothing in the terms of s. 265 of the Contract Act that appears to us to amount to a prohibition of suits for dissolution of partnership and an account in those Courts, which ordinarily, having reference to the value of the subject-matter in dispute, would be competent to entertain them. Section 215 and

(1) 4 A. 283. (2) 4 A. 437. (3) 6 C. 521.
(4) 1 M. 340. (5) 7 C. 157. (6) 7 C. 428.

Forms 113, 132, and 133 of the Civil Procedure Code, on the contrary, which were framed long after the Contract Act came into operation, seem to contemplate and make provision for suits of such a description; and we know of no extraneous rule of law that forbids litigation of such a nature between partners. In the present case the plaintiff came into Court alleging the partnership between himself and the defendant to be still subsisting, and, asking for its dissolution, prayed for accounts to be taken. This suit was therefore precisely of the character mentioned in s. 215, and was not an application under s. 265 by the partners of a partnership or their representatives, "*after the termination thereof,*" to have the business of the firm [503] wound up, &c. In our opinion that section is, as we in a former judgment stated, of an enabling kind, and allows the members of a partnership that has ceased to exist to invoke the machinery of the Court of the District Judge to wind up their business for them, instead of doing it themselves. We certainly cannot read it as precluding a suit such as the one before us in appeal, nor can we understand why any such prohibition as that contended for should exist. On the contrary, with the number of small partnerships that exist among persons in this country, much inconvenience and unnecessary expense would be caused were partners in all cases compelled to resort for dissolution of partnership or winding up the affairs of their firms to the District Judge's Court. We think therefore that the plaintiff's suit as brought was properly preferred in the Court of the Munsif, and rightly entertained by him. Hence it was competent for him to make the reference to arbitration, and his judgment and decree in accordance with the award of the arbitrators were legal and proper, and should be upheld. We may add that it is satisfactory to be able to take this view, as it would have been little short of a scandal that the plaintiff, himself having instituted the suit and consented to the arbitration, should be allowed to succeed upon an objection to the jurisdiction to which he had himself resorted for relief. The appeal is decreed with costs, and the decision of the Judge being reversed, the decree of the Munsif will be restored.

1883 APRIL 1.

APPELLATE CIVIL.

5 A. 500=3 A.W.N. (1883) 100.

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5 A. 503=3 A.W.N. (1883) 103.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

MADHO PRASAD (*Defendant*) *v.* AMBAR (*Plaintiff*).* [2nd April, 1883.]

Landholder and tenant—Suit for rent where the right to receive it is disputed—Act XII of 1881 (*N.-W.P. Rent Act*), *s.* 148—*Third person.*

In a suit for rent between a landholder and a tenant under the N.-W.P. Rent Act, 1881, where the right to receive rent is disputed, any rights which the landholder may have against the third person, who has been made a party to the suit, under s. 148 of the Act, can only be enforced through the medium of the Civil Court by a suit for declaration of title and for recovery of any rents improperly collected by such person.

[504] *Held*, therefore, where in such a suit it was found that the third person had actually and in good faith received the rent sued for, the claim should not have been decreed against him but should have been dismissed.

[F., 9 A. 394 (398); R., 13 A. 364 (365).]

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* Second Appeal No. 1193 of 1882, from a decree of J. M. C. Steinbelt, Esq., Judge of Banda, dated the 24th July, 1882, modifying a decree of Munshi Janki Prasad, Assistant Collector of the first class, Banda, dated the 22nd July, 1881.

1883 APRIL 2.

APPELLATE CIVIL.

5 A. 503 = 3 A.W.N. (1883) 103.

THIS was a suit instituted in the Court of the Assistant Collector of Banda for recovery of Rs. 137-1-9 principal and interest, arrears of rent for 1288 fasli, under cl. (*a*), s. 93, Act XII of 1881, (N.W.P. Rent Act). The plaintiff, Ambar, a co-sharer of a village, sued the defendants as heirs of a deceased tenant named Maghu. Upon hearing their defence, which was that Maghu had paid Rs. 125 out of the sum claimed as rent for 1288 fasli to Madho Prasad, another co-sharer of the village, the Court ordered Madho Prasad to be made a defendant under s. 148 of the Rent Act. The defendant Madho Prasad admitted having received Rs. 125 from Maghu in 1288 fasli. The Court of first instance dismissed the suit. The plaintiff Ambar appealed to the District Court. The District Judge found that the defendant Madho Prasad had received the Rs. 125 and in good faith, and dismissed the plaintiff's appeal. In appeal to the High Court it was urged that all the persons concerned being parties to the suit, the District Court ought to have determined the case on its merits and decided who among the defendants was liable to the plaintiff's claim. This contention prevailed, and the case was remanded to the District Court under s. 562 of the Civil Procedure Code. Upon the rehearing of the case by the District Court the plaintiff obtained a decree for Rs. 125 against the defendant Madho Prasad. From this decree Madho Prasad appealed to the High Court on the following grounds:—(1) The decree of the lower appellate Court was not warranted by the provisions of s. 148 of the Rent Act: (2) The *bona fide* receipt by the appellant of rent not being disputed, no decree should have been passed against him in the present suit.

Babu *Ram Das Chakarbati* and Munshi *Ram Prasad*, for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

The Court (STRAIGHT, J. and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—The pleas in appeal have force and must prevail. No doubt by s. 148 of the Rent Act in suits between landholders and [505] tenants, in which the right to receive rent is disputed on the ground that it has been *bona fide* paid to a third person, such third person may be brought on to the record as a party. This, however, is only for the purpose of determining, between the landlord and the tenant, the question as to whether the latter made the payment to such third person, as one who had actually and in good faith received rent from him before and up to the time when the right to sue accrued. The provisions of s. 148 were obviously made for the protection of the tenant, who, upon establishing a payment to a third person, under the circumstances mentioned therein, must be held to have satisfactorily answered the landholder's claim. Any rights the latter may have against the third person can necessarily only be enforced through the medium of the Civil Court, by a suit for declaration of title and recovery of any rents improperly collected by him.

In the present case it is found as a fact that Madho Prasad, the appellant, received the Rs. 125 *bona fide* under circumstances fulfilling the requirements of s. 148 of the Rent Act. The Judge, being of that opinion, should have dismissed the plaintiff-respondent's claim to that extent, but instead of doing so he has decreed it against the appellant.

Such portion of his decree cannot stand, and allowing the appeal with proportionate costs, we direct that the decree be modified by striking out such portion of it as declares any liability on the part of Madho Prasad.

Appeal allowed.

1883 APRIL 2.

APPELLATE CIVIL.

5 A. 503 = 3 A.W.N. (1883) 103.

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5 A. 505 = 3 A.W.N. (1883) 106.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Brodhurst.

NASIR HUSAIN (*Plaintiff*) *v.* SUGHRA BEGAM AND OTHERS (*Defendants*).* [5th April, 1883.]

Muhammadan Law—Gift—Transfer of absolute estate—Condition—*Sunni *Law—*Shia *Law.

The owner of a house made a gift thereof to certain persons "for their residence, and that of their heirs, generation after generation," declaring that if the donees sold or mortgaged the house, he and his heirs should have a "claim" to the house, but not otherwise. *Held*, that under Muhammadan Law, whether that by which the Shias, or that by which the Sunnis, were governed, the house passed by the gift to the donees absolutely, the declaration by the donor as to the effect of an alienation by the donees being in the nature of a recommendation, and not having the effect of limiting the estate in the house itself.

[506] IN this case the plaintiff's father, Zulfikar Husain, executed on the 23rd of November, 1868, a deed of gift in respect of a certain house belonging to him to his cousins Ali Muhammad, Muzaffar Husain and the defendant Abdul Muzaffar; and by another deed of gift duly registered, and executed on the 14th of December, 1872, he assigned his proprietary right in the same house to the plaintiff Nasir Husain. The right of Ali Muhammad, one of the abovenamed transferees under the deed, dated the 23rd of November, 1868, was attached in execution of a decree against him held by the defendant Sughra Begam. The plaintiff objected in the execution department, but as his objections were disallowed, he brought this suit to establish his right to the house in dispute, and for a declaration that on the death of Ali Muhammad all his right in the property ceased and terminated. The main point for determination in this case was whether, under the terms of the instrument of transfer, dated the 23rd of November, 1868, the proprietary right in the house had passed to the transferees. The materia lportion of that instrument was as follows:—"I have of my own accord and free will given the house to brothers Ali Muhammad, Muzaffar Husain, and Abdul Muzaffar for their residence and that of their heirs, generation after generation: I or my heirs neither have nor shall have any claim regarding the house in question; but if the said brothers or their heirs attempt to sell or mortgage the house, I or my heirs shall have a claim to the house: so long as a sale or mortgage is not effected, I or my heirs shall have no connection or concern with the house." The Court of first instance observed as follows on the point in question:—On reading the deed of gift.........from Zulfikar Husain to Ali Muhammad, Muzaffar Husain, and Abul Muzaffar, I find that the donor made a gift of the house and not of its usufruct (*sookna*) to the above-mentioned persons and the heirs of their bodies (*naslan bad naslan*), with a condition that the donees

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* First Appeal No. 125 of 1881, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 5th August, 1881.

1883 APRIL 5. — APPELLATE CIVIL. — 5 A. 505= 3 A.W.N. (1883) 106.

should be precluded from selling or mortgaging it, such a condition being void according to Muhammadan Law. The deed states, "that whereas my cousins, the heirs of my uncle Raza Husain, were in want of a house, I give this house to them and the heirs of their bodies, generation after generation, for their residence: I or my heirs have or shall have no claim to the house, unless the donees or their heirs mortgage [507] or sell it." The house, as shown by the terms of the deed, was not made over to the sons of Raza Husain as a loan, for use during their life, or for a limited time, nor was there any reservation of the donor's right to resume it after extinction of the family of the donees; but the house was given to the donees as a gift absolutely, with a condition attached to it, that they should not sell or mortgage it. The resumption of possession by the donor was not contingent upon the extinction of the heirs of the donees, but on their breaking the above condition, which, according to Muhammadan Law, was void. It is laid down in Baillie's Digest of Muhammadan Law, p. 537 :—" All 'our' masters are agreed that when one has made a gift and stipulated for a condition that is *fasid*, or invalid, the gift is valid and the condition void; as if one should give another a female slave and stipulate 'that he shall not sell her' or 'shall make her *oom-i-wulud*,' or 'shall sell her to such a one,' or 'restore her to the giver, after a month,' the gift would be valid, and all the conditions void." It "is a general rule with regard to all contracts which require seizin, such as gift and pledge, that they are not invalidated by vitiating conditions." From the very fact of the donees appropriating the house as a gift, and not using it as a loan, and laying out a large sum of money in rebuilding it, it is evident that they considered and treated the house as their own property by gift. The house and not only its use or usufruct being granted, and the condition attached to it being void, the donees have absolute property in the house." Having regard to this decision the Court of first instance held that the right of Ali Muhammad, one of the donees, was heritable and transferable, and dismissed the suit. The plaintiff appealed to the High Court, contending, *inter alia*, that the parties to the suit being Shias were not governed by the texts of Muhammadan Law relied upon by the lower Court, which were applicable to Sunnis.

Pandits *Bishambhar Nath* and *Nand Lal*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Mir *Zahur Husain*, for the respondents.

[508] The Court (STUART, C.J., and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

STUART, C.J.—We are of opinion that the Subordinate Judge has come to a right conclusion in this case, and that the house, the subject of the suit, was taken by the defendants, not merely for the purpose of residence, but absolutely. The operative words in the deed of gift are very clear and strong. (Afte rstating these words, the judgment continued) :—Now the meaning of such a conveyance is perfectly clear. The purpose and inducement of the gift of the house is residence, but the gift itself in property is to the donees and "their heirs, generation after generation," and what follows is merely in the nature of recommendation, and has not in law the effect of limiting the estate in the house itself. This is the construction of such an instrument under all systems of law, European or

Indian. It is clearly conformable to the law of England, and the Subordinate Judge shows that it is in accordance with Muhammadan Law.

1883 APRIL 5.

APPELLATE CIVIL.

5 A. 505 = 3 A.W.N. (1883) 106.

It was argued at the hearing on behalf of the appellant that the parties in the present case are Shias, and that the text of the Muhammadan Law, and of the other authorities referred to, related to the more numerous Moslem sect, the Sunnis. The parties in the present case are undoubtedly Shias, and if their Imameea Law had contained any precept or provision inconsistent with the Sunni Law referred to by the Subordinate Judge, it would have been our duty to have given effect to such a state of things. But the careful examination which we have given to the doctrines of the Imameea Code, as expounded by Mr. Baillie, 1869, page 226 *et seq.*, has convinced us that there is no difference on this subject between the two systems of Muhammadan Law. In fact, while the Sunni Law is very distinct, the Shia or Imameea Law is silent on the subject, the intention in the latter system evidently being the adoption and application of the Sunni rule to Shias, where their own Imameea Law does not speak, the only cases of gifts of this nature alluded to in the latter being gifts plainly limited to a life interest.

There is a passage in Baillie's Imameea Law, pp. 226, 227, which, if expressing undoubted Shia doctrine, perhaps deserves [509] some notice. The passage is this :—" If one should say 'I have given this mansion to thee for life, and to thy successor,' it would only be an *oomra*, or for his own life, and there would be no transfer to the life-holder, according to the most approved opinion ; just as if he had not said 'to thy successor'." If such is the Imameea Law it is difficult to understand, and still more difficult to appreciate, a limitation of interest which necessitates the striking out from the words of gift its distinctly expressed extension to a "successor." The author does not explain what he is pleased to call "the most approved opinion." It is at least a most arbitrary construction of the gift, confessing, as it appears to do, that it could not stand if the terms "to thy successor" also remained part of the gift. In the present case, however, the estate given by the gift is conveyed in much larger terms, giving the house to the donees " for their residence and that of their heirs, generation after generation : I or my heirs neither have nor shall have any claim regarding the house in question,"—words which, if they are capable of any legal meaning, clearly and distinctly bestow the right to the thing given absolutely.

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5 A. 509 (F.B.)=3 A.W.N. (1883) 105=8 Ind. Jur. 203.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

DEO KISHEN (*Defendant*) v. BUDH PRAKASH (*Plaintiff*).*
[5th April, 1883.]

Hindu Law—Inheritance—Insanity.

A person is disqualified under Hindu Law from succeeding to property, if he is insane when the succession opens, whether his insanity is curable or incurable.

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* Second Appeal No. 110 of 1882, from a decree of H. F. Evans, Esq., Judge of Moradabad, dated the 16th September, 1881, affirming a decree of Maulvi Samiullah Khan, Subordinate Judge of Moradabad, dated the 29th April, 1881.

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Under the same law, when property has once vested by succession in a person, his subsequent insanity will not be a ground for its resumption.

Under the same law, although a person becomes qualified to succeed to property, after the disqualification of insanity ceases, he cannot resume property from an heir who has succeeded to it in consequence of his disqualification when the succession opened.

[510] *Dwarkanath Bysak* v. *Mahendranath Bysak* (1), *Broja Bhukan Lal Ahusti* v. *Bichan Dobi* (2), *Kalidas Das* v. *Krishan Chandra Das* (3), referred to.

[F., 28 A. 247 (248) = 3 A.L.J. 4 = A.W.N. (1905) 265; R., 38 A. 117 (120) = 14 A.L.J. 11; 22 C. 864 (869); 8 S.L.R. 279 = 29 Ind. Cas. 42.]

THE plaintiff, Budh Prakash, brought the present suit against the defendant Deo Kishen for possession of certain immoveable property. The plaintiff claimed as the daughter's son of one Girdhari Lal deceased. The defendant contended, *inter alia*, that as Indrain Kuar, the widow of Girdhari Lal, was alive, the plaintiff had no title during her lifetime. On behalf of the plaintiff it was alleged that Indrain Kuar was insane and had been so at the time of her husband's death; and it was argued that such being the case, she was disqualified from inheriting. The Court of first instance found that the plaintiff's allegations as to the insanity of Indrain Kuar were correct, and held that she was not entitled to inherit, and gave the plaintiff a decree. On appeal by the defendant the District Court affirmed the decision of the first Court. The defendant Deo Kishen then appealed to the High Court. The first two grounds of appeal were as follows:—(i) The decision is bad in law in that Indrain Kuar, widow of the deceased Girdhari Lal, and grandmother of the plaintiff, being alive, the plaintiff cannot, according to Hindu Law, maintain the present suit, and in that Indrain Kuar, having admittedly not been born insane, but having become so after her marriage, cannot be deprived of her right of inheritance: (ii) In order to disqualify a person from inheritance on the ground of insanity, it is absolutely necessary according to Hindu Law that his insanity should be congenital; but in the present suit no such thing was either alleged or proved as regards Indrain Kuar. The Divisional Bench before which the case came on for hearing (TYRRELL and MAHMOOD, JJ.) referred the question raised by these grounds to the Full Bench in the following terms:—

TYRRELL, J.—This appeal raises the important question whether a Hindu, in this case a woman, who was born sane, but subsequently became a lunatic, was insane at the time of her husband's death and is so still, must be regarded as a person disqualified absolutely and for all time to inherit or take the ancestral estate. In general terms, must insanity to justify disqualification be [511] proved to be congenital and therefore presumably incurable? We refer the question to the Full Bench.

Mr. *Dillon*, Munshis *Hanuman Prasad* and *Sukh Ram*, Pandit *Nand Lal* and Mir *Zahur Husain*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

The following opinions were delivered by the Full Bench:—

OPINIONS.

STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ.—The subject of exclusion from inheritance is treated of in Ch. II, sect. X, Mitakshara,

(1) 9 B.L.R. 198. (2) 9 B.L.R. 204, *note*. (3) 2 B.L.R. F.B. 103.

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FULL BENCH.

5 A. 509 (F.B.) = 3 A.W N. (1883) 105 = 8 Ind. Jur. 203.

and verse 1 includes, among persons who are disqualified from succession, a mad man and an idiot; and in the 2nd verse a "mad man" is explained to be one affected by any of the various sorts of insanity proceeding from the air, bile or phlegm, from delirium or from planetary influences, and an "idiot" is said to be a person deprived of the internal faculty, meaning one incapable of discriminating right from wrong. The fact that some distinction is drawn between idiotcy and madness, and the definition given to the latter form of insanity in the 2nd verse, would certainly imply that the insanity which excludes from succession is not necessarily congenital; and taken with the 6th verse—"They are debarred of their shares if their disqualification arose before the division of the property"—the inference may be drawn that insanity existing at the time the succession opens is sufficient to exclude from inheritance.

The Smriti Chandrika, which is a work of some authority on this side of India, when not opposed to the Mitakshara, is very explicit. In Ch. V, verse 9, it is stated:—"It must be understood that such as appear at the time of division to have been afflicted with impotence, &c., are excluded from their shares, and that the exclusion is not confined to those only that are naturally (that is by birth) impotent, or the like." Nor does it appear necessary that the insanity be incurable, for the 7th verse of the same Ch. II, sect. X, Mitakshara, clearly contemplates the case of a cure, and provides that "If the defect be removed by medicaments and other means (as penance and atonement) at a period subsequent to partition, the right of participa-[512]tion takes effect;" and this rule is clearly expressed in the 4th verse of Ch. VIII, Viramitrodaya:—"If subsequently (to partition or succession) their defects are cured by medication or the like, they become entitled to obtain their shares; and this is reasonable because it is by reason of the defects that they were disqualified to share."

As the disqualification arises with reference to incapacity to perform religious ceremonies for the deceased, it is reasonable to suppose that it would have effect if it exists at the time the succession opens, and without reference to the incurability of the disorder.

But when property has once vested by succession in the heir, his subsequent insanity will not be a ground for its resumption. On this point Viramitrodaya, Ch. VIII, verse 4, is explicit. After stating that the exclusion takes place if the disqualification occur previously to succession, the author proceeds—"but not also if subsequently to partition (or succession), for there is no authority for the resumption of allotted shares." And on the same principle that property once vested cannot be divested, although a person previously insane will become qualified to inherit property on the defect being removed, he cannot resume it from an heir who has succeeded to it in consequence of his disqualification when the succession opened, and the property will thenceforward follow the line of succession under Hindu Law.

No decision of this Court on this subject has been brought to our notice, but the view we take is in accordance with decisions of the Calcutta Court reported in 9 Bengal Law Reports, pages 198 and 204, and other cases referred to in Mayne's Hindu Law.

STUART, C.J.—I concur generally in the conclusion arrived at by my colleagues in this reference. The Hindu Law on exclusion from inheritance is, on the authorities relating to it, so vague and uncertain as to many of its details, that a satisfactory examination of the whole subject, showing in clear terms what the law really is, would be attended with no little difficulty. Such a field of inquiry, however, is unnecessary in the

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FULL BENCH.

5 A. 509 (F.B.) = 3 A.W.N (1883) 105 = 8 Ind. Jur. 208.

present case, and what we have to do, I apprehend, is to return such an answer as will [513] enable the Judges of the Division Bench, from whom the reference comes, to decide the appeal.

Two conclusions, or *theses*, however, appear plainly discernible from the various texts. The first is, that congenital insanity, or, as it is otherwise termed, idiotcy, disqualifies and excludes. The second is, that supervening insanity existing at the time that the succession opens, and the property vests in another, also excludes. That such is the Hindu Law very sufficiently appears; and the principle of it is well stated by Mr. John D. Mayne in his excellent treatise on Hindu Law and Usage, 1878, page 513, where he says:—"The Hindu Law never allows the inheritance to be in abeyance, and if he is not capable of succeeding at the time the descent takes place, the subsequent removal of his incapacity will not enable him to dispossess a person whose title was better than his while the defect existed, though inferior to his own after the defect was removed." And in support of this doctrine he refers to a Full Bench ruling by the Calcutta High Court, *temp.* PEACOCK, C.J., who delivered the judgment, the case being *Kalidas Das* v. *Krishna Chandra Das* (1). And the law so laid down applies to females as well as to males.

It is not suggested that the insane person, who is a woman, was so from her birth, and even if she was, such insanity of a Hindu woman does not appear to disqualify her for marriage. On this subject Mr. Mayne, basing his opinion on the Institutes of Manu, Ch. II, ss. 66 and 67, says:—"A Hindu marriage is the performance of a religious duty, not a contract;" adding "therefore the consenting mind is not necessary, and its absence, whether from infancy or incapacity, is immaterial;" and see on the same subject the same Institutes, Ch. VIII, s. 205. But in the present case it is distinctly found on the evidence that she was insane at the time of her husband's death. That being so, she could not, according to Hindu Law, take the property as his heir, and applying this conclusion, the Division Bench will have no difficulty in disposing of the appeal.

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[514] CIVIL REVISIONAL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

WILAITI BEGAM (*Plaintiff*) v. NUR KHAN (*Defendant*).*
[13th April, 1883.]

Civil Procedure Code, s. 13—Res judicata.

N sued *W* for a moiety of a brick kiln, claiming by right of inheritance, and alleging in respect of the other moiety that it was his own property. *W* in her defence to the suit denied that *N* had any right in the kiln and that a moiety of the kiln belonged to him. An issue was framed on the point whether a moiety of the kiln belonged to *W* which the Court of first instance decided in *N*'s favour. *N* eventually obtained a decree for a moiety of the kiln which he claimed by right of inheritance. *W* appealed, contending, *inter alia*, that it was not proved that a moiety of the kiln belonged to *N*. The appeal was decreed, and the decree of the Court of first instance in *N*'s favour was set

* Application No. 4 of 1882, for revision under s. 622 of the Civil Procedure Code, of an order of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 1st February, 1882.

(1) 2 B.L.R. F.B. 103.

aside. *W* subsequently sued *N* for the value of bricks which he had wrongfully taken from the kiln. *N* set up as a defence to the suit that a moiety of the kiln belonged to him. *Held*, that the issue whether a moiety of the kiln belonged to *N* was *res judicata*, under s. 13, *Expl.* 1 of the Civil Procedure Code.

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IN February, 1878, Nur Khan, half brother of one Muhammad Yar Khan, deceased, sued Wilaiti Begam, the daughter of the deceased, to recover one-half of certain zamindari estates, and one-half of a certain "*kothi*" (house), of a certain garden, and of a certain brick kiln. He claimed these properties as an heir to Muhammad Yar Khan. He stated in respect of the other half of the *kothi*, garden, and kiln that such half was "owned by him from before." With regard to the claim in respect of the zamindari properties, Wilaiti Begam set up as a defence that Nur Khan had surrendered to her his right of inheritance in her father's estate, and was therefore not competent to sue to enforce such right. With regard to the *kothi*, garden and kiln, she set up as a defence that they were the exclusive property of Muhammad Yar Khan, and Nur Khan was wrong in stating that he was entitled in his own right to a half thereof. The Court trying this suit framed as one of the issues for trial the issue "whether the *kothi*, garden, and kiln, are joint property, or are they situate on land exclusively belonging to Muhammad Yar Khan." After deciding Nur Khan's claim in respect of the zamindari estates in his favour, the Court came to the following decision upon the issue set out above:— **[515]** "Now the only point to be determined is whether the garden and other small properties jointly belonged to the plaintiff and the defendant's father or exclusively to the latter. The evidence of both parties is in favour of the plaintiff, and proves that the property belonged jointly to the plaintiff and the defendant's father. For the reasons given above, the defendant's witnesses are not reliable, while those of the plaintiff are found to be trustworthy. The land occupied by the garden and *kothi* belonged jointly to the plaintiff and the defendant's father, and this fact is satisfactorily proved by the evidence of the plaintiff's witnesses. Good and strong evidence was required to prove that one of the sharers had erected the building on the joint land, but no such evidence is forthcoming; therefore the entire claim should be decreed." The Court accordingly gave Nur Khan a decree as claimed. Wilaiti Begam appealed to the High Court. Of the grounds of appeal, six in number, five related to the claim in respect of the zamindari estates, and the sixth to the claim in respect of the *kothi*, garden, and kiln. This ground was as follows:—" That the plaintiff's claim to a share in the garden, the *kothi*, and the brick-kiln, upon the ground of joint interest therein, is not supported by sufficient evidence." The High Court, by a judgment dated the 27th August, 1879, decided that Nur Khan had surrendered the half share of Muhammad Yar Khan's property to which he was entitled by inheritance to Wilaiti Begam, and therefore that his claim failed. On the 24th April, 1881, in the course of execution of the High Court's decree, Nur Khan and Wilaiti Begam entered into a compromise, whereby the former agreed to waive all claim to the "properties decreed by the High Court in the latter's favour," and the latter agreed to waive her right to recover the costs of the previous litigation between the parties. In June, 1881, Wilaiti Begam brought the present suit against Nur Khan for Rs. 100, the value of bricks which she alleged the latter had wrongfully taken from the brick-kiln in question, which, it had been decided in the former suit, belonged to her. The defendant pleaded that the kiln with its bricks belonged to him and the

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plaintiff's father (Muhammad Yar Khan) in equal shares; and that in the former suit he had not sought any relief in respect of his own share. The Court of first instance framed the following issue, among others, for trial: [516]—"Whether the kiln is a joint property or it belongs exclusively to the plaintiff; and is s. 13 of the Civil Procedure Code applicable to the defence raised by the defendant." The Court held that such defence was barred by that law. The appellate Court held that such defence was not so barred. It observed:—"Section 13 does not bar the claim. The decree of the first Court and the final decision of the High Court in the former case are filed with the record. A perusal of them shows that Nur Khan, the present defendant, was plaintiff in the former case. He stated that he and Muhammad Yar Khan, the father of Wilaiti Begam, the defendant in that case, were sharers of half-and-half in the kiln. That case was for the legal share of Nur Khan, in half the kiln, the share of Muhammad Yar Khan, and the plaintiff had clearly excluded his own half share in the kiln. The defendant in that case (Wilaiti Begam) contended that the entire kiln belonged to Muhammad Yar Khan, but the lower Court held it to be joint. The High Court awarded the entire property left by Muhammad Yar Khan to Wilaiti Begam, and dismissed the plaintiff's claim, which was for a portion of the property left by Muhammad Yar Khan. The High Court did not make a finding as to whether the whole or only half the kiln had been left by Muhammad Yar Khan, and in fact there was no necessity to make a finding to that effect. The moiety alleged by the then plaintiff Nur Khan was not in dispute in that case, therefore it was quite unnecessary to make a finding on it. Secondly, the cause of action in the present suit, which is for the value of bricks appropriated by Nur Khan, accrued on the 18th March, 1881, as stated in the plaint, and the former case was decided by the High Court on the 27th August, 1879, before that date: s. 13 is quite irrelevant."

The plaintiff applied to the High Court for revision of the appellate Court's order, under s. 622 of the Civil Procedure Code, contending that the question of the title of the parties respectively to the brick-kiln had been finally decided in the former suit and was therefore *res judicata*.

Mr. *Conlan* and Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the plaintiff.

Mr. *Ross*, for the defendant.

[517] The Court (STUART, C.J., and TYRRELL, J.) delivered the following judgments:—

JUDGMENTS.

STUART, C.J.—I am of opinion that this application for revision should be allowed. I have frequently taken occasion to express from this Bench the very strong objections I entertain to the procedure enacted by s. 13 of the Code, because, as I have pointed out, this plea in the District Courts of these Provinces is almost invariably used without any of the conditions and safeguards which make it intelligible and reasonable in England and Scotland; and I have suggested that such a plea should never be allowed to a party in the District Court as a matter of right, but only with the express sanction of the Court, that is, the particular District Court in which it may be desired to plead it. In the present case, however, this plea of *res judicata* comes before us under other and very different circumstances. It appears to me that it has been properly taken as an objection, and that it must be given effect to. For here the judgment on which it is based is not the judgment of a District Kutcherry,

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but a judgment of this Court which, as clearly as language can, excludes such a suit as the present. In fact, it is very plain to me that the defendant, Nur Khan, has deliberately put difficulties in his way which it was hopeless for him to attempt to avoid. For even if there had been no ground for the plea of *res judicata* in the present suit, he might have been conclusively barred by a plea in estoppel in respect of the compromise under which he conceded the whole of the property left by Muhammad Yar Khan, including, of course, the brick-kiln and the bricks made in it, to the applicant Wilaiti Begam. We have, however, not only that compromise before us, but a judgment by a Division Bench of this Court finding that the defendant had deliberately given up to the applicant the whole of this property as sole proprietress. A more distinct *res judicata* therefore could not possibly have been shown, and we cannot hesitate to accept it as a plea absolutely conclusive against the defendant. The present application for revision must therefore be granted.

TYRRELL, J.—I am of the same opinion. It is true that Nur Khan in his plaint filed in the former suit on the 27th November. 1878, did not include the moiety of the brick-kiln now claimed by him. On the contrary, he reserved it in the 3rd paragraph of the **[518]** plaint, saying "one-half of the kiln is owned by the plaintiff from before." But it is no less true that in her written answer to that plaint Wilaiti Begam pleaded in express terms that the "entire brick-kiln *solely* belonged to Muhammad Yar Khan, her father; that the plaintiff had *no right in it*; and he is entirely wrong in saying that half of the said property belonged to him exclusively," *i.e.*, in saying then what he now again alleges in the suit before us in revision. And the issue thus raised formed the first issue proposed for determination in the suit of 1878. It was "whether the kiln was joint property (of Muhammad Yar Khan) or was situate on separate land exclusively belonging to Muhammad Yar Khan?" This issue was decided by the Court of first instance in favour of Nur Khan. The defendant Wilaiti Begam appealed to this Court; and her 6th plea was that Nur Khan's "claim to a share in the kiln upon the ground of joint interest therein is not supported by sufficient evidence." This appeal was decreed, and the decree of the Subordinate Judge negativing Wilaiti Begam's exclusive pretensions to the entire brick-kiln was set aside. I cannot but hold that s. 13 of the Civil Procedure Code is applicable to the case. Nur Khan's allegation of a joint interest with Muhammad Yar Khan in the kiln was expressly made by him and denied by Wilaiti Begam in the suit of 1878 (Exp. I, s. 13). The decree which expressly decided that question in Nur Khan's favour has been cancelled altogether. And I therefore think with the Hon'ble and learned Chief Justice that the bar of *res judicata* applies to this issue as much as it indubitably would to the other issues more directly arising out of the "claim of the plaintiff" in his suit. I therefore concur in the order allowing this application with costs.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SHIBBA (*Defendant*) *v.* HULASI (*Plaintiff*).* [20th April, 1883.]

Small Cause Court suit—Suit by landholder against purchaser of produce of tenant's land for rent—Damages.

B, who held a decree for money against *G*, a cultivator, brought to sale in execution of his decree the produce of certain land occupied by *G*, and such pro-[519]duce was purchased by *S*. The landholder, to whom *G* owed rent for land, sued *G* and *S* for the amount of the rent, on the ground that under s. 56 of the N.-W. P. Rent Act the produce of the land was hypothecated for the rent. *Held*, that the defendants could only be held responsible *ex delicto*, and the suit was therefore one for damages, and, the amount claimed being under Rs. 500, one cognizable in a Court of Small Causes.

THE facts of this case as alleged by the plaintiff Hulasi were that Bandi, a *pro-forma* defendant in the suit, held a decree for money against Ganesh, another defendant. In execution of this decree he brought to sale the produce of certain land cultivated by Ganesh, and the same was purchased by the defendant Shibba. At the time of this auction-sale Ganesh owed the plaintiff Hulasi, who was the proprietor of the land, certain arrears of rent. The plaintiff contended that, in accordance with s. 56, Act XII of 1881, until such arrears of rent had been satisfied, no other claim could be enforced on the produce of the land by sale in execution of decree or otherwise, and therefore claimed to recover the amount of such arrears (Rs. 63-7-0) from Ganesh and Shibba, the auction-purchaser. The Court of first instance dismissed the claim, but in appeal the District Court reversed the judgment of the lower Court and gave the plaintiff a decree against Shibba and Ganesh.

Against this decree of the District Judge the defendant Shibba appealed to the High Court.

Mr. *Simeon*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondent.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—It cannot be contended, nor, indeed, is it urged for the plaintiff-respondent, that any liability on the part of the defendants 1 and 3 arose *ex contractu*; on the contrary they could only be held responsible *ex delicto*. This suit therefore was one for damages below Rs. 500, and cognizable by a Small Cause Court. The preliminary objection taken by the respondent's pleader, that no second appeal lies is fatal to the appeal, and it must be dismissed with costs.

Appeal dismissed.

* Second Appeal No. 1391 of 1882, from a decree of J. L. Denniston, Esq., Judge of Farukhabad, dated the 10th October, 1882, reversing a decree of Munshi Munmohan Lal, Munsif of Kanauj, dated the 11th July, 1882.

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[520] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

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RANJIT SINGH AND OTHERS (*Defendants*) *v.* ILAHI BAKHSH (*Plaintiff*).*
[20th April, 1883.]

Partition of mahal—*Act XIX of* 1873 (*N.-W.P. Land-Revenue Act*), ss. 113, 114, 115—*Omission to frame decree in case under s.* 113, *in which a question of title is decided—Necessity for a decree in such a case—Necessity for a decree in a suit under the Civil Procedure Code—Second appeal.*

When a Collector or Assistant Collector has determined to inquire into objections raising questions of title preferred under s. 113 of the N.-W.P. Land-Revenue Act, 1873, his proceeding thereupon must be conducted as an original suit in a Civil Court.

It is essential that in a suit under the Civil Procedure Code a decree should be drawn up.

Held, therefore, that in a proceeding under s. 113 of the N.-W.P. Land-Revenue Act, where the rights of the parties are decided, a decree should be drawn up giving effect to the decision.

An Assistant Collector passed a decision under s 113 declaring the rights of the parties, but did not draw up a decree giving effect to such decision. There was an appeal to the District Court from such decision, which made a decree affirming it.

Held, by STUART, C.J., on second appeal, that the defect arising from the want of a decree on the record of the Court of first instance was a bar to the hearing of the second appeal, and the proceedings of the District Court should be set aside, and the case should be sent back to the Assistant Collector in order that he might frame a decree.

Held, by STRAIGHT, J., that the decree of the District Court was appealable, such defect notwithstanding, and the appeal should be decreed and the decree of the District Court reversed, and the case be sent back to the Assistant Collector for the purpose aforesaid.

Observations by STUART, C.J., on the absence in the Code of Civil Procedure of any mandatory provisions in reference to the framing of decrees.

[N.F., 14 A. 500 (501); R., 4 O.C. 298 (299); 13 P.R. 1901=137 P.L.R. 1901; 9 S.L. R. 193.]

THIS was a case instituted in the Court of an Assistant Collector of the first class under the provisions of s. 109 of Act XIX of 1873 (N.-W.P. Land-Revenue Act), for partition of a seven and an half biswas share of a village. Notices were issued according to the provisions of s. 111 under which the defendants appeared and lodged certain objections raising questions of title; whereupon the Assistant Collector proceeded under s. 113 of the same Act to inquire into the merits of such objections. After taking evidence on both sides he decided all the issues raised in favour of the plain-[521]tiff, whom he declared "under s. 113, Act XIX of 1873, to be entitled to a share in the disputed property proportionate to his purchased seven and an half biswas share in the village." No decree was made by the Assistant Collector in accordance with this decision. From this decision of the Assistant Collector, dated the 6th January, 1882, the defendants appealed to the District Judge, who, after noticing the absence of a decree, dismissed the appeal, being of opinion that "the decision aforesaid was intended to have the force of a decree."

* Second Appeal No. 576 of 1883, from a decree of H. G. Keene, Esq., Judge of Meerut, dated the 28th February, 1882, affirming a decree of G. Billings, Esq., Assistant Collector of the first class, Meerut, dated the 6th January, 1882.

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In second appeal to the High Court two questions were raised:—(1) whether there should be a formal decree framed in a case decided under s. 113 of Act XIX of 1873 in which the rights of the parties are declared; and (2) what order should be made by the High Court in this appeal, no formal decree having been framed by the Assistant Collector.

Mr. *Hill*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and Pandit *Sundar Lal*, for the appellants.

Mr. *Conlan* and Pandit *Bishambhar Nath*, for the respondent.

The Court (STUART, C.J., and STRAIGHT, J.) delivered the following judgments:—

JUDGMENTS.

STUART, C.J.—This was a case purporting to be a second appeal in a revenue matter from the Court of the District Judge of Meerut, but when it was called on for hearing before us, Mr. *Hill*, leading counsel for the appellants, brought to our notice the circumstance that the judgment of the Assistant Collector had not been followed by any decretal order, and that in fact there was no decree by the Court of first instance. This peculiarity of the case, however, does not appear to have escaped the notice of the lower Courts. It is not referred to in the reasons of appeal before the lower appellate Court, but the Judge himself has in his judgment directed attention to it. He says:—"This decision (of the Assistant Collector) is not free from obvious irregularities. There has been no formal decree." He goes on to add, however, "but the absence of such has been condoned by this Court on the lower Court certifying that its decision was intended to have the effect of a decree." The Judge further observes:—"The above abstract shows that [522] there has been a substantial determination of the points duly framed, and the appellants do not object to the technical informality." In consequence of these remarks, I have looked into the record, as I was anxious to know what the "certifying" proceeding of the Court of the Assistant Collector could possibly be. I find that what took place was this. At the end of the memorandum of appeal, filed in the lower appellate Court, and which was signed by Mr. Smith, counsel for the appellants, there is this note by the Judge's Munsarim:—"Properly stamped—within time—decree not filed—see s. 541, Act X of 1877, and ss. 113 and 114, Act XIX of 1873. Mr. Smith says that decrees are not prepared in such cases and granted to parties by the Revenue Courts, nor is there any provision for it."

Upon this the Judge wrote the following:—"Let the Collector be called upon to state whether the paper, of which copy has been herewith filed, is the expression of his opinion adjudicating and forming a decision in the case, or whether there is any other decree." The report so ordered is in the following terms:—"The order in this case was a decision under ss. 113 and 114, Act XIX of 1873, adjudicating the question of title raised in the course of the partition proceedings. There is no other decree, nor does any appear to be required, as the matter forming the subject of the contention has been disposed of, and there is nothing in the Act which provides for the passing of a separate 'decree' in such cases."

This seems to have satisfied the Judge, for he thereupon recorded an order to register the appeal. Now, the question thus raised, that is, whether a formal decree is an absolutely necessary and essential part of the record in a civil suit under the Code of Civil Procedure, is not a little perplexing, although the argument on the score of the convenience

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afforded by a formal decree is so great as to be conclusive to the mind of a practised lawyer, (if not to those who refused to know anything about procedure beyond the letter of the Code itself), in favour of the view that a decree summarizing the conclusions of a judgment, and expressed in the formal language of the law, is a necessary judicial supplement to the provisions of the Code of Procedure. I say advisedly judicial supplement, for, strange as it may seem, there is not to be found in the [523] entire Code, with one curious exception which I shall presently notice, a single enactment providing *eo ipso* that a judgment in suits shall be followed by a *decree*, while the mind and intention of the Legislature on the subject are, I think, manifestly discernible. The Munsarim of the Meerut District Court, whose note is very creditable to him, was quite correct in directing attention to ss. 113 and 114 of the Revenue Act. These sections are in the following terms:—"113. If the objection raises any question of title, or of proprietary right, which has not been already determined by a Court of competent jurisdiction, the Collector of the District or Assistant Collector may either decline to grant the application until the question in dispute has been determined by a competent Court, or he may proceed to inquire into the merits of the objection. In the latter case the Collector of the District or Assistant Collector, after making the necessary inquiry, and taking such evidence as may be adduced, shall record a proceeding declaring the nature and extent of the interest of the party or parties applying for the partition, and any other party or parties who may be affected thereby. The procedure to be observed by the Collector of the District or Assistant Collector in trying such cases shall be that laid down in the Code of Civil Procedure for the trial of original suits, and he may, with the consent of the parties, refer any question arising in such case to arbitration, and the provisions of Chap. VI (relative to arbitrators) of the same Code shall apply to such reference."

"114. All orders and decisions passed by the Collector of the District or Assistant Collector under the last preceding section, for declaring the rights of parties, shall be held to be decisions of a Court of Civil Judicature of first instance, and shall be open to appeal to the District or High Court under the rules applicable to regular appeals to those Courts. Upon such appeals being made, the District or High Court may issue a precept to the Collector of the District or Assistant Collector, desiring him to stay the partition pending the decision of the appeal."

To these sections may be added s. 115, allowing a second appeal to this Court. It is thus quite clear that the entire procedure provided by the Civil Code is made to apply to all partition suits, such [524] as the present, and it follows that if the formality of an express decree is necessary to a judicial record in a civil suit, it is equally necessary in a revenue suit.

But let us look into the Code of Civil Procedure, and see how its provisions stand in reference to this matter. Chapter XVII of the Code treats "of judgment and decree," and generally, it may be said, of the elementary qualities of a suit; and it begins with s. 198, which provides that "the Court, after the evidence has been duly taken and the parties have been heard, either in person or by their respective pleaders or recognized agents, *shall pronounce judgment* in open Court, either at once, or on some future day, of which due notice shall be given to the parties or their pleaders;" and the following sections, down to s. 204 inclusive, deal with the qualities and characteristics of a judgment. We then come to

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s. 205, which without any preface or enactment that the judgment shall be followed by a decree, provides that "*the decree* shall bear date the day on which the judgment was pronounced: and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree." What "decree?" I cannot find any previous enactment, or, indeed, any provision throughout the Code, that in all suits the judgment shall be followed by a decree, while at the same time the definition of "decree," its form and its characteristics, are carefully stated. It really almost looks as if the Legislature meant to say:—"The formality of a decree is not absolutely essential to the enforcement of a judgment, but it *may* be added, and when it is so added, it shall be in the terms and in the form that have been provided in sections so and so." Can that possibly be what was intended? Surely not. Why should there be a difference between a judgment and decree in this respect? The Code provides that there shall be a judgment and a judgment of this kind it describes, and it explains in s. 206 that the decree must agree with the judgment, and what it shall contain and as to costs, but it does not say that there *shall* be a *decree*, or that the judgment shall be followed by a decree or anything to that effect. It appears to assume a decree as part of the procedure in a suit, and so far it may be argued very reasonably that such a formality was intended. That a formal decree was [525] really intended is also plain from other parts of the Code. Chapter XIX, which begins with s. 223 and ends with s. 343, shows this abundantly. Then the compilers of the Code are at pains to inform us what they mean by a decree, and by a very precise definition we are told that "decree" "means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal. An order rejecting a plaint, or directing accounts to be taken, or determining any question mentioned or referred to in s. 244, but not specified in s. 588, is within this definition; an order specified in s. 588 is not within this definition." Then s. 541 provides that an appeal from an original decree "shall be accompanied by a copy of the *decree appealed against* and (unless the appellate Court dispenses therewith) of the judgment on which it is founded. Such memorandum shall set forth, concisely and under distinct heads, the grounds of objection to *the decree appealed against*, without any argument or narrative, and such grounds shall be numbered consecutively;" and by s. 587 the same procedure is to be followed in appeals from appellate decrees, so that under such procedure no appeal without a decree can be entertained, and many other instances of the same kind could be given showing that a decree as a formal proceeding in itself was intended, although it is not in so many terms required by the Code, as a necessary proceeding after judgment.

A curious exception to this general condition of the Code is to be found in s. 522, which regulates the procedure for the enforcement of awards in arbitrations directed by the Court. By that section it is provided that "if the Court sees no reason to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and if no application has been made to set aside the award, or if the Court has refused such application, the Court shall * * * proceed to give judgment according to the award," and "*upon the judgment so given a decree shall follow*, and shall be enforced in manner provided by this Code for the execution of decrees. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with,

the award." This exceptional provision, that in the case [526] stated a decree shall follow upon the judgment, however remarkable in itself, appears to me to lend force to the reasoning which the Code otherwise suggests, and which shows that a decree as a necessary formality of a suit was clearly intended, as indeed its existence in practice is plainly assumed. I am therefore fully persuaded that the intention of the Code of Civil Procedure was that in all suits there should not only be a judgment, but a decree giving the formal expression of an adjudication when such adjudication decides a suit or appeal. But at the same time this is an intention we derive rather by implication than by direct expression. And why this should be so it is difficult to understand, unless the want of an express provision that a decree should follow a judgment was an inadvertency, and that in fact such a defect is a *casus omissus* in the Code.

It appears to me, indeed, that it should be so held, and although an express provision would have been more satisfactory, I consider that it is my duty to give effect to the manifest intention of the Code, and therefore to hold, as I do hold, that a decree is a necessary part of the ultimate procedure in all suits, and that the want of it is not, as the Judge of Meerut seems to have imagined, a mere irregularity. It is, on the contrary, an indispensable requisite of a judicial record, nor can the want of it be "condoned" either by the Court or by the parties, and without it, in fact, an appeal cannot be put in motion. The *judgment* clearly is not enough, for that is at best an argumentative explanation of the mind of the Court, and it is not sufficiently tangible for the purposes of an appeal on grounds and for reasons which may be distinctly set out. For such purposes the summing up of the conclusions of the Court by means of a decretal order, and thereon a decree, is in substance as well as in form a necessary reality in litigious procedure, without which the law could not be executed. In fact, as I remarked in the case before us, without a decree a judicial record does not *speak*, and wanting it no proceeding subsequent to the judgment can with any certainty be taken. The decree is, indeed, in substance as well as in form, the mouthpiece of the suit in its immediate result, and without it the dispute between the parties would not be intelligible. The question is one of procedure, based on principles which are essential to the legal charac-[527]ter and the logical completeness of all suits, and this is a judicial *desideratum* which appears to me to be fully recognized by ss. 113 and 114 of Act XIX of 1873, read with the Code, as I have felt bound to expound it in regard to this case.

Under these circumstances there has been some discussion as to what should be the form of our order. It has been suggested that, although the reasons of appeal cannot be looked at, still the case can be entertained by us in the form of the appeal actually presented, for the purpose of enabling us, being thus seized of the case, to make a proper order. But this view I cannot accept. There is, in fact, no appeal before us which we can dispose of in that character, no appeal which we can hear, because the grounds on which the appeal comes into this Court are grounds which we cannot consider as to whether they be good or whether they be bad. The want of a decree in the first Court's record was, when the case was called on before us, brought to our notice by the counsel for the appellants himself as preventing the hearing of the appeal on its merits. To give him our judgment, therefore, by any form of words would, to say the least, be a grossly illogical proceeding on our part. In fact, the actual

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state of the case in the form of an appeal in this Court shows another *casus omissus* in the Code of Procedure, and these defects are really becoming so numerous as to deserve the attention of the Legislature. There is not, so far as I can discover, a single section of the Code of Procedure which provides for the form of judgment or order in such a case as the present. The whole of the provisions of the Code assume a full and proper appeal before the appellate Court, and that even where, as provided by s. 542, the Court disposes of the appeal on some ground not set forth in the reasons, but still these reasons being before the Court for disposal on the lower Court's decree. Want of jurisdiction in a lower Court is quite a different matter, for a plea to such effect necessarily assumes a proper judgment and decree, without which, in fact, no plea against the jurisdiction could be taken.

Again, the form and contents of the judgment in appeal are given in s. 574, and it is the only provision I can find in the Code on the subject of the judgment in appeal; and it appears to me [528] to be intended to apply to all appellate judgments whatever, and no straining of its directions could make the section apply to the present case. Thus, this s. 574 provides that "the judgment of the appellate Court shall state—

(*a*) the points for determination;

(*b*) the decision thereupon;

(*c*) the reasons for the decision; and

(*d*) when the decree appealed against is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed by the Judge or by the Judges concurring therein." None of these particulars can be noticed in the case now before us, and we are therefore left to our resources for making such an order as will apply to and regulate the procedure to be followed.

The defect arising from the want of a decree in the first Court's record is fatal, not only to the present appeal on its own merits, but even to its being heard, and also to the appeal to the Judge below, and in fact, to the validity and regularity of everything that has been done since the recording of the Assistant Collector's judgment, and the order I must propose is that we set aside the whole proceeding before the Judge, and direct that the case be sent back to the Assistant Collector, that he may prepare and complete the proceedings before him by the addition of a proper decree, giving precise effect substantially and formally to the conclusions of his judgment. The costs of this order will be costs in the cause.

STRAIGHT, J.—On the 15th March, 1880, the respondent to this appeal made an application to the Assistant Collector of Meerut, under s. 109 of Act XIX of 1873, for partition of a 7½ biswas share of a certain village, and notices were issued according to the provisions of s. 111, under which the appellants appeared and lodged objections, raising questions of title, and thereupon the Assistant Collector, in pursuance of the powers given by s. 113 of the same law, proceeded to inquire into the merits of such objections. After a full investigation and taking evidence on both sides, he in a lengthy decision, declared the respondents entitled to a share "in [529] the disputed property proportionate to his purchased 7½ biswas share in the village: the partition will now be proceeded with."

It appears that this decision was unfortunately not formally embodied in a decree, though it should be remarked that no question was raised upon that point by the appellants in their petition of appeal to the

Judge, who, though he took notice of this defect in the proceedings of the lower Court, as set out in the learned Chief Justice's judgment, in the result confirmed the order of the Assistant Collector. In appeal, however, before us the learned counsel for the appellants has himself directed our attention to the fact that no decree was prepared in the Assistant Collector's Court, and he argued that as by the 3rd paragraph of s. 113 of the "Revenue Act," 1873, the procedure to be followed in partition matters is that "laid down in the Civil Procedure Code for the trial of original suits;" and as by s. 114 "orders and decisions passed by a Collector or Assistant Collector under s. 113 for declaring the rights of the parties shall be held to be decisions of a Court of Civil Judicature of the first instance, and shall be open to appeal to the District or High Court under the rules applicable to regular appeals to those Courts," it follows, as a necessary consequence, that for the purpose of making such orders and decisions effectual, it was essential that they should have expression given to them by formal decrees. I have taken time carefully to consider this point, being at first somewhat doubtful as to the construction to be placed on the 2nd paragraph of s. 113, "shall record a proceeding declaring the nature and extent of the interest of the party or parties applying for the partition, and any other party or parties who may be affected thereby." Reading ss. 113, 114 and 115 together, however, it seems to me that when a Collector or Assistant Collector has determined to make inquiry into objections raising questions of title preferred under s. 113, his proceeding thereupon must be conducted and regarded as conducted in the same mode as an original suit in a Civil Court, in which it is obviously essential that a decree should be drawn up in order to give effect to the judgment of the Court. In this view of the matter, the decision of the Assistant Collector in the case before us should have been embodied in a decree, not only for the purpose of declaring the rights of the applicant as against his objectors and the method of the partition, but to [530] supply a tangible basis on which an appeal could be preferred. I need not stop to argue that a decree is "*ex necessitate rei*" the imperative outcome of a civil suit: indeed, ss. 205 to 212 of the Code, the chapters dealing with attachment and proceedings in execution, the provisions regarding appeal and s. 644, with the forms to be found in sch. IV of the Act, seems to presume this, otherwise they could have no practical effect or purpose. If, then, the procedure of the Collector or Assistant Collector in trying cases under s. 113 "shall be that laid down in the Code of Civil Procedure for the trial of original suits," I do not think it unreasonable to hold that a decree is a necessary incident to his proceedings, as the embodiment of his decision in a proper and formal shape. I need not make any remarks, with regard to the views expressed by the learned Chief Justice as to the absence from the Civil Procedure Code of any mandatory provision in reference to the preparation of decrees. It seems enough to say that we both arrive at the same conclusion as to the necessity for a decree in a civil suit.

I regret that I find myself unable to concur in the opinion expressed in the last paragraph of the learned Chief Justice's judgment, or the order he proposes. There is to my mind no difference between this appeal and one in which a lower Court has acted without jurisdiction, and the matter comes before us in first or second appeal as the case may be. However defective it may turn out on examination, there is the decree of the Judge existing, and, as such, capable of appeal as declared in s. 115. It is only in virtue of the appeal so given to this Court that we are seized of the

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case, and are competent to pass any orders upon it. If the learned Chief Justice's view is correct, that no appeal lies to this Court, because no appeal lay to the lower Court, the only order we could properly pass would be to dismiss the appeal. As I have said, however, I think an appeal does lie from the decree of the Judge, and I would decree this appeal, and, reversing the decree of the Judge, would remit the case to the Court of the Assistant Collector, with a view to a formal decree being prepared in accordance with the decision of the 6th January, 1882. The costs hitherto incurred shall abide the result.

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5 A. 531 = 3 A.W.N. (1883) 115.

[531] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MUHAMDI BEGAM (*Plaintiff*) *v.* ABBAS ALI KHAN (*Defendant*).*
[20th April, 1883.]

Suit for money had and received—Suit by assignee of profits against lambardar—Small Cause Court suit.

The transferee of a mortgage of a share of an undivided estate sued the lambardar of the estate for the profits of such share for a certain year, the amount claimed being Rs. 500. *Held*, regarding such suit as one for money had and received to the plaintiff's use, that it was one of the nature cognizable in a Court of Small Causes.

THE facts of this case, as set out in the plaint, were that a 12½ biswas share of certain rent-free land in a village belonging to one Tejdar Begam was mortgaged to one Hijat Begam. As lambardar of the village, the defendant Abbas Ali was responsible to the co-sharers for their shares of the profits, and in the years 1286 and 1287 fasli a sum of Rs. 500, principal and interest, was due to Hijat Begam, in respect of the 12½ biswas share before alluded to. Hijat Begam died; and her heirs, by a sale-deed, dated the 10th of February 1882, duly registered, made over their claim to the Rs. 500 so due to the plaintiff Muhamdi Begam, who accordingly brought this suit in the Munsif's Court to recover that amount. The plaintiff obtained a decree for Rs. 212-14-0 out of the amount claimed, and appealed in respect of so much of the claim as had been dismissed. The lower appellate Court slightly modified the decree and allowed the plaintiff Rs. 232-4-0 out of the amount claimed, but dismissed the claim as to the remainder. In second appeal by the plaintiff it was contended on behalf of the respondent that a second appeal would not lie, the suit being one of the nature cognizable in a Court of Small Causes.

Shah *Asad Ali*, for the appellant.

Pandit *Bishambhar Nath* and Mir *Zahur Husain*, for the respondent.

The Court (STRAIGHT, J., and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—A preliminary objection is taken by the learned pleader for the respondent that, the suit being in the nature of [532] one cognizable by a Small Cause Court, no second appeal can be entertained.

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* Second Appeal No. 1327 of 1882, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 31st July, 1882, modifying a decree of Maulvi Ahmad Hasan, Munsif of Amroha, dated the 23rd May, 1882.

The plaintiff-appellant, claiming as the assignee of certain rights under a mortgage to her vendor's predecessor in title, sues the defendant, lambardar of the estate in which the land to which such mortgage relates is situate, for the profits of 1286 fasli. We can only regard such a claim as one for money had and received to the use of the plaintiff, and therefore, the amount being Rs. 500, the suit was cognizable by the Small Cause Court. Hence the appeal must be dismissed with costs.

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Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

ADI DEO NARAIN SINGH AND ANOTHER (*Plaintiffs*) v. DUKHARAN SINGH AND OTHERS (*Defendants*).* [25th April, 1883.]

Hindu widow—Adverse possession—Limitation—Reversioners—Cause of action—Act I of 1877 (*Specific Relief Act*), s. 42—*Joint Hindu family—Partition.*

On the death of *P*, a Hindu widow, who had been in possession of the estate of her deceased husband, *D*'s daughter *B* was entitled to succeed to the estate, if it were *D*'s separate property. *S*, however, alleging that the estate was ancestral property, to which he was entitled to succeed, took possession of it. Thereupon the sons of another daughter of *D*, alleging that the estate of *D* was his separate property, that *B* was entitled to succeed to it, that they were the next reversioners, and that *B* was acquiescing in a possession on the part of *S* which was adverse to her and to them as next reversioners, sued *B* and *S* for a declaration of their reversionary right, and for possession of *D*'s estate or such relief in this respect as the Court might think fit to give. *Held*, that the plaint disclosed a right to sue on the part of the plaintiffs and a cause of action. *Nobin Chunder Chuckerbutty* v. *Gurru Persad Doss* (1), *Radha Mohan Dhar* v. *Ram Das Dey* (2), *Gunesh Dutt* v. *Lall Muttee Kooer* (3) and s. 42 of the Specific Relief Act, referred to.

In order to show separation in a Hindu family, it is not necessary to establish a partition of the joint estate into separate shares or holdings; it is enough that there has been ascertainment and definition of the extent of right and interest of the several co-sharers in the whole, and of the proportion of participation each of them is to have in the income derived from the property, to effect a severance and destruction of the joint tenancy, so to speak, and to convert it into a tenancy in common. *Appovier* v. *Rama Subba Aiyan* (4), followed.

Held, therefore, where, although the ancestral property of a Hindu family had not been formally and completely partitioned by metes and bounds, the [533] income of it had been enjoyed by the different members of it in distinct and defined shares, that the family was not a joint and undivided Hindu family.

It being decided that *B* was entitled to the estate of *D* and that she should be in possession of it, the Court, having regard to *B*'s conduct, gave the plaintiffs a declaration of their reversionary right to *D*'s estate and directed that possession of it should be given to *B*, and, if she declined to accept possession, then that *A*, one of the plaintiffs, should be put in possession for her as manager on her behalf, and he should act under the orders and directions of the lower Court, filing accounts in, and paying the income to her, through such Court, whose receipts should be a sufficient discharge.

[F., A.W.N. (1884) 172; Appr. & F., 33 M. 473 = 5 Ind. Cas. 640 = 20 M.L.J. 204 = 7 M.L.T. 340 (343); Appr., 8 A. 429 (433); R., 19 B. 809 (815); 76 P.L.R. 1904; D., 14 A. 156 (158) (F.B.).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

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* First Appeal No. 29 of 1881, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 24th December, 1880.

(1) B.L.R. F.B.R. 1008. (2) 3 B.L.R. 362.
(3) 17 W.R. 11. (4) 11 M.I.A. 75.

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Messrs. *Conlan* and *Spankie*, and Pandit *Ajudhia Nath*, for the appellants.

Messrs. *Colvin*, *Ross* and *Howard*, Pandit *Bishambhar Nath*, Munshi *Sukh Ram* and Babu *Beni Prasad*, for the respondents.

The Court (STRAIGHT, J., and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—This is an appeal from a decision of the Subordinate Judge of Azamgarh passed on the 24th of December, 1880. The suit relates to the zamindari and house property left by one Durga Dayal Singh, of whom the plaintiffs-appellants, Adi Deo Narain Singh and Ram Deo Narain Singh, are respectively grandson and great-grandson on the daughter's side. The circumstances of the case are somewhat peculiar and need explanation. One Pahlwan Singh, the common ancestor, had six sons, of whom the above-named Durga Dayal Singh was one, and it will become an important question for consideration and determination hereafter, whether upon the decease of Pahlwan Singh there was separation among the brothers, for if there was not, it is conceded that the claim of the plaintiffs falls to the ground.

Durga Dayal Singh died in June 1875, leaving Phul Kuar, his childless widow; and the plaintiffs allege that from this time until the 15th of December, 1878, when she herself died, Phul Kuar remained in possession and was recorded as the proprietor of the whole estate left by Durga Dayal Singh. At the death of Phul Kuar this estate, if his separately, should by the Hindu law of inheritance have passed for life to Bansraj Kuar, his daughter by another [534] wife, Nawas Kuar, who had predeceased him, and who is admitted by the plaintiffs in their plaint to have an immediate and preferential interest to theirs, they only claiming as her reversioners. Conceding this, however, they come into Court upon the allegation that the defendants 1 to 8 are wrongfully in possession of the whole estate of Durga Dayal Singh, which should be in the hands of Bansraj Kuar, who, they assert, is improperly acquiescing in and countenancing such possession of the defendants in collusion with them, and that thereby their reversionary rights have been and are affected, while the property itself is being wasted and depreciated. The present suit was instituted on the 9th April, 1880, by the plaintiffs, Adi Deo Narain Singh and his brother, Sri Deo Narain Singh, who died in the course of the litigation and has been succeeded by his son, the minor plaintiff, Ram Deo Narain Singh. As will be seen on reference to the accompanying family tree, the accuracy of which is admitted, the representatives of all the sons of Pahlwan Singh, with the exception of Ram Pragas, to whom no heir survives, are parties to the litigation, Bansraj Kuar, the daughter of Durga Dayal Singh, having been joined in the array of defendants.

The Subordinate Judge, after taking a great deal of oral and documentary evidence, came to the conclusion that the plaintiffs had failed to establish that Durga Dayal Singh had separated from his brothers, and upon this footing dismissed the suit at the same time remarking that no sufficient proof had been produced of Bansraj Kuar's collusion with the defendants. It is from this decision that the plaintiffs now appeal, and their main contention is, that the proof on the record abundantly shows, that Durga Dayal Singh did live and enjoy his property separately from his brothers, and that Phul Kuar, his widow, after him was recorded in respect thereof, and continued in sole possession till

her death in 1878, which could not have been the case had the property been joint. Before, however, we approach the consideration of this question of fact, upon which we may at once say we do not agree with the Subordinate Judge, it is necessary to dispose of a legal point raised by the defendants as to the capacity of the plaintiffs to maintain a suit at all. It was urged as a sort of demurrer to the plaint that it neither discloses [535] a cause of action, nor does it show any "*status*" in the plaintiffs to come into Court and ask for the relief claimed. Conceding for the purposes of argument that Durga Dayal Singh's estate was separate, the plaintiffs, it was contended, in the presence and during the lifetime of Bansraj Kuar, and in the absence of any alienation or diversion of the property by her, cannot seek a declaration of their rights as reversioners, and certainly cannot claim possession of the estate. To this it was replied on the part of the plaintiffs that, it being admitted they would have had a good title to institute a suit had Bansraj Kuar made any transfer of or charge on the reversionary estate, "*a fortiori*" if she was acting in collusion with the other defendants by acquiescing in and countenancing their wrongful possession thereof, or if by intentionally or supinely refraining from asserting her own interests in the property against such possession, she had allowed limitation to begin to run, there was ample ground to justify the plaintiffs seeking a declaration of their title and asking to have the estate reduced into possession. As to the claim for possession, the plaintiffs admitted their willingness to accept any order in that behalf the Court might impose, but maintained it was obvious, from the attitude of Bansraj Kuar, the life tenant, that she was unfit to have charge of the estate, and imperative that it should be reduced into the possession of some one who could protect the interests of her and the reversioners alike. In answer to these arguments the defendants urged that if there was fraud and collusion between Bansraj Kuar and themselves, their possession could not be adverse to her; on the contrary it must be taken to be with her consent, and so no question of limitation could arise. It was, moreover, contended for the defendants that there was not a particle of evidence to show fraud or collusion, and this being the basis upon which the plaintiffs had come into Court, they having failed to establish it could not be allowed relief upon grounds they themselves had not put forward.

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It will be convenient first of all to look at the plaint to see exactly what in terms is the position asserted by the plaintiffs. Paragraph 5 is as follows :—"Subsequently Phul Kuar died on the 15th September, 1878, and the defendants, notwithstanding their previous failure and defeat, again resolved to interfere [536] illegally with the said property in reliance on their riches and on the large number of their partisans. In reality Bansraj Kuar, defendant 9, the childless daughter of the said ancestor, who is now by order of succession prescribed by the Shastras entitled to possession, took no notice of it. On the contrary, she having colluded with the defendants, kept silent, and therefore the plaintiffs, with a view of protecting the property and restraining the defendants' illegal acts, instituted a suit under Act XIX of 1841 in the Court of the Judge of Azamgarh, but they obtained no redress from that Court. On the contrary the title of the defendants 1st party was on the 5th of April 1879, declared summarily and erroneously and in contrariety with the principles of the Shastras, with the real facts, and with the value of the property." Para. 6.—"Since the suit brought under Act XIX of 1841 was decided in favour of the defendants 1st party, the mutation cases with respect to the

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ilaquas, which had been pending in and postponed by the Revenue Court pending the said decision, were also decided against the plaintiffs on the 20th of October, 1879, and the mutation of names with respect to most of the villages of pargana Ghosi was effected in favour of the defendants 1st party. This is calculated by all means to deprive the plaintiffs of their just right and to disinherit them in future, and as these orders were passed against the plaintiffs, it became incumbent on them to have them cancelled by a Court." Para. 7.—" Although according to the order of succession prescribed by the Shastras the right of succession to and possession of the ancestor's property devolves first on Bansraj Kuar, yet the said lady has since the death of the ancestor, Durga Dayal Singh, or of Phul Kuar, the maternal grandmother of the plaintiffs, neither obtained possession of the property left by the ancestor, nor made any endeavour to obtain possession of and protect it, nor did she take any measure. On the contrary, she having acquiesced in the possession of defendants 1 to 8 allowed them to take unlawful possession and to have mutation of names in respect of the said property effected in their favour. This evidently proves the overt collusion of defendant No. 9, and is highly prejudicial to the plaintiffs and calculated to deprive them of their right. It is evidently highly necessary to protect the property left by the ancestor from the effects of the law of limita-[537]tion and to preserve the right of the plaintiffs, who are heirs under the Shastras. The carelessness and collusive silence of the defendant 9 have especially resulted in this, that the defendants have broken and spoilt the hereditary dwelling-house and are at the point of wasting and ruining the other property also."

We do not feel ourselves greatly pressed by the argument of the learned counsel for the defendants that, looking to the above language of the plaint and the way in which the case for the plaintiffs is put forward, they cannot be allowed to succeed if they prove anything short of actual fraud and collusion. It is impossible to apply very strict or technical rules to the construction of pleadings in this country, at any rate in these Provinces, or to bind parties too closely down to the exact phraseology employed in them. What we take the plaint in this case substantially to mean is, that, whether through indifference or carelessness or by deliberate or intentional omission to assert her own rights, Bansraj Kuar has acquiesced in a possession on the part of the defendants 1 to 8 that is adverse to such rights, and that in consequence the interests of the plaintiffs as presumptive reversioners are directly and immediately imperilled. The argument that the possession of the defendants 1 to 8, if held with the consent of Bansraj Kuar, cannot be regarded as adverse, appears to us a fallacious one. It was in no way derived from or under her, for she never obtained any possession herself at all; nor do the defendants maintain their possession in virtue of any title acquired by them through her by sale, transfer or otherwise; but on the contrary their allegation is that they and the last male owner, Durga Dayal Singh, were joint, and consequently that succession goes in the male line, and that they are his heirs. If the estate now in question were, as asserted by the defendants, joint, the acquiescence or consent of Bansraj Kuar would be indifferent, for it could only be of importance if the estate were separate, which the defendants deny. Apart from this, if we should pay any attention at all to the written statements filed by Bansraj Kuar, they, whether she is acting collusively with the other defendants or not, most distinctly declare that the possession of those defendants is adverse to her. Such being the case, it is clear law that if

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time has begun to run against her, equally is it running against the plaintiffs. In face of the result of the suit [538] under Act XIX of 1841, the orders passed in the mutation cases in October, 1879, and the fact that from December, 1878 to April, 1880, Bansraj Kuar had made no move to attack what she now declares to be the wrongful possession of the estate of Durga Dayal Singh by the defendants, we find it impossible to concur in the contention that the plaintiffs had no sufficient cause of action to justify their coming into Court. As remarked by Sir BARNES PEACOCK in *Nobin Chunder Chuckerbutty* v. *Guru Persad Das* (1), "reversionary heirs presumptive have a right, although they may never succeed to the estate, to prevent the widow committing waste, and I have no doubt that if a proper case were made out, reversionary heirs would have a sufficient interest, as well as creditors of the ancestor, by suit against the widow and the adverse holder, to have the estate reduced into possession, so as to prevent their rights becoming barred by limitation," and the same views are enunciated in *Radha Mohun Dhar* v. *Ram Das Dey* (2) and *Gunesh Dutt* v. *Lall Muttee Kooer* (3). It is to be noted that these were decisions given before s. 42 of the "Specific Relief Act" had become law, and now "any person entitled to any right as to any property may institute a suit against any person denying or interested to deny his title to such right, and the Court may in its discretion make therein a declaration that he is so entitled." It could scarcely be seriously contended that the words "any right" would not cover the case of the plaintiffs, who are obviously the immediate reversioners to Bansraj Kuar, or that the defendants by holding adverse possession to the life-tenant are not indirectly denying the title of the reversioners. Had she obtained possession of the estate of Durga Dayal Singh on the death of Phul Kuar and then made an alienation of it, the plaintiffs would obviously have been entitled to seek a declaration that such alienation would not hold beyond the term of her life. But the case of the plaintiffs is something more than this, for, as we have already pointed out, Bansraj Kuar never has had possession, but it has been held adversely to her by the defendants from the death of Phul Kuar, and she has never been permitted to enter upon her life-tenancy. Had the plaintiffs, therefore, merely sought for a [539] declaration of their right as reversioners, they would have been met, and successfully we think, with the objection that as they might have asked for consequential relief—namely, that the estate should be reduced into possession—a declaratory decree could not be given them. We are therefore of opinion that the plaint does upon the face of it disclose both a right in the plaintiffs to bring a suit and a good cause of action for the same, and in this view of the matter it is unnecessary to consider whether, if at all, or to what extent, fraud and collusion between Bansraj Kuar and the other defendants is established in fact, or to determine the "*bona fides*" or otherwise of her letter of the 9th September 1880. Assuming, as it has been necessary to do for the purpose of discussing this first question, that Bansraj Kuar is entitled to the estate of Durga Dayal Singh for life, in which case the plaintiffs are admittedly the nearest presumptive reversioners, who, were she to die at this moment, would succeed to it, the fact of the defendants holding possession in such a way that time has begun to run, against not only Bansraj Kuar but the plaintiffs, seems abundant justification for the institution of the suit. Such being our

(1) B.L.R.F.B.R. 1008. (2) 3 B.L.R. 362. (3) 17 W.R. 11.

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views upon the preliminary point taken by the counsel for the defendants, we now proceed to address ourselves to the remaining question, upon the determination of which the claim of the plaintiffs must stand or fall—namely, whether Durga Dayal Singh at the time of his death was joint or separate in estate.

In order to facilitate our coming to a conclusion upon this point, it is both necessary and convenient to ascertain the legal principle by which our consideration of the matters of fact under this head are to be guided. The case of *Appovier* v. *Ram Subba Aiyan* (1) is the leading authority upon the subject, and the rules laid down by their Lordships of the Privy Council therein have been universally followed both by the Courts of India and subsequent decisions of that Board. The following passages from the judgment have a material bearing upon the question before us:—"According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a [540] certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rent a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the mode of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, *although the property itself has not been actually severed and divided.*" Then again: "It is necessary to bear in mind the two-fold application of the word 'division'; there may be a division of right, and there may be a division of property." Again:—"Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de facto* division of the subject-matter. This may at any time be claimed by virtue of the separate right. The words with which this instrument of the 22nd of March, 1834, concludes manifest an intention to become divided * * * We find therefore a clear intention to subject the whole of the property to a division of interest, *although it was not to be immediately perfected by an actual partition* * * * The deed of March, 1834, operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, *viz.*, that that is sufficient to make a divided family, and to make a divided possession of what was previously undivided, *without the necessity of its being carried out with an actual partition of the subject-matter.*"

[541] The plain principle deducible from the above observation is, that in order to show separation it is not necessary to establish a partition of the joint estate into separate shares or holdings; it is enough

(1) 11 M.I.A. 75.

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that there has been ascertainment and definition of the extent of right and interest of the several co-sharers in the whole, and of the proportion of participation each of them is to have in the income derived from the property, to effect a severance and destruction of the joint tenancy, so to speak, and to convert it into a tenancy in common. In the suit before us there is no agreement of the kind to be found in *Appovier's case*, and it undoubtedly lies with the plaintiffs to establish the separation of Durga Dayal Singh, through which alone by the succession of Bansraj Kuar can their reversionary rights arise. It may at once be conceded that no formal and complete partition by metes and bounds was ever effected between the sons of Pahlwan Singh, either by consent or through the instrumentality of the revenue authorities, though proceedings with that object were commenced by Durga Dayal Singh and Balgobind, his brother, in 1874. We must therefore look to the evidence adduced to see if, as a matter of fact, the sons of Pahlwan Singh or their successors, who are parties to the present suit, did or did not enjoy the income of the ancestral estate in distinct and defined shares? Now, without wishing unduly to disparage the oral testimony produced by the defendants, we prefer, having regard to the peculiar circumstances of the case, the undoubted prejudice there is among many Hindus against succession following in the female line, and the facility with which persons of the means of defendants 1 to 8, especially when they are in possession of property, can get witnesses to come forward and support them, to rely upon the documentary proof to be found in the record, some of which dates as far back as 1851.

(After referring and commenting on this proof, the judgment continued) :—Looking at all the documentary evidence to which we have already referred, we think it would be impossible to hold that the sons of Pahlwan Singh remained a joint and undivided Hindu family within the meaning of the Hindu law after the year 1851, and in this view of the matter it follows that Bansraj Kuar, at the death of Phul Kuar, became entitled to the estate of Durga Dayal [542] Singh for her life, and should now be in possession thereof. At an earlier stage of our judgment, in discussing the preliminary point raised by the defendants, we took occasion to observe that, having regard to the construction we were disposed to put upon the plaint, it did not appear to us necessary to enter into the question of fraud or collusion between Bansraj Kuar and the defendants 1 to 8. Her conduct, however, must be considered now, when we have to determine the shape in which a decree should be given to the plaintiffs. Although her supineness in not asserting her rights against the trespass of the defendants and the ambiguous terms of her letter to the plaintiffs awaken suspicion as to her "*bona fides*," it is to be borne in mind that after the present suit was instituted she did apply to be made a plaintiff. It therefore appears to us that an equitable and proper order will be to decree the appeal with costs, and declaring the rights of the plaintiffs as reversioners to the estate of Durga Dayal Singh, to order that possession thereof be given to Bansraj Kuar. If she declines to accept possession, then the plaintiff Adi Deo Narain Singh will be put into possession for her as manager of the property on her behalf, and he will act under the orders and directions of the lower Court, filing accounts in and paying the income to her through such Court, whose receipts shall be a sufficient discharge. We leave the question of mesne profits open.

Appeal allowed.

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Before Mr. Justice Straight and Mr. Justice Tyrrell.

BHAWANI GHULAM AND ANOTHER (*Defendants*) v. DEO RAJ KUARI, GUARDIAN OF LAL NARAIN DAR (*Plaintiff*).* [4th May, 1883.]

Hindu Law—Mitakshara—Joint Hindu family—Impartible Raj—Power of Rajah to alienate—Primogeniture—Suit by eldest son to set aside alienation.

Where there is no local or family custom overriding the general law, the succession to a Raj or impartible zamindari, according to Hindu Law, goes by primogeniture.

In the absence of any custom to the contrary, a Raj or impartible zamindari is, according to Hindu Law, not separate property but joint family property.

The *Shivagunga case* (1), *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (2). *Doorga Prasad Singh* v. *Doorga Konwari* (3). *Stree Rajah Yanumula* [543] *Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (4) and *Periasami* v. *Periasami* (5), followed. The *Tipperah case* (6), observed on.

According to the law of the Mitakshara, joint family property cannot be alienated by any member of the family, save for urgent and necessary expenses of the family, without the consent of all the members.

Held, therefore, where the holder of an impartible Raj made an absolute gift of a portion of the estate appertaining to the Raj to one of his wives, "in token of his love for her," and his eldest son sued to set aside the alienation, that, the parties being members of a joint Hindu family, and governed by the law of the Mitakshara, the son was entitled to bring the suit, and that the alienation, not being made for necessary purposes, was void.

Held also, on the evidence in this case, that a custom entitling the holder of the Raj to make such an alienation was not established.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Colvin*, Lala *Lalta Prasad*, Munshi *Sukh Ram*, and Shaikh *Maula Bakhsh*, for the appellants.

Mr. *Hill*, the *Senior Government Pleader* (Lala *Juala Prasad*), Babu *Jogindro Nath Chaudhri*, and Shah *Asad Ali*, for the respondent.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—The plaintiff-respondent, Lal Narindar Bahadur Pal, by his mother and guardian, Rani Deo Raj Kuari, as eldest son of Rajah Bhawani Ghulam Pal, seeks in the suit before us in appeal to have his right declared to the succession to the Raj of Mahauli, part of the estates belonging to which lie in the District of Basti, in these Provinces, and for the avoidance of a deed of gift executed by his father on the 18th of February, 1877, in favour of Rani Surtaj Kuari, his second wife, by which seventeen villages were conveyed to her. The plaintiff's allegations are in substance, that these seventeen villages formed the most valuable and important part of the Raj; that they had descended to his father from his predecessors by virtue of his succeeding to the position of Rajah and occupying the *gaddi*; and that as ancestral estate belonging

* First Appeal No 139 of 1880, from a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 2nd October, 1880.

(1) 9 M.I.A. 543. (2) 14 M.I.A. 570. (3) 4 C. 190.
(4) 13 M.I.A. 333. (5) 5 I.A. 61. (6) 12 M.I.A. 523.

to the Raj, they were inalienable under the Hindu Law. In other words, the position asserted by the plain-[544]tiff is, to put it shortly, that each successive Raja of Mahauli is a mere life-tenant of the Raj; that he is only entitled to the income derived from the Raj estate charged with allowances for maintenance to certain members of the family; and that he has no power to permanently dispose of or convert the "*corpus*" of it by will, gift or otherwise, but must leave it as he took it to his successor, whose succession is determined by primogeniture. Rajah Bhawani Ghulam Pal and Rani Surtaj Kuari, the donee under the deed of gift sought to be invalidated, are the defendants in the suit, and they directly traverse the plaintiff's allegations in their written statement, asserting that it has been the long recognised custom and practice for the incumbents of the Raj to deal with the estate as absolute owners. They further impeach the plaintiff's right to come into Court, on the ground that succession to the *gaddi* does not go by seniority, but by selection according to personal merit and fitness. The Subordinate Judge of Gorakhpur decreed the plaintiff's claim as prayed, and from his decision the appeal now before us at the instance of the defendants has been preferred. The case is one of considerable moment, not only from the value of the property in suit, but the importance of the legal questions involved as to the precise character of the property of the Raj and the power of the Rajah in regard to it. Before addressing ourselves to the points raised for our determination, a few words may be conveniently devoted to recording the history of this Mahauli Raj. The estates, which are considerable, lie in the parganas of Tanda and Akbarpur, Fyzabad, in the province of Oudh, and Mahauli and Rasulpur, in the district of Basti, in these Provinces. It would appear that some 300 years ago two brothers, by name Alakdeo and Tilakdeo, Surajbansi Rajputs, hailing, so they alleged, from Kumaun, invaded the locality in which the property above mentioned is situate, and killing one Kaulbil, the then Rajbhar, appropriated his lands and made them the nucleus of the present Raj. Subsequently, for services rendered or for some other reason, they obtained from one of the Delhi Emperors the title of "Pal," which has now for a long course of years attached to the family. Originally the dwelling-house of the Rajah was in the village of Mahauli, but it was afterwards removed to Mahson, where it now is situated. The seventeen villages, to [545] which the deed of gift in favour of Rani Surtaj Kuari relates, are nearly all situated in Mahson, and are estimated, in round figures, to be worth some five lakhs of rupees, and form, so the plaintiff alleges, the most valuable part of the Raj properties. The names of the several Rajahs who have preceded the present incumbent in their order are, as far as we have been able to ascertain them, (1) Dip, (2) Jaswant, (3) Kalandar, (4) Bakhtawar, (5) Sarfaraz, (6) Shamshere and (7) Mardan, father of the defendant Ghulam, and grandfather of the plaintiff. Of the above, with the exception of Kalandar, who is said to have been selected in preference to his elder brother Zorawar, though the evidence as to this is of the vaguest and most unsatisfactory kind, succession to the *gaddi* has been ruled by primogeniture.

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We now revert to the contentions urged by the appellants' counsel in support of the appeal. Briefly they are—*1st*, that the plaintiff has no title to come into Court during his father's lifetime, for he is neither a co-proprietor nor a reversioner; *2nd*, that if he has a right to institute a suit, it rests with him to establish the inalienability of the Raj, and that under any circumstances the defendants have conclusively proved the

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competence of the Rajah to make the gift impeached. The first question involves the consideration of many points of no slight difficulty and complexity, and their examination has been not a little perplexed by a perusal of the numerous authorities to which we were referred in the course of the arguments at the hearing of the appeal. Putting aside the suggestion of custom or usage made in the plaint, which we do not feel called upon to discuss, the position asserted by the plaintiff apparently resolves itself into this: The estate now in possession of my father is ancestral; he and I are members of a joint Hindu family, ordinarily subject to the law of the Mitakshara. If I survive him I must under that law succeed to the estate. Although it is admittedly impartible in the sense that I cannot demand partition thereof or have joint enjoyment of the income derived therefrom, yet I have, so to speak, a limited proprietorship therein in the shape of rights to maintenance and succession by survivorship. In other words, the plaintiff claims that except in so far as from the nature of the state they are in-[546] applicable, his case must be determined according to the principles of the Hindu law which govern joint families and their property. As a matter of first impression it appears to us that this contention is based on grounds of justice and good sense, but it will be convenient at once to see how far authority supports it. Turning to the well-known *Shivagunga case* (1) we find the following apposite passage:—

"The zamindari is admitted to be in the nature of a principality—impartible, and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindu law prevalent in that part of India, with such qualifications, only as flow from the impartible character of the subject. Hence, if the zamindar, at the time of his death, and his nephews were members of an undivided Hindu family, and the zamindari, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle."

The decision of their Lordships in that case proceeded on grounds that left the principles thus laid down untouched, and they seem to establish that a Raj or impartible zamindari may be a portion of joint family estate, and that in the absence of a custom to the contrary, succession to it will be regulated by the ordinary rules of Hindu law. In harmony with this view are the following passages in another Privy Council judgment—*Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (2). Here, again, the object of dispute was an impartible property, the succession to which was alleged by both parties to be governed by special family custom, which, by the way, neither side proved. Recapitulating a portion of our quotation above from the *Shivagunga case*, their Lordships observe:—"Such also must be the rule of succession to be applied in the case now under appeal," and they then go on to remark:— "The High Court, in their judgment in the present case, declare that no work of authority or decision has been cited or found directly giving the rule of descent. That this [547] should be so may perhaps be explained by the fact that primogeniture is the rare exception to the ordinary rule in Hindu families, taking place only upon the descent of some impartible subject as a Raj or office, and that in most cases of the kind there

(1) 9 M.I.A. 543.

(2) 14 M.I.A. 570.

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has probably been found some local usage regulating such descent." Later they say:—"It will be found from numerous authorities and instances, that although the father's property by the general rule descends upon all his sons, yet whenever it becomes necessary to make a distinction, precedence is given to the first born." Again:—"It is true that these doctrines occur in passages treating of divisible inheritance, but the presumption from them is irresistible, that in the case of an inheritance which is from its nature indivisible, and can therefore go to one only of several sons, the first-born, by reason of his general pre-eminence, should be preferred to his younger brothers." "It is right," their Lordships add in a concluding paragraph "to observe that, if the decision had to rest only upon reasons of policy and convenience, these reasons would seem greatly to preponderate in favour of the right of the first-born son. The inheritances of Hindus which descend on a single heir are almost entirely confined to zamindaris in the nature of a Raj and to offices, and it is obviously in accordance with reason and convenience that such succession should devolve upon the son, who would, in natural course, first reach manhood, and be capable of discharging the duties attaching to inheritances of this kind." The conclusion to be deduced, as it appears to us, from these observations of their Lordships is, that where there is no local or family custom overriding the general law, the succession to a Raj or impartible zamindari according to Hindu law goes by primogeniture. There is one other decision of the Privy Council, *Doorga Persad Singh* v. *Doorga Konwari* (1)—in which the passage from the *Shivagunga case* is quoted with approval, and where the following material remarks to the question under our consideration occur:—"The impartibility of the property does not destroy its nature as joint family property or render it a separate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were [548] separate." In this connection we may also refer to the judgment in *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (2) in the course of which it is observed:—"It is therefore clear that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession to separate estates." So in *Periasami* v. *Periasami* (3) it is said: "He would, therefore, necessarily be joint in that estate, so far as was consistent with its impartible character, with his two younger brothers, the latter taking such right and interests in respect of maintenance and possible rights of succession, as belong to the junior members of a Raj or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate, though impartible, was up to the year 1829, in a sense, the joint property of the joint family of the three brothers." We have thought it right to quote at this length from these Privy Council rulings because the counsel for the appellants greatly pressed upon us a case, to be found at page 523 of the 12th volume of Moore's Indian Appeals, which is known as the *Tipperah case*, and particularly the following passage on page 540:—"Still, when a Raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction also involving a contradiction to call this separate ownership, though coming by inheritance, at once

(1) 4 C. 190. (2) 13 M.I.A. 333. (3) 5 I.A. 61.

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sole and joint ownership, and so to constitute a joint ownership without the common incidents of co-parcenership." With deference we can only remark, that we find ourselves wholly unable to reconcile this view of the matter with the opinions expressed in the other judgments of their Lordships from which we have quoted, and by which in every aspect of the question before us we prefer to be guided. An impartible Raj or zamindari must, it seems to us, be one of two things—either a separate estate conferring independent and absolute proprietary powers and carrying its own special rules of succession, or a joint ancestral estate pertaining and belonging to a joint undivided family. Because it is impartible it is not necessarily separate, for its impartibility does not "destroy its nature as joint family property," nor does it "make the succession follow the succession of separate estate." If, then, it can be considered joint property, is [549] it to be so merely in name? It must be conceded that the complete rights of ordinary co-parcenership in the other members of the family, to the extent of joint enjoyment and the capacity to demand partition, or merged in, or, perhaps, to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains, along with the right to maintenance, in a sufficiently substantial form to preserve for them a kind of dormant co-ownership. This is matter, however, more pertinent to the second question we shall presently have to consider. As to the first—namely, the competency of the plaintiff to maintain this suit—we think that, in the absence of any custom to the contrary, he and his father being Hindus and members of a joint Hindu family, and as such subject to the law of the Mitakshara, the estate pertaining to the Raj of Mahauli must be regarded as joint family property, in which he has an immediate present interest and a right of succession as eldest son. In this view of the matter the first contention urged for the appellant fails.

In support of his second point—namely, that the *onus* was on the plaintiff to establish the inalienability of the Raj—the counsel for the appellant referred us to *Rajah Udaya Aditya Deb* v. *Jadub Lal Aditya Deb* (1). We have very carefully perused that ruling of their Lordships of the Privy Council, as also the judgment of the High Court of Calcutta (I. L. R., 5 Cal., 113) from whose decision the appeal was preferred, and it seems to us sufficient to say that the property, to which the litigation related, was situated in Lower Bengal, where the parties would be subject to the Dayabhaga and not the Mitakshara. Under the general law, therefore, by which they were governed, the Rajah had power to make alienations, and it was for those who deemed his right to do so, to establish a custom of inalienability that would override the general law. In the case before us, however, the Mitakshara is the law of the parties; and if we have correctly held that the Mahauli Raj estate is joint family property, then, save for urgent or necessary expenses of the family, no one member, even though he stands in the position of father or manager, [550] can alienate it or any part of it without the consent of all. Such at least is the view of the Hindu law that has been always recognised by this Court in a long, and, as far as we know, unbroken series of decisions, from which we should hesitate to depart. It cannot be pretended that an absolute gift of seventeen of the best and most valuable villages of the Raj to a junior wife is within the

(1) 8 I.A. 248.

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exception. On the contrary, to recognise such a power in a Hindu father would defeat the first principles of the Hindu law of inheritance, and render the continuance of the joint family system impossible. We put it to the counsel for the appellant in the course of his argument, that if he carried it to its logical conclusion, a Rajah might dissipate the whole of his ancestral estate, and of his own free will extinguish the Raj, and he frankly admitted that he did not shrink from going that length. If for a moment we can entertain questions of policy, we doubt the expediency or propriety of allowing any such doctrine to go abroad. Looking at the matter in its practical aspect, and having regard to the origin and growth of these small powers or principalities, which are not without purpose or usefulness, we are not prepared to admit, at any rate, so far as the law governing these Provinces is concerned, except where it is clearly over-ridden by well-recognised family custom, any such absolute disposing power in one member of a joint family over estate, which has some of the incidents at least of joint family property. For to do so would involve the inconsistency that while the Rajah or incumbent for the time being can in no way control the succession after him, he may nevertheless effectually deprive his successor of anything to succeed to. Until corrected by higher authority, we must hold that the law of the Mitakshara is applicable to the present case, and that the defendant Rajah and the minor plaintiff being members of a joint Hindu family, and the estate of the Raj being joint ancestral property, the alienation impeached by this suit, not having been made for necessary purposes, is void and must be set aside.

It only remains for us now to deal with the third contention put forward by the appellants' counsel—namely, that a custom has always existed in the Mahauli Raj, whereby the Rajah for the time being can make alienations of the character challenged in [551] this suit, and that this has been done over a long course of years. They contended that this custom has been well established by their evidence; that some of these witnesses are alienees in possession of parts of the estate conferred on them under the operation of this custom by former Rajahs; that no evidence was offered by the other side to contradict or qualify this testimony, and that it is not shown that objection was ever taken to any act of alienation previous to that which is the subject of this action.

The case, which the defendants thus set up, may be stated in the terms of the deed impugned by the respondent.

"Accordingly," wrote the donor, the reigning Rajah, "I am, with reference to the nature of the Raj and *raisat*, and custom and usage of the family and country, the *sole permanent proprietor*, *having full power to make transfers of every kind*, and there is *no partner or sharer with me in the estate;* that a long time ago I have of my own accord contracted a marriage with Rani Surtaj Kuari, and I am very much satisfied and pleased by her good conduct and love and obedience to me, but I have up to this time not done any benevolent act to the said Rani in token of my love to her; that I have therefore, considering it expedient, made a gift and grant of my own free will and accord, without any force or compulsion whatever, but with my pleasure, of the under-mentioned villages, *owned and possessed by me exclusively*, which form a portion of my (*ilaka*) estate, in favour of the said Rani; that after putting her in proprietary possession thereof, I corroborate and confirm the transaction by the declaration that the said Rani will be the *absolute proprietor* from this date of the under-mentioned villages together with all the acquired and acquirable rights, revenue and *sair* items, &c.; that *neither I nor my*

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future heirs or representatives have, or shall have, any power to take back the entire or any portion of the said gifted property; that the said Rani shall retain it in her possession by virtue of her proprietary right, that she shall enforce all *her proprietary powers, including that of making transfers also*, and that she should get her name entered in the public office as proprietor instead of mine."

To support these positions the defendants relied on the oral evidence of three witnesses, members of their family, who had [552] been produced by the other side, on that of a score of witnesses called and examined by themselves, and on an undigested mass of documents consisting of deeds of *shankalp*, of *birt*, and of *muafi* grants, of extracts from administration-papers pertaining to estates once attached to the estate, and of sundry "reports of tahsildars" and other officials which were improperly allowed to come on the record as evidence, and which we exclude from our consideration. We have to determine whether this evidence sufficiently shows (1) that previous Rajahs had, by custom and usage, the absolute uncontrolled powers over the estate claimed by the defendants; (2) that they exercised such powers; (3) that they exercised them in the way and to the extent of the present alienation; and (4) that this custom is not only ancient and certain, but is also reasonable in itself, as well as invariable and uncontradicted in its application.

(After an examination of the evidence of the three witnesses for the plaintiff mentioned above, and of the witnesses for the defendants, the judgment continued) :—Having carefully considered this testimony, we cannot find that it establishes the fact, much less the custom, of any alienation so large in its scope, and so absolute in its character, as that made by the present Rajah in favour, exclusively and for ever, of his younger Rani. We are told of settlements on cadets of the Rajah's house (*babuai*), of pious and charitable gifts (*birt, shankalp* and *muafi*), and of life allowances for maintenance, or education of young "babus." We hear nothing of such an alienation as is challenged on behalf of the Rajah-apparent in this action, nor do we find anything to show assertion by any Rajah, prior to the father of the plaintiff, of a right or title to permanently transfer the estates attaching to the Raj. It remains to see how the documentary evidence helps the defendants' case. It is sufficient to say that it does not carry it a step beyond the point reached by the oral testimony. It indicates transfers by Rajahs of certain bighas in mauzas by way of religious and charitable grants "under the usual *birt* conditions and limitations:" transfers of waste lands to Ranis and others to bring into cultivation on a *muafi* tenure: and gifts of parts of mauzas or of an entire mauza to "babus" in virtue of their *babuai* right. There are two cases only that wear an apparently [553] different aspect. These are the alleged "gifts" to the prostitute Roshan (page 34, appellants' book), and to Rani Taliwand Kuari, page 30, *id*. The latter extended to three mauzas only, and the deed of gift has not been produced. We have noticed above the circumstances which favour the theory that it was not an absolute and perpetual conveyance of this property to the Rani, the donee, but partook rather of the character of a life-settlement on her and *babuai* for the sons she had borne to the Rajah donor; but even if it were, one such exceptional instance would be wholly inadequate to establish the custom prayed in aid by the defendants.

As to the prostitute's gift, that conveyed to her "the *muafi* rights and interests" in one village only, mauza Koharwa as her *birt* property, for which she paid *malikana* to the Rajah, and it is needless to point out

that this differed "*toto cœlo*" from the assignment in perpetuity under the deed which is assailed in the present litigation. We are of opinion, for the foregoing reasons, that this appeal fails, and should be dismissed with costs, and we do order accordingly.

Appeal dismissed.

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5 A. 553 = 3 A.W.N. (1883) 133.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield.

EMPRESS *v.* MAZHAR HUSAIN. [9th May, 1883.]

Public servant framing incorrect record—Forgery—Act XLV of 1860 (*Penal Code*), ss. 218, 463.

A public servant, in charge as such of certain documents, having been required to produce them, and being unable to do so, fabricated and produced similar documents, with the intention of screening himself from punishment. *Held*, that such fabricated documents not being records or writings with the preparation of which such public servant as such was charged, he could not legally be convicted under s. 218 of the Penal Code, nor, such documents not being forgeries, as they were not made with the intent specified in s. 463, could he be legally convicted under s. 471.

[Diss., 15 Bom. L.R. 708 = 2 Bom. Cr. Cas. 115 = 14 Cr. L.J. 518 = 20 Ind. Cas. 998 = 37 B. 666; R., U.B.R. (1892—1896) 279 (Cr.).]

THE appellant, Mazhar Husain, was a clerk in the office of the Nagina Municipality, and as such in charge of the municipal records. Two persons, Abdulla and Tarifunnissa, were charged with a breach of a municipal rule which prohibited the erection of buildings without the permission of the Municipality. The accused pleaded [554] that written permission had been given them by the Municipality, and the appellant was therefore ordered to produce the two orders whereby permission had been given. Such permission had really been given, and one of the original orders was afterwards discovered; but owing to the careless way in which Mazhar Husain kept the documents under his charge, he failed to find the orders when required. To screen himself from punishment, he forged and produced two written orders purporting to be those required. He was committed to the Sessions Court for trial, charged under ss. 465 and 471 of the Indian Penal Code, and was convicted under ss. 218 and 471, and sentenced to two years' rigorous imprisonment. It was contended on his behalf (1) that as it was not any part of his duty to prepare or frame any record, but only to keep them safely when given into his custody, the conviction under s. 218 was illegal; and (2) that as there had been no intention to cause wrongful gain or loss to any one, and only a desire to screen himself from punishment, no offence under s. 471, Indian Penal Code, had been committed.

Mr. *Colvin*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENT.

OLDFIELD, J.—The conviction under ss. 218 and 471 of the Indian Penal Code cannot stand. The fabricated petitions are not records or writings with the preparation of which accused, being a public servant, was charged, as so to enable his offence of fabrication to fall within the

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meaning of s. 218; nor are the fabricated papers forgeries as defined in s. 463, as it cannot be held that they were made with the intent specified in that section, and in consequence there can be no offence under s. 471. The convictions and sentences are therefore set aside.

There is grave reason to suppose, however, that the papers have been fabricated by the accused, and if this was done with the intention stated in s. 192, he will be guilty of an offence under s. 193 of the Indian Penal Code. It is directed that he be re-tried for an offence under that section. If the Court find accused guilty, the punishment already undergone will be considered in the sentence.

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5 A. 555 = 3 A.W.N. (1883) 133.

[555] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BATASI AND ANOTHER (*Plaintiffs*) *v.* MAHESH AND OTHERS (*Defendants*).* [9th May, 1883.]

Debt due to deceased person—Suit by legal representative—Certificate to collect debts—Act XXVII of 1860.

The plaintiffs in this suit sued the defendants on a bond, claiming as the heirs of the deceased obligee. The defendants denied that the plaintiffs were the heirs of the deceased obligee, and contended that they should have obtained a certificate under Act XXVII of 1860 before suing. There being good reason to doubt the validity of the title of the plaintiffs, the lower appellate Court postponed the decision of the case for a certain time in order to give the plaintiffs an opportunity of obtaining such certificate. The plaintiffs failing to avail themselves of this opportunity, the lower appellate Court dismissed the case. The High Court, on second appeal, refused to disturb the lower appellate Court's decision.

THE plaintiff in this suit, Batasi, sued in her own name and on behalf of Baldeo Prasad, a minor, to recover a bond-debt due to one Babu Lal, deceased. Batasi claimed as the widow of Babu Lal, and Baldeo Prasad as his son. The defendants denied that the plaintiffs were heirs to Babu Lal, and contended that they should have obtained a certificate under Act XXVII of 1860 before suing. The Court of first instance allowed this contention, and refused to entertain the suit until a certificate under Act XXVII of 1860, in the minor's name, had been obtained, on the ground that it was doubtful whether Baldeo Prasad was the lawful heir to Babu Lal, observing that no debtor could be compelled to pay a legal representative what he owed until such a certificate was produced. On appeal by the plaintiffs the lower appellate Court, observing that the ruling of the first Court that no debtor could be compelled to pay a legal representative what he owed until a certificate under Act XXVII of 1860 was obtained, was a little too sweeping, but that it had exercised a sound discretion in this case in refusing to entertain the suit until a certificate had been obtained, there being good reason to doubt the validity of the title of the plaintiffs, postponed the decision of the appeal for one month in order to give the plaintiffs an opportunity of obtaining a [556] certificate. The plaintiffs did not avail themselves of this opportunity, but allowed the time to expire without taking any steps to obtain a

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* Second Appeal No. 16 of 1882, from a decree of G. E. Knox, Esq., Judge of Mirzapur, dated the 6th October, 1882, affirming a decree of Munshi Madho Lal, Munsif of Mirzapur, dated the 26th May, 1882.

certificate, and the lower appellate Court therefore dismissed the appeal. In second appeal the plaintiffs contended that there was no necessity for a certificate, and their title should have been determined in the suit. **1883 MAY 9.**

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Munshi *Kashi Prasad*, for the appellants.

Babu *Ram Das Chakarbati*, for the respondents.

The Court (STRAIGHT, J., and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—It is plain to us that the defence made to the suit was not frivolous or vexatious, and seeing that the Judge in appeal allowed one month for a certificate to be obtained and that no steps were taken in the matter, we shall most certainly not disturb his decision. The appeal is dismissed with costs.

Appeal dismissed.

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5 A. 556=3 A.W.N. (1883) 136.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SRIMATI PROSONOMOYI DEVI AND ANOTHER (*Defendants*) *v.* BENI MADHAB RAI AND ANOTHER (*Plaintiffs*).* [16th May, 1883.]

Civil Procedure Code, s. 503—Receiver.

The powers conferred by s. 503 of the Civil Procedure Code are not to be exercised as a matter of course, and it is not a reason for allowing an application for the appointment of a receiver that it can do no harm to appoint one. The discretion given by that section is one that should be used with the greatest care and caution. Because a plaintiff in his plaint makes violent and wholesale charges of waste and malversation against a defendant in possession of property as executor under a will or as the tenant for life, and upon this basis applies for a receiver to be appointed, it is not a necessary consequence that such appointment should be made.

Held, in this case, where the sons of a Hindu widow, in possession of her husband's estate, under a will, sued their mother, as reversioners under the will, for possession of the estate, on the ground of mismanagement and waste, and on the same grounds applied for the appointment of a receiver under s. 503 of the Civil Procedure Code, that a receiver had been appointed on insufficient grounds.

[F., 107 P.R. 1908; U.B.R. (1908), 2nd Qr., C.P.C. 503; R., 2 L.B.R. 222 (223); 36 P.R. 1910=72 P.L.R. 1910=53 P.W.R. 1910; D., 73 P.R. 1902.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

[557] Mr. *Ross*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Babu *Jogindro Nath Chaudhri*, for the appellants.

Messrs. *Colvin*, *Conlan* and *Hill*, Lala *Ram Prasad*, and Babu *Ram Das Chakarbati*, for the respondents.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—This is an appeal from an order of the Officiating Judge of Allahabad, passed on the 17th April last, by which, under s. 503 of the Civil Procedure Code, he appointed a receiver of the property involved

* First Appeal No. 51 of 1883, from an order of R. D. Alexander, Esq., Judge of Allahabad, dated the 17th April, 1883.

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in a suit pending in his Court, between Beni Madhab Rai Chaudhri and Shiama Charan Rai Chaudhri, plaintiffs, and Srimati Prosonomoyi Devi and Aushutosh Mukarji, defendants. The litigation relates to the estate of one Rameshar Rai Chaudhri, who died at Allahabad on the 12th November, 1872. The two plaintiffs are his sons, while the first defendant is his widow, and the second his son-in-law, husband of his eldest daughter. The suit was instituted in the Court of the Subordinate Judge of Allahabad on the 19th March, 1883, but, for reasons which it is unnecessary to go into, the case was, at his request, transferred to the file of the District Judge. It would appear that three days prior to his death, namely, on the 9th November, 1872, Rameshar Rai executed a will, as to which it is enough to say, for the purposes of the matter before us, that defendant 1, being appointed executrix under it, was constituted manager of a property thereby devoted to religious purposes, and was declared to be entitled to possession of the residuary estate for her life. What her powers were in respect of the latter, this is not the proper moment to determine, as that question will have to be decided by the lower Court when, at the hearing of the suit, it comes to construe the instrument of the 9th November, 1872, as a whole. Whether the life interest granted her was of the limited character contended for by the plaintiffs or not, their reversionary rights are distinctly declared in the 5th clause of the will, and, *prima facie*, they are entitled to institute the suit, out of which the application before us on appeal has arisen. The main allegations contained in the plaint that are reiterated in the affidavit filed for appointment of a receiver, to which our attention has mainly had to be [568] directed are, that defendant 1, since she has been in possession of her deceased husband's estate, has so mismanaged, wasted, and squandered it, that immoveable and moveable properties, which were at his death of the value of Rs. 4,26,544-9-1, have depreciated to Rs. 2,58,536-5-2; and to show the mode in which this has been brought about, it is categorically charged against her—(1) that she realized Rs. 1,80,644-15-1 and Rs. 2,988-12-1 outstanding debts, and has misappropriated these amounts; (2) that she entered into non-successful speculations at the instance of defendant 2, and incurred heavy losses, more particularly in the matter of a contract relating to castor seed; (3) that she delayed paying the legacies bequeathed under the will for so long a period that no less a sum than Rs. 16,754-9-1 for interest and other expenses had ultimately to be added to them in respect of interest and costs; (4) that she so managed the zamindaris and the *devatra* estate that large sums due from tenants of the former were not collected, while their rental has been decreased to the extent of Rs. 14,190-9-4, and that karindas were permitted to receive and withhold monies without being compelled to disgorge, or being prosecuted for their misappropriation; (5) that instead of confining the expenses incurred for the Durga Puja and other festivals and ceremonials to the income of the property, she misapplied large sums drawn from the *corpus* of the estate, to the amount of Rs. 29,001-1-7, for those purposes; (6) that she advanced monies on ornaments deposited with her by way of pledge, and made no return in the account for such advances; (7) that in respect of Government Promissory Notes purchased by her in 1873 and 1874, and subsequently mortgaged by her to the Bank of Bengal, she, upon their ultimate sale to satisfy charges, incurred a loss of Rs. 4,002-10-6; (8) that she removed and misappropriated silver articles and gold ornaments belonging to the estate; (9) that she converted to her own use 60,000

rupees' worth of gold mohars left by her husband; (10) that at the end of 1877 a cash credit balance of Rs. 6,860-0-3 stood in the books of the estate, but that it is not carried into the next year's accounts, and is nowhere accounted for; (11) that she made away with the reserve cash fund, and caused false entries to be inserted in the books of account, in order to make it appear that she and defendant 2 are creditors of the [559] estate to a considerable amount; (12) that the relations between her and defendant 2 have been and are of such a character, that there is good reason to believe that the waste and misappropriation which have gone on will continue, and that she has threatened the plaintiffs that even if they should succeed in the suit they will be unable to reap any benefit from it.

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Defendant No. 1 filed an affidavit, traversing in terms all these allegations—among other matters asserting—

1. That from her husband's death Thakurdas Chattarji, her father, who had for many years acted as her husband's cashier, and in whom he had confidence, continued to fill the same capacity towards her down to 1876, when he retired through infirmity and old age.

2. That plaintiff 1 then looked after the estate on her account, but having entered into partnership with the husband of her second daughter, he applied funds belonging to the estate in such business, and so she would not continue him as manager.

3. That it was then proposed to appoint her second son-in-law, Parbati Charan Chattarji, as manager, but plaintiff 1 objected, and in January, 1878, defendant 2 was appointed with plaintiff 1's consent, with Babu Kali Das Nandi and Babu Aprokash Chandar Mukarji as auditors, and that during 1878 and 1879 defendant 2 acted as such manager.

4. That disputes arose between plaintiff 1 and defendant 2 in reference to certain debts paid for the former, and ultimately the latter retired, and it was shortly after this that the charge of immorality was first made, which charge was altogether false and unwarrantable.

5. That Babu Aprokash Chandar Mukarji was then appointed and acted as trustee until the 19th of July, 1879, when defendant 2 again became manager.

The affidavit also in terms denies making over to defendant 2 any part of the estate; allowing debts to become time barred; misapplication of assets or monies received; diminishing or misappropriating the *corpus* of the estate; unreasonable delay in paying legacies; losses in speculation with defendant 2; non-collection of [560] rents, or allowing karindas to retain monies, or negligently permitting the rental of the zamindaris to fall in value; removal of silver articles or gold ornaments; conversion of 60,000 rupees' worth of gold mohars; that there was any reserve cash fund; that any false entries were made in the books; that estate is reduced in value; that she ever threatened plaintiffs as alleged by them; that she has any intention of making away with the estate. The affidavit also explains that the castor seed contract was a speculation similar to others entered into by the deponent's husband during his lifetime, in which he had availed himself of the advice and assistance of defendant 2; that such delay as did occur in the payment of legacies was due to the fact that two of the deponent's three daughters, the legatees, were under age, and the legacy of the younger one was paid to her husband, after he had taken out a certificate of guardianship; and moreover, that the settlement of these matters was made by Babu Aprokash Chandar Mukarji with the knowledge of plaintiff 1; that any diminution

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in the rental of the zamindari was due to bad years; that the terms of the will did not limit the expenses for festivals and ceremonials to the income of the *devatra* property; and that, as a matter of fact, the plaintiffs themselves had been present at, and taken part in many of these celebrations; that it was true, as stated in the plaintiffs' affidavit, that at the end of 1877 there was a balance of Rs. 6,860-0-3; but of this Rs. 2,000 was given to one Sharoda Prasad Chattarji to buy bricks for business purposes and the rest was spent by plaintiff 1; that defendants 1 and 2 did advance monies to the estate; that for some time after her husband's death the two plaintiffs lived in the same house with her; that when they left she made them an allowance of Rs. 200 per mensem each; that they returned to her again, but only for a short time; and that when they went away again, she allowed them Rs. 100 each per mensem.

We do not propose to make any particular reference to the affidavit of defendant 2, as, whatever the lower Court may decide as to his having been properly or improperly joined in the suit, it is sufficient, for the purposes of the appeal before us, to say that it contradicts the allegation made against him in the affidavit of plaintiff 1. We therefore find that the charges of waste, mismanagement, and [561] immorality are met by a direct denial; and until they have been investigated at the trial of the case, it is impossible to say whether all or any of them are true or not. The Judge below, as we gather from the terms of his order, appears to have thought that the powers conferred by s. 503 of the Code are to be exercised pretty much as a matter of course, and because it could do no harm to appoint a receiver, there was no objection to his acceding to the application of the plaintiffs. If this was his opinion, we must say at once most emphatically that it was an erroneous one. The discretion given by s. 503 of the Code, to the High and District Courts alone be it observed, is one that should be used with the greatest care and caution. Because a plaintiff in his plaint makes violent and wholesale charges of waste and malversation against a defendant in possession of property as executrix under a will or as the tenant for life, and upon this basis applies for a receiver to be appointed, it is not a necessary consequence that such appointment should be made. If any such doctrine or principle were to be recognized, s. 503, instead of serving the useful purpose for which it was framed, would give unscrupulous and rancorous litigants an engine for the most unjustifiable interference with the rights of property under the pretence and protection of legal sanction. In the case before us defendant 1 is rightfully in possession of the estate of her deceased husband under the express provisions of his will, and "in such cases Courts of Equity will pay a just respect to such legal and equitable rights and interests of the possessor of the fund, and will not withdraw it from him by the appointment of a receiver, unless the facts averred and established in proof show that there has been an abuse, or is danger of abuse, on his part. For the rule of such Courts is not to displace a *bona fide* possessor from any of the just rights attached to his title unless there be some equitable ground for interference." (Story's Equity Juris., vol. 2, page 41). Without in any way anticipating the result of the suit in the course of which the order now before us in appeal has been made, we cannot but suspect that the plaintiffs have put forward their claim in an inflamed and exaggerated form, and we entertain very grave doubts as to whether the application for a receiver was made with any other object than to cause annoyance. For they well knew that to intrude such an official into the house of their mother, a Hindu lady, could only be

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[562] regarded as an insult and degradation, and no Court, in our opinion, should countenance such a proceeding except upon the clearest and most convincing grounds. We have set out the matters contained in the affidavits on both sides very fully, so as to make it understood that we have clearly present to our minds all that is alleged on the one hand and denied on the other. Whatever conclusions the Court below may arrive at after it has heard the evidence, we think the Judge, who made the order now under appeal, would have exercised a sounder discretion had he, so far as the application for a receiver was concerned, accepted the denial on oath of the defendant 1, and not in a case of this nature have implicitly believed the assertions of the plaintiffs. Moreover, he appears to have fallen into error as to the extent of the moveable property within the disposition and control of defendant 1, and he seems to have lost sight of the fact that no title can be established by the plaintiffs to immediate possession; on the contrary, the life estate of defendant 1 is patent on the face of their father's will. Seeing that the latter was placed in possession of the property as executrix and manager by the express directions of her husband's will, we do not think that such possession should be lightly disturbed, and certainly not until the Court below had much better grounds before it than those upon which the Judge proceeded. We have therefore come to the conclusion that the appeal must prevail, and we decree it, reversing the order appointing the receiver and dissolving the temporary injunction granted by the Judge. The expenses and costs incurred by the receiver will be paid by the respondents. The costs of the application and of this appeal will be costs in the cause.

Appeal allowed.

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5 A. 562 = 3 A.W.N. (1883) 148.

CIVIL REVISIONAL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

CARTER (*Defendant*) v. THE AGRA SAVINGS BANK, LIMITED (*Plaintiff*).* [22nd May, 1883.]

Promissory note—Uncertain agreement.

Held, that the following instrument was so vague and indefinite in its terms that it could not be regarded as a promissory note:—"I, *J.M.C.*, do hereby [563] promise to pay at Allahabad to the Manager of the Agra Savings Bank, Limited, the sum of Rs. 10 on or before the 15th day of October 1876, and a similar sum monthly every succeeding month, for full value and consideration received: dated the 9th September, 1876."

THIS was an application for revision under s. 622 of the Civil Procedure Code by the defendant in a Small Cause Court suit. The suit was for arrears due on an instrument made by the defendant, J. M. Carter, in favour of the plaintiff, the Agra Savings Bank, Limited, the terms of which were as follows:—"I, J. M. Carter, do hereby promise to pay at Allahabad to the Manager of the Agra Savings Bank, Limited, the sum of Rs. 10 on or before the 15th day of October, 1876, and a similar sum monthly every succeeding month, for full value and consideration received: dated the 9th September, 1876." The defendant contended

* Application No. 89 of 1883, for revision under s. 622 of the Civil Procedure Code of an order of R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad, dated the 26th February, 1883.

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5 A. 562 = 3 A.W.N. (1883) 156.

that the lower Court had erred in holding that this instrument was a promissory note.

Messrs. *Hill* and *Howard*, for the defendant.

Mr. *Conlan* and Munshi *Ram Prasad*, for the plaintiff.

The Court (STRAIGHT, J., and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—We are of opinion that this instrument is so vague and indefinite in its terms, that it cannot be regarded as falling within the category of promissory note. It is impossible from its language to say for what period it is to subsist, or whether the Rs. 10 mentioned in it is to be payable only during the life of the present manager of the Bank or for the whole life of the promisor. We allow the application for revision, so far as the first plea in the petition is concerned, and with this intimation direct the record to be returned to the Small Cause Court for the suit to be disposed of according to law. Costs will be costs in the cause.

Cause remanded.

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5 A. 564 (F.B.) = 3 A.W.N. (1883) 157.

[564] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

UMED RAM (*Decree-holder*) v. DAULAT RAM (*Judgment-debtor*).*
[23rd May, 1883.]

Trees—"Immoveable" property—"Moveable" property—Act XI of 1865, *s.* 19—*Act III of* 1877 (*Registration Act*), *s.* 3—*Act IV of* 1882 (*Transfer of Property Act*), *s.* 3—*Act I of* 1868 (*General Clauses Act*), *s.* 2 (5), (6).

Held that, for the purposes of the Mufassal Small Cause Court Act, standing timber is not "moveable" property.

Nasir Khan v. *Karamat Khan* (1), referred to.

[F., 11 M. 193 (196); R., 10 A. 159 (160); 9 Ind. Cas. 133; 3 K.L.R. 146.]

THIS was a reference to the High Court under s. 617 of the Civil Procedure Code by the Judge of the Court of Small Causes at Agra. The Judge stated the facts of the case and the point on which he entertained doubt as follows:—

"In this case the decree-holder has applied for the attachment of certain trees as the property of the judgment-debtor. It is objected that standing trees are not moveable property, and a Court of Small Causes is not competent to attach them. According to the definition of immoveable property as given in the Penal Code and the Indian Succession Act, standing trees come within the category of such property. But the Indian Registration Act, 1877, and the Transfer of Property Act, 1882, define moveable property to include standing timber and growing crops.

"The rulings of the High Court on the point are conflicting. In the case of *Choodhry Roostum Ali* v. *Dhandoo* (2) it was held that trees were

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* Reference No. 42 of 1883, under s. 617 of the Code of Civil Procedure, by Babu Promoda Charan Banarji, Judge of the Court of Small Causes at Agra, dated the 9th February, 1883.

(1) 3 A. 168. (2) N.W.P.H.C.R. (1868) 157.

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5 A. 564 (F.B.) = 3 A.W.N. (1883) 157.

to be regarded as moveable property for the special purposes of the Registration Act only, and that ordinarily they were to be considered as immoveable property. In the case of *Nasir Khan* v. *Karamat Khan* (1), on the other hand, trees were held to be moveable property, but it appears that the ruling in the case of *Roostum Ali* v. *Dhandoo* (2) was not brought to the notice of the Hon'ble Judges.

"As the point is thus a doubtful one, and there is a conflict of authority in regard to it, and as several other applications have been [565] made, some for the attachment of standing trees and growing crops, I deem it desirable to refer to the Hon'ble High Court the question whether standing timber and growing crops are to be regarded as moveable property, and whether a Court of Small Causes is competent to order their attachment and sale.

"My own opinion on the matter is that the definition of immoveable property contained in the Transfer of Property Act, which excludes standing timber and growing crops, should be taken as a guide, and that trees and growing crops should be regarded as moveable property. But as the rulings of the High Court on the point are conflicting, I refer the question to the Hon'ble Court for an authoritative decision."

The Divisional Bench before whom the reference was laid (OLDFIELD, J., and BRODHURST, J.) referred the question raised to the Full Bench.

The parties did not appear.

The following opinion was delivered by the Full Bench :—

OPINION.

STUART, C.J., STRAIGHT, J., OLDFIELD, J., BRODHURST, J., and TYRRELL, J.—The question referred is whether standing timber is moveable property within the meaning of s. 19, Act XI of 1865, against which a Court of Small Causes can direct execution of its decree.

The Mufassal Small Cause Court Act (XI of 1865) contains no definition of the words "moveable" and "immoveable" property, and these words have been differently defined in different Acts. In the Registration Act and the Transfer of Property Act, standing timber, growing crops and grass are included in "moveable" property. In the General Clauses Act (I of 1868), however, "immoveable" property includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth ; and "moveable" property means property of every description except "immoveable" property ; and under these definitions standing timber will be "immoveable" property. The interpretation clause of the General Clauses Act is made applicable to that Act and all Acts made by the Governor-General in Council after that Act shall come into operation, unless [566] there be something repugnant in the subject or context. It therefore does not apply to the Mufassal Small Cause Court Act ; but we are of opinion that the definitions of "immoveable" and "moveable" property which it contains may appropriately be applied to the Small Cause Court Act, as being in accord with the spirit of that Act, and the scope of the powers intended to be exercised under it by a Judge of a Small Cause Court. We are of opinion therefore that standing timber must be classed as immoveable property, and this view appears to be in accord with the current of rulings on the subject.

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(1) 3 A. 168. (2) N.W.P.H.C.R. (1868) 157.

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We may add that the case of *Nasir Khan* v. *Karamat Khan* (1), to which the Subordinate Judge directs our attention, has been misread by him, for it was there held, not that the trees themselves, but that the fruit on them was of the nature of moveable property.

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5 A. 566 = 3 A.W N. (1883) 150.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

JAGAT NARAIN RAI AND ANOTHER (*Defendants*) *v.* DHUNDHEY RAI (*Plaintiff*).* [25th May, 1883.]

Civil Procedure Code, s. 295—Mortgage—First and second mortgagees—Sale of mortgaged property in execution of decree of second mortgagee—Suit by first mortgagee for re-sale of property in execution of his decree.

On the 22nd March, 1878, the first mortgagee of certain property obtained a decree enforcing his mortgage. On the 25th March, 1878, the second mortgagee obtained a decree enforcing his mortgage. Both decrees were made by the same Court On the 20th June, 1878, the property was put up for sale in execution of the second mortgagee's decree. The first mortgagee subsequently brought a suit for a re-sale of the property in satisfaction of his decree. *Held* that this was the only course open to him, and he could not have enforced satisfaction of his decree in accordance with the provisions of s. 295 of the Civil Procedure Code, inasmuch as the provisions of the first and second provisos to that section refer only to sales in execution of simple money-decrees, whereas the property in question had been sold in execution of a decree ordering its sale, and the provisions of the third proviso relate to subsequent and not prior incumbrances.

[D., 10 A. 35 (38).]

THE facts of this case were as follows:—The owners of a one-anna six-pie share of a certain village gave the plaintiff in this suit [567] a mortgage on the share for Rs. 166. On the 22nd March, 1878, the plaintiff obtained, in the Court of the Munsif of Basti, a decree against the mortgagors enforcing the mortgage. In the meantime the owners of the share gave a mortgage on one anna of it to one Shankar for Rs. 48. Shankar obtained a decree enforcing this mortgage on the 25th March, 1878, also in the Court of the Munsif of Basti. On the 20th June, 1878, the share was put up for sale in execution of Shankar's decree, and was purchased by Jagat Narain and Sri Kishen, defendants in this suit. The plaintiff subsequently brought the present suit to set aside the sale, and to obtain a declaration of his right to recover the amount of his decree by a re-sale of the share. The Court of first instance gave the plaintiff a decree. On appeal by the defendants it was contended on their behalf that the plaintiff should have sought to bring the property to sale in satisfaction of the amount of his decree by execution thereof, and not by instituting the present suit. The lower appellate Court disallowed this contention, holding that the plaintiff had the option of bringing a suit to obtain a re-sale of the property.

In second appeal the defendants contended in their grounds of appeal "that under the provisions of ss. 285 and 295 of the Civil Procedure Code, the plaintiff was not entitled to sue to bring the property in dispute to sale."

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* Second Appeal No. 437 of 1882, from a decree of R. J. Leeds, Esq., Judge of Gorakhpur, dated the 23rd January, 1882, affirming a decree of Maulvi Munim-ud-din, Munsif of Basti, dated the 3rd September, 1881.

(1) 3 A. 168.

1883 MAY 25.

APPELLATE CIVIL.

5 A. 566 = 3 A.W.N. (1883) 150.

Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Mir *Zahur Husain*, for the respondent.

JUDGMENT.

The judgment of the Court (STRAIGHT, J., and BRODHURST, J.) was delivered by

STRAIGHT, J.—The substantial contention ingeniously urged by the pleader for the appellants, rests on the second plea in the memorandum of appeal. It is in effect, that the respondent-plaintiff, not having enforced satisfaction of his decree of the 22nd of March, 1878, in accordance with the provisions of ss. 285 and 295 of the Civil Procedure Code, by the machinery of the execution department, cannot now come into Court with a fresh suit based upon that decree to obtain a re-sale of the property. We, however, [568] think that he can, and that is the only course open to him. The first paragraph of s. 295 and cls. (*a*) and (*b*) have reference only to sales in execution of simple money-decrees, and to the mode in which sale-proceeds are to be rateably distributed among simple money-decree-holders. The provisos contained in cls. (*a*) and (*b*) declare the incompetence of a mortgagee or incumbrancer, as such, to share in any surplus proceeds arising, when property is sold subject to his mortgage or charge. But the alternative is afforded him of consenting to the property being sold free of his mortgage and charge, in which case the Court may give him the same right against the sale-proceeds as he had against the property sold.

In the case before us, the decree, in execution of which the one-anna share of mauza Sheosara was sold, was not a simple money-decree, and therefore in our opinion those portions of s. 295 to which we have adverted are inapplicable. It remains to be seen whether cl. (*c*) supports the contention of the appellants. That no doubt has reference to a sale in execution enforcing a charge, but it will be noticed at once that in distributing the sale-proceeds, the discharge of subsequent and not prior incumbrances is alone taken into account. In this view of the matter we think that the main plea relied on by the appellants fails: and concurring generally with the decisions arrived at by the lower Courts, we dismiss the appeal with costs.

Appeal dismissed.

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5 A. 568 (F.B.) = 3 A.W.N. (1883) 159.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

MASARAT-UN-NISSA (*Defendant*) v. ADIT RAM (*Plaintiff*).*
[31st May, 1883.]

Sale-certificate—Registration—Act III of 1877 (*Registration Act*), s. 17 (*b*)—*Civil Procedure Code*, s. 316.

Held that a sale-certificate granted under s. 316 of the Civil Procedure Code is not a document the registration of which is compulsory under the Registration Act, 1877, s. 17 (*b*).

[R., 142 P.R. 1908 (F.B.).]

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* First Appeal No. 127 of 1882, from an order of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 16th June, 1882.

1883 MAY 31. — FULL BENCH. — 5 A. 568 (F.B.) = 3 A.W.N. (1883) 159.

[569] THE plaintiff in this suit claimed possession of a moiety of a certain house and some land adjoining. He alleged that he had purchased the property at a sale in execution of a decree and obtained a sale-certificate; that before the certificate could be registered, it had been lost; and that before he could obtain a duplicate thereof, the time allowed by law for the registration of a sale-certificate expired. The defendant, Masarat-un-nissa, representing the person whose property had been sold, contended that, as the plaintiff's certificate of sale was an instrument the registration of which was compulsory, and it had not been registered, the plaintiff had not a title to the property sold. The Court of first instance allowed this contention and dismissed the plaintiff's suit. On appeal by the plaintiff the lower appellate Court disallowed the contention, and remanded the case to the Court of first instance for re-trial.

The defendant appealed to the High Court from the order of remand, contending that the registration of the sale-certificate being compulsory, and it not being registered, the suit based thereon was not maintainable. The Divisional Bench before whom the appeal came for hearing (OLDFIELD and BRODHURST, JJ.) referred the question raised by it, namely, whether a sale-certificate, granted to a purchaser at a sale in execution of a decree under s. 316 of the Civil Procedure Code, is an instrument the registration of which is compulsory under s. 17 (*b*) of the Registration Act, 1877, to the Full Bench.

Munshi *Hanuman Prasad*, for the appellant.

Pandit *Bishambhar Nath*, for the respondent.

The following opinions were delivered by the Full Bench:—

OPINIONS.

STUART, C.J.—My answer to this reference is, that a certificate of sale, granted under s. 316 of the Code of Civil Procedure, does not require registration as provided by s. 17 of the Registration Act. The term "registration," as it is used in Act III of 1877, does not apply to the procedure provided for sale-certificates, although, as will be presently seen, that procedure partakes of the character and purpose of registration.

The documents, the registration of which is compulsory under s. 17 of the Registration Act, are instruments brought into exis-[570]tence by the act of private parties themselves, the publication and preservation of which can alone be secured by means of their registration; but a sale-certificate is not such an instrument but an act of the Court granting it; and as regards its publication and preservation it is in this position:— Section 316 of the Civil Procedure Code provides that: "Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before: provided that the decree under which the sale took place was still subsisting at that date." But although of itself it constitutes a title to the property sold, the sale-certificate is not to be left merely in the private custody of the purchaser, for by s. 89 of the Registration Act, as amended by Act XII of 1879, it is provided that "every Court granting a certificate under s. 316 of the Code of Civil Procedure shall send a copy of such certificate to the registering officer, within the local limits of whose jurisdiction the whole or any part of the immoveable property comprised in such certificate is situate, and such officer shall file the copy in his Book No. 1," which Book 1 is directed by

s. 51 of the same Act to be kept as a "register of non-testamentary documents relating to immoveable property."

1883 MAY 31. — FULL BENCH. — 5 A. 568 (F.B.) = 3 A.W.N. (1883) 159.

It thus appears that sale-certificates are by the Registration Act subjected to a procedure which is tantamount to, if it was not intended as a substitute for, registration, that is, such registration as is referred to by s. 17 of the Registration Act, and that such procedure is compulsory and not discretionary, but it is quite a different question whether sale-certificates have any place among the documents and instruments, the registration of which is compulsory under that section. I am quite clear that they are not among such documents and instruments.

I may add that under the general rules and circulars of this Court (page 189), revised and published so late as August last, certificates of sale are among those documents which are not only exempted from being destroyed, but are ordered to be "retained permanently." Although, therefore, a certificate of sale does not require the registration provided by s. 17 of the Registration **[571]** Act, every object obtained by registration is secured to sale-certificates without that formality.

TYRRELL, J.—I concur in the answer recorded by the learned Chief Justice.

STRAIGHT, OLDFIELD and BRODHURST, JJ.—The primary question to be considered is, whether a sale-certificate, granted to an auction-purchaser under s. 316 of the Procedure Code by a Court executing a decree, is an instrument within the meaning of cl. (*b*) of s. 17 of the Registration Act, 1877. Under Act VIII of 1859, s. 259, which declared that "such certificate shall be taken and deemed to be a valid transfer of such right, title and interest," read with s. 17 of the then Registration Law (VIII of 1871), the High Courts of Madras, Bombay, and this Court held, on several occasions, that sale certificates were registrable, though the Calcutta Court expressed a different view which ultimately found expression in the Full Bench ruling reported in the Indian Law Reports, 9 Cal. 82. We, however, are only concerned with the Procedure and Registration Acts now in force, and upon the construction of some of the sections therein contained must the answer to this reference hinge. Turning, first of all, to s. 316, as it originally stood in Act X of 1877, it ran as follows:—"When a sale of immoveable property has become absolute in manner aforesaid, the Court shall grant a certificate, stating the name of the person who, at the time of sale, is declared to be the purchaser, and the date of such sale." Here it will be observed the old words of Act VIII of 1859 "shall be taken and deemed to be a valid transfer, etc.," do not appear. It would seem, however, that this section was either too vague or too general in its terms, and difficulties arose as to what was the precise date at which the estate vested in the auction-purchaser, and consequently it was wholly repealed by s. 49 of Act XII of 1879. This latter Act, it is also important to notice, amended s. 89 of the Registration Act, by introducing the second paragraph now to be found in it, requiring the Court granting a certificate of sale under the Procedure Code to send a copy of it to the registering officer, who "*shall* file such copy in his Book No. 1." Section 316 of the Procedure Code now provides that "when a sale of immoveable property has **[572]** become absolute in manner aforesaid, the Court shall grant a certificate, stating the property sold and the name of the person who, at the time of sale, is declared to be the purchaser. Such certificate shall bear the date of the confirmation of sale; and, *so far as regards the parties to the suit and persons claiming through or under them,*

1883 MAY 31. — FULL BENCH. — 5 A. 568 (F.B.)= 3 A.W.N. (1883) 159.

the title to the property shall vest in the purchaser from the date of such certificate and not before." The words in italics seem to indicate that as between the decree-holder, the judgment-debtor, and the auction-purchaser the sale-certificate is conclusive as to the date when the title of the latter vested. But coming back to the real question—Is this sale-certificate an instrument requiring registration in order to secure the title of the person to whom it is granted? Undoubtedly under the present Stamp Law it is treated as akin to a conveyance, and the duty to be paid has to be calculated upon the amount of the purchase-money. This, however, does not assist towards a solution of the difficulty, and we must turn to s. 17 of the Registration Act itself. Looking to the terms of that section, we think that the expression "executed after the passing of this Act" is not a very happy or appropriate one to apply to a sale-certificate drawn up according to Form 150 of the Procedure Code, and granted to an auction-purchaser under s. 316. The words "execute" and "execution" in reference to deeds and other instruments have a well-understood legal meaning, an example of which is to be found in ss. 261 and 262 of the Code of Procedure, and it will, we think, be conceded that it would scarcely be correct to speak of a certificate of guardianship or to collect debts granted by a District Judge as having been "executed" by him. Still, putting aside any technical objections to the words "executed," a glance at other portions of the Registration Act, as, for instance, ss. 34 and 35, relating to the inquiry before the registering officer, and s. 58, dealing with the particulars required to be indorsed on documents admitted to registration, cannot have any possible application to sale-certificates. The same observation may be made with regard to Part XII, dealing with refusal to register, for under s. 89, paragraph 2, the registering officer has no option or discretion in the matter when the copy of a sale-certificate is forwarded to him by the Civil Court, as the words are "shall file in his Book No. 1," which is the "register of non-testamentary documents relat-[573]ing to immoveable property," wherein by s. 51 "shall be entered or filed all documents or memoranda registered under ss. 17, 18 and 89, which relate to immoveable property."

Having given the matter our best consideration, we have come to the conclusion that under the present law a sale-certificate is not an instrument of the kind mentioned in cl. (*b*) of s. 17 of Act III of 1877, and is not compulsorily registrable. It is true it is not in terms exempted like a certificate under the Land Improvement Act, 1871, which would have been the simplest thing to do; but looking to the language of s. 89, paragraph 2, and the mention made thereof in ss. 32, 34 and 51, we think that such registration, as is required by law, is to be effected by the Court granting it. Seeing that all the authentication of, and publicity to, a document relating to the transfer or mortgage of immoveable property, aimed at by the Registration Act, is secured through the medium of the Civil Court, it is difficult to understand the object of, or necessity for, registration of the same instrument a second time. Of course an auction-purchaser, who desires to make himself secure from the operation of s. 50 of the Registration Act, and to guard against the Court's neglecting its duty, may register his sale-certificate and so protect himself from being superseded by subsequent registered documents in respect of the same property. Our answer to the reference must therefore be that indicated in the preceding observations, namely, that a sale-certificate granted under s. 316 of the Civil Procedure Code is not compulsorily registrable.

5 A. 573=3 A.W.N. (1883) 158.

1883 JUNE 11.

APPEL-LATE CIVIL.

5 A. 573= 3 A.W.N. (1883) 158.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

PARSHADI LAL AND OTHERS (*Defendants*) v. MUHAMMAD ZAIN-UL-ABDIN (*Plaintiff*).*
MUHAMMAD ASHGAR ALI (*Defendant*) v. MUHAMMAD ZAIN-UL-ABDIN (*Plaintiff*).† [11th June, 1883.]

Suit to set aside execution sale—Suit for possession of immoveable property sold in execution of decree—Limitation—Act IX of 1871 (*Limitation Act*), *sch. ii, No.* 14—*Act XV of* 1877 (*Limitation Act*), *sch. ii, No.* 12.

P obtained a decree against *M* in April, 1874, in execution of which property belonging to the latter was sold in 1874, 1875 and 1876. In March, 1880, this [574] decree was reversed by the Court of last appeal. In February, 1881, *M* sued to set aside the sales of his property in execution of the decree, and for possession of the property. *Held* that, both under No. 14, sch. ii of the Limitation Act, 1871, and No. 12, sch. ii of the Limitation Act, 1877, the suit was barred by limitation.

[R., 4 A.L.J. 273; 2 L.B.R. (1893—1900) 16 (17).]

THE facts of this case were as follows:—Certain persons, claiming as the heirs to one Umrao Begam, deceased, brought a suit against Muhammad Zain-ul-abdin, the plaintiff in this suit, the husband of the deceased, for certain immoveable property and mesne profits, the value of certain promissory notes, and the dower due to the deceased, in the Court of the Subordinate Judge of Moradabad, and on the 8th April, 1874, obtained a decree *ex-parte*. Muhammad Zain-ul-abdin appealed from this decree to the High Court. On the 18th August, 1875, the High Court dismissed the appeal on the ground that the decree was not appealable. He appealed from the High Court's decree to Her Majesty in Council. On the 27th November, 1878, Her Majesty in Council made an order directing that the case should be remanded to the High Court to hear and determine the appeal. On the 1st March, 1880, the High Court, having heard the appeal, modified the decree of the Subordinate Judge, and dismissed the suit in respect of the promissory notes and the dower-debt. In the meantime the plaintiffs in the suit had taken out execution of the Subordinate Judge's decree in respect of the dower-debt, and property belonging to Muhammad Zain-ul-abdin was sold on the 20th November, 1874, 20th November, 1875, and 15th November, 1876. In February, 1881, Muhammad Zain-ul-abdin instituted the present suit against the plaintiffs in the former suit and the purchasers of the property, in which he claimed that the execution sales of the 20th November, 1874, 20th November, 1875, and 15th November, 1876, might be declared null and void, and possession of the property be given him. He stated in his plaint that "the right to sue for the invalidation and annulment of the sales accrued to him on the 1st March, 1880, the date on which the decree of the Subordinate Judge having been modified by the High Court, the debts for the payment of which the sales had been effected was declared invalid," and that "he could not institute the suit before that date, which was the date [575] of his cause of action."

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* First Appeal No. 64 of 1882, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 16th March, 1882.

† First Appeal No. 65 of 1882, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 16th March, 1882.

1883 JUNE 11. — APPELLATE CIVIL. — 5 A. 573 = 3 A.W.N. (1883) 158.

The defendants set up as a defence to the suit that it was barred by limitation, as it should have been brought within one year from the date of the confirmation of the sales. The Court of first instance disallowed this contention, observing as follows:—"The limitation of one year has nothing to do with this case: the cause of action having accrued to the plaintiff on the 1st March, 1880, the date when the decision was modified, and the suit having been instituted on the 22nd February, 1881, it cannot be considered beyond time." In the event the Court of first instance gave the plaintiff a decree.

Of the defendants, three joined in appealing to the High Court, and one appealed separately. The appeal first mentioned was numbered 64; the other 65. They were heard together, and the main contention in both was that the suit was barred by limitation.

Pandit *Ajudhia Nath* and Mir *Zahur Husain*, for the appellants.

Pandit *Bishambhar Nath* and Shah *Asad Ali*, for the respondent in No. 64.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), Munshi *Hanuman Prasad*, and Mir *Zahur Husain*, for the appellant.

Pandit *Bishambhar Nath* and Shah *Asad Ali*, for the respondent in No. 65.

JUDGMENT.

STRAIGHT and OLDFIELD, JJ.—These two appeals, Nos. 64 and 65 of 1882, may conveniently be disposed of in a single judgment, for though the position of the appellants in No. 64 is somewhat different to that of the appellant in No. 65, the two questions of law raised are common to both cases. Two pleas were urged before us at the hearing,—first, that the substantial relief prayed in the suit being to have the auction-sales of November, 1874, 1875 and 1876 set aside, it is barred by limitation, whether we look to art. 14, Act IX of 1871, or to art. 12 of Act XV of 1877; secondly, that the appellants, either themselves being or representing the auction-purchasers at such sales, which have never been set aside, have acquired an indefeasible title to the property sought to be recovered, and the plaintiff-respondent has no cause of action.

[576] It appears to us unnecessary to discuss the soundness or otherwise of this latter contention, as the first ground relied on by the appellants is, in our opinion, a valid one, and fatal to the maintenance of the suit. The only way in which the plaintiff can claim to assail the title of the defendants is by obtaining the cancelment of the sales at which the latter purchased, and so long as those sales stand good, their position is unimpeachable. In short, the plaintiff cannot secure the main object of his suit, namely, possession of the properties, until he has had the sales set aside, which is virtually what is asked by the plaint. We think therefore that, whether the old or the new Limitation Law is applicable, the suit is barred by limitation, and cannot be entertained.

In this view of the matter both appeals must be decreed with costs in both Courts, and the decision of the Subordinate Judge being reversed, the plaintiff's claim will stand dismissed.

Appeals allowed.

5 A. 576=3 A.W.N. (1883) 112.

1883
APRIL 17.

APPELLATE CIVIL.

5 A. 576=
3 A.W.N.
(1883) 112.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

KEWAL RAM (*Decree-holder*) *v.* KHADIM HUSAIN AND ANOTHER (*Judgment-debtors*).* [17th April, 1883.]

Execution of decree—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (4)—Step-in-aid of execution.

An application by a decree-holder praying that the objections taken by the judgment-debtor to the sale of property belonging to him in execution of the decree should be disallowed, and the sale be confirmed, is an application from the date of which the period of limitation for a subsequent application for execution of the decree may be computed.

[F., 21 C. 23 (26).]

THE decree-holder in this case applied for execution of his decree on the 10th August, 1878. On the 28th January, 1879, certain immoveable property belonging to the judgment-debtors was sold. On the 28th February they applied to have the sale set aside. On the same day the Court ordered the decree-holder to show cause in writing on the 15th March why the application should not be granted. On the 15th March the decree-holder filed a written answer to the application for the cancelment of the sale, [577] in which he prayed that the objections of the judgment-debtors might be disallowed and the sale be confirmed. The application was eventually disallowed. On the 10th February, 1882, the decree-holder again applied for execution of the decree. The lower Courts held that the application was barred by limitation, as the last application, within the meaning of No. 179 (4), sch. ii of Act XV of 1877, had been made on the 10th August, 1878, since when more than three years had elapsed.

In second appeal the decree-holder contended that limitation should be computed from his application of the 15th March, 1879, and therefore the present application for execution was within time.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the appellant.

Shah *Asad Ali*, for the respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the decree-holder's application of the 15th March, 1879, sufficed to avoid the bar of limitation. The orders of the Courts below are set aside, and the case remanded to the first Court for disposal on the merits.

* Second Appeal No. 72 of 1882, from an order of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 31st August, 1882, affirming an order of Maulvi Muhammad Ezid Bakhsh, Munsif of Moradabad, dated the 3rd July, 1882.

1883
MAY 7.

FULL
BENCH.

5 A. 577
(F.B.)=
3 A.W.N.
(1883) 130=
8 Ind. Jur.
264.

5 A. 577 (F.B.)=3 A.W.N. (1883) 130=8 Ind. Jur. 264.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

MUNNA SINGH AND OTHERS (*Plaintiffs*) *v.* GAJADHAR SINGH (*Defendant*).* [7th May, 1883.]

Sale in execution of decree—Sale set aside—Return of purchase-money—Suit by purchaser for purchase-money—Civil Procedure Code, ss. 313, 315.

Per STRAIGHT, OLDFIELD, and TYRRELL, JJ.—That the words in s. 315 of the Civil Procedure Code, "no saleable interest," mean "nothing to sell," and are not intended to confine the cases in which a purchaser at an execution-sale shall be entitled to receive back his purchase-money to those in which the judgment-debtor, though having an interest, such interest is, by prohibition of law or for some other reason, unsaleable.

Held, by the Full Bench, that a purchaser at a sale in execution of a decree can maintain a suit against the decree-holder for recovery of his purchase-money, [578] when it is found that the judgment-debtor had no saleable interest in the property sold, and he is not limited to the special procedure in the execution department mentioned in s. 315.

[F., 13 A. 383 (385); 23 A. 355 (356); 35 A. 419=11 A.L.J. 606=19 Ind. Cas. 986; 22 B. 783 (785); 5 C.W.N. 240 (241); 7 C.W.N. 105 (107); 12 A.L.J. 908=36 A. 529; R., 12 C.P.L.R. 49 (51); 8 M.L.J. 194 (195); Cons., 11 M. 269 (273); D., 14 A.L.J. 1216.]

THIS was a reference to the Full Bench by STRAIGHT and BRODHURST, JJ. The facts of the case and the point of law referred are fully set out in the order of reference, which was as follows:—

STRAIGHT, J.—This is an appeal from a decision of the Additional Subordinate Judge of Cawnpore, dated the 20th August, 1881. The material facts for consideration are as follows:—Gajadhar Singh, the defendant-respondent, had a money-decree against one Dhan Singh, and in execution of it, he, on the 21st February, 1879, brought to sale a zamindari share of his judgment-debtor in mauza Nasauli Buzurg. This was purchased by Ahsan-ul-zaman and Imdad Husain for Rs. 105. Dhan Singh subsequently objected to the sale on the ground that the property was ancestral, and for some reason best known to himself, the Munsif, on the 4th March, 1879, set it aside and directed a fresh sale for the 20th June following. Meanwhile Ahsan-ul-zaman and Imdad Husain instituted a suit against Gajadhar Singh and Dhan Singh for establishment of the sale of the 21st February, 1879. The Munsif on the 28th May, 1879, holding that such a suit would not lie, dismissed it, but on the 19th November following, on appeal to the Subordinate Judge, this decision was reversed and the plaintiff's claim was decreed. In the interim, the sale ordered for the 20th June had taken place, and the plaintiffs-appellants had become the purchasers of the before-mentioned property for Rs. 425. After the decision on appeal of the suit of Ahsan-ul-zaman and Imdad Husain, the plaintiffs-appellants were dispossessed of the share so purchased by them, and in consequence they now sue Gajadhar Singh to recover the Rs. 425 paid by them on account of it. The Munsif decreed the claim, but the Additional Subordinate Judge on appeal dismissed the suit upon two grounds: first, that having regard to the

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* Second Appeal No. 1848 of 1881, from a decree of Babu Kashi Nath Biswas, Additional Subordinate Judge of Cawnpore, dated the 20th August, 1881, reversing a decree of Shah Ahmad-ullah, Munsif of Fatehpur, dated the 20th June, 1881.

1883 MAY 7.

FULL BENCH.

5 A. 577 (F.B.) = 3 A.W.N. (1883) 130 = 8 Ind. Jur. 264.

provisions of s. 315 of the Procedure Code no suit can be maintained, and that the plaintiffs-appellants should have sought their remedy in the execution department, and next, that upon the principle of "*caveat emptor*," the plaint disclosed no cause of action.

[579] From this decision the plaintiffs appeal to this Court, and their pleas in appeal specifically assail the soundness of these two rulings of the Subordinate Judge.

The substantial point really seems to be, whether the language of s. 315 of the Procedure Code does forbid a suit like the present, and perhaps in order to more satisfactorily consider this question, it may be convenient to see what the law with regard to it was under Act VIII of 1859, and what alterations have been introduced by the present Code. Section 258 of Act VIII of 1859, provided that "whenever a sale of immoveable property is set aside, the purchaser shall be entitled to receive back his purchase-money with or without interest, in such manner as it may appear proper to the Court to direct in each instance." In reference to this section many rulings may be found, but I think it sufficient to mention *Sowdamini Chowdhrain* v. *Krishna Kishor Poddar* (1), *Dorab Ally Khan* v. *Khajah Moheeooddeen* (2), *Framji Besanji Dustur* v *Hormasji Pestanji Framji* (3), *Hira Lal* v. *Karim-un-nisa* (4), *Ram Narain Singh* v. *Mahtab Bibi* (5), and an unreported Full Bench decision of this Court in Appeal No. 7 under s. 10 of the Letters Patent, dated 21st April last. By all these decisions it seems to have been recognized as an established principle of law, that a purchaser at a sale in execution of decree cannot recover his purchase-money, if it turns out that the judgment-debtor whose immoveable property he has purchased had no saleable interest, and that s. 258 of Act VIII of 1859 solely applies to those cases in which a sale has been set aside for irregularity in publishing and conducting it. The only contrary view of which I am aware is enunciated by COUCH, C.J., in *Bank of Hindustan* v. *Prem Chand Raichand* (6). It would therefore seem to come to this, that under the old law an auction-purchaser could get back his purchase-money if the sale were set aside for material irregularity in publishing or conducting it, but that it was not a sufficient ground to avoid it, that the judgment-debtor had no saleable interest. The auction-purchaser bought at his peril, for there was no warranty, express or implied, and if he acquired nothing, that was his misfortune. Sections 313 and 315 of [580] the new Code, however, have introduced an entirely new state of things, and in them are to be found special provisions for the benefit of auction-purchasers of immoveable property at sales in execution of decree, where the judgment-debtor turns out to have no saleable interest. By s. 313 such purchaser may now apply to have such sale set aside, "on the ground that the person whose property purported to be sold had no saleable interest," and "the Court may make such order as it thinks fit." For this application the Limitation Law of 1877, art. 172, allows a period of sixty days from the date of sale, and not thirty as allotted to ordinary applications to set aside a sale under ss. 311 and 312. Moreover, s. 588 of the Code, cl. (16), makes orders under s. 313 setting aside or refusing to set aside a sale appealable. But beyond these provisions of s. 313, a still greater change is to be met with in s. 315, for there we find that, if a sale has been set aside under

(1) 4 B.L.R. F.B. 11. (2) 1 C. 55. (3) 2 B. 258.
(4) 2 A. 780. (5) 2 A. 828. (6) 5 B.H.C.R. 83.

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s. 313 or it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the "purchaser" has for that reason "been deprived of it, he shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid." It is to be observed that an unusual course has been adopted in this latter paragraph of introducing into a Code regulating procedure a novel and somewhat startling declaration of substantive law. Now no doubt according to the Contract Law of this country a purchaser by private sale can hold the seller responsible for any loss he may sustain, if through the invalidity of the latter's title to sell the former is deprived of his purchase. It may be that the framers of the Code of 1877 had this present to their minds, when they introduced the innovation in s. 315, and contemplated placing purchasers by public and private sales upon the same footing, though it is to be noticed that while in the case of private sales the buyer is to be recouped for any loss he has sustained, that is to say, his *solatium* is to be in the shape of damages, in the case of a public sale of immoveable property the auction-purchaser "*shall be entitled*" to "*receive back his purchase-money.*" "Shall be entitled," but how? "The re-payment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a [581] decree for money." Now it seems to me that, looking at those provisions, more particularly to the paragraph just set out, while it was intended by ss. 313 and 315 to introduce a new principle of law in the interest of auction-purchasers, it was meant to limit its application and enforcement to a particular form of procedure, namely, by proceedings in the execution-department. In my opinion, where sections of an Act, as in the present instance, declare a new and specific right to be a legal right and enforceable, and at the same time contain provisions as to the procedure by which such right may be enforced, this is the procedure that must be adopted and no other. Now it is to be remarked that while the "decree-holder" or "the person whose immoveable property has been sold" must, if they seek to set aside a sale, apply within thirty days from its taking place, the auction-purchaser has sixty days, or just double the time, in which to prefer his application under s. 313, this longer period being allotted as a reasonable one for him within which on the one hand to obtain confirmation of sale and possession, or on the other hand to find out that his purchase has been infructuous and so to apply for re-payment of his purchase-money. If he applies to the Court that brought the property to sale to have it set aside, on the ground that the judgment-debtor had no saleable interest, both the judgment-debtor and the decree-holder are to have an opportunity of being heard against such application, and if it is granted, the Court shall declare the auction-purchaser entitled to receive back his purchase-money with interest or without, as it may decide, and such order may be enforced at once in execution in the same manner as a decree for money. Why, when a simple and plain-sailing procedure of this kind is laid down, it is to be said, that the same section which directs it, also gives a right to bring a regular suit, I cannot myself understand. If the sale is set aside under s. 313 and the order, if appealed, is confirmed, the auction-purchaser is "*de facto*" entitled to a refund of his purchase-money. Why then is he to be allowed to adopt the dilatory and expensive alternative of a regular suit against the decree-holder, who has probably already entered up satisfaction of his decree, and to subject him to a delay, that might result in his

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ultimately finding himself barred by time from making a fresh application for execution against his judgment-debtor? [582] In my opinion, therefore, ss. 313 and 315, more particularly the latter, do bar a regular suit, and the remedy of the auction-purchaser lies in the execution-department. As, however, the point is one of considerable importance, and no decision, as far as I am aware, has yet been passed upon it, I would, if my brother BRODHURST consents, refer the following question to the Full Bench for its opinion :—

Having regard to the language of ss. 313 and 315 of the Procedure Code, can an auction-purchaser at a sale in execution of decree maintain a suit against the decree-holder for recovery of his purchase-money, when it turns out that the judgment-debtor had no saleable interest in the property sold, or is he limited to the special procedure in the execution-department therein provided.

BRODHURST, J., concurred in the reference.

Pandit *Ajudhia Nath* and Lala *Lalta Prasad*, for the appellants.

Munshi *Sukh Ram* and *Maulvi Mehdi Hasan*, for the respondent.

The following opinions were delivered by the Full Bench :—

OPINIONS.

STUART, C.J.—We are asked by this reference whether, having regard to the language of ss. 313 and 315 of the Procedure Code, an auction-purchaser at a sale in execution of a decree can maintain a suit against the decree-holder for recovery of his purchase-money, when it turns out that the judgment-debtor had no saleable interest in the property sold, or whether he is limited to the special procedure in the execution-department therein provided, and my answer is in the affirmative. The case appears to come under the third condition of things mentioned in s. 315, *viz.*, "when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase money has been paid"; and then the section goes on to provide that "re-payment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money." This procedure, it will be observed, is [583] permissive and discretionary. It does not bar a suit, if that be considered, under the circumstances of the case, the more appropriate and convenient remedy, for to proceed by way of suit is in all cases a plaintiff's right, unless the suit is excluded expressly or by necessary implication. Here there is no exclusion of a suit, either express or implied, but an alternative proceeding of a summary nature is allowed by which a disappointed purchaser may, if he thinks fit, recover his money. The words "when it is found" in this s. 315 deserve attention: in my opinion they contemplate some previous proceeding, in which it had been found that the judgment-debtor had no saleable interest in the property purported to be sold, or the words may mean "when it has been ascertained or has become known," in which case the purchaser might apply to the Court for re-payment by means of the procedure provided by the section, but not to the exclusion, in the alternative, of a suit. It follows therefore that both remedies, that is either one or the other, are open to a purchaser seeking to get back his purchase-money on the ground of the judgment-debtor having no saleable interest; that is,

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unless something has been done, some step taken by way of suit or application, either the one or the other of these remedies is, in the discretion of the party interested in getting a sale set aside, by reason of the judgment-debtor having no saleable interest, available to the purchaser. On the other hand, where a party has elected and put in motion his procedure, whether by suit or application, that is for the occasion his only remedy. A suit is, as I have said, a plaintiff's right, when no other remedy is provided; but if the object is to set aside a sale of land he may, in his discretion, proceed summarily under s. 315, or he may proceed by way of suit.

In the case which has given rise to this reference there was no application of the kind contemplated by s. 313, and there cannot be a doubt therefore that the suit which was actually brought was the proper remedy.

STRAIGHT, J.—I went very fully into the facts of the case, and the questions involved in it, upon which this reference has arisen, in my order of the 7th June last, and it would serve no useful purpose to recapitulate the same matters here. All the points [584] involved have now been exhaustively argued and examined at the hearing before the Full Bench, and it only remains to express an opinion upon them. By way of preliminary I may remark that at the outset of the discussion of this reference a question was raised by my brother OLDFIELD, as to whether the expression "no saleable interest" in ss. 313 and 315 of the Civil Procedure Code was intended to cover cases in which sales were set aside on the ground that the judgment-debtor had no saleable interest at all, or whether it was meant to be confined to those instances where, though having some interest, it was, either by prohibition of law or for some other reason, unsaleable. I confess I do not feel myself pressed to adopt the latter conclusion, nor am I disposed to place any such limitation upon the words. For it should not be lost sight of, that whereas by s. 249, Act VIII of 1859, all that had to be proclaimed for sale was "the right, title and interest of the judgment-debtor," now by the present Code it is "the property and any incumbrance to which the property is liable" that must be advertised. Hence, in harmony with this latter provision, it would seem that ss. 313 and 315 provide for cases in which by reason of property having been put up and sold, either as free from incumbrance, or without disclosure of all incumbrances, the purchaser does not acquire the interest that purported to be sold him. It is further to be observed that now under s. 287 of the present Code, the duty and obligation is cast upon the Court executing a decree of ascertaining the several matters to be specified in the sale notification by the examination of any person it thinks necessary, or of any document in the possession or power of such person relating to the property to be sold It is obvious, therefore, that if an incumbrance or incumbrances, which are not disclosed, do exist, the auction-purchaser must, in the sense of s. 315, be thereby deprived of what he has purchased, and what purported to be sold him—namely, the property free of incumbrances, just as much as if it turned out that it belonged to somebody else, and that the judgment-debtor had no interest in it at all. I fail to understand why any distinction of the kind suggested by my brother OLDFIELD at the hearing, but which, having had the advantage of seeing his answer to this reference, I find he does not now maintain, should be drawn in favour of an auction-purchaser who buys when the [585] judgment-debtor has an interest that is not saleable, as against an auction-purchaser who buys when the judgment-debtor has no interest at all. As

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bearing upon the view I take, that the words "no saleable interest" should not be limited in the manner suggested, I may refer to a case decided by PONTIFEX, J.—*Naharmul* v. *Sadut Ali* (1). Under all the circumstances, therefore, I think the expression should be interpreted in the widest and most general sense, and as meaning in plain terms "nothing to sell." For I cannot suppose it was ever intended that a purchaser at an auction-sale held under the authority of a Court, who buys a property as free from incumbrance, which subsequently turns out to be mortgaged up to its full value, can be said to have purchased what purported to be sold him, because it may be argued that he technically acquired the judgment-debtor's equity of redemption.

So much for this preliminary point; and now to turn to the substantial question raised by the reference—namely whether, when a sale is set aside on the ground that the judgment-debtor had no saleable interest, or such is afterwards found to be the case, the auction-purchaser is absolutely bound to resort to the Court which ordered the sale to enforce a payment of his purchase-money, or whether he has the alternative of a regular suit open to him? In other words, are the provisions of s. 315 exhaustive, and do they prohibit such a suit? In my referring order I stated all the reasons that occurred to me why this question should be answered in the affirmative, and it is unnecessary to repeat them. At the hearing before the Full Bench it was much pressed upon us, that as the expression used in s. 315 is "may be enforced," and a suit is not in terms forbidden, no bar exists to a proceeding of that character.

There is weight in this contention, as also in the argument, that questions of difficulty as to the re-payment of purchase-money might arise between auction-purchasers and decree-holders, which it would be most unsatisfactory and inconvenient to have determined in the execution department. As the law now declares that if a purchaser at a Court-sale is deprived of his purchase, because there was nothing belonging to the judgment-debtor to [586] sell him, he is entitled to receive back his purchase-money, it would perhaps be unreasonable to limit his remedy to that provided in s. 315. For it must not be lost sight of that it is not only when a sale has been set aside under ss. 312 and 313, but further "when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it," that an auction-purchaser is declared by s. 315 entitled to receive back his purchase-money, and this provision was no doubt intended to cover a case in which, though the sale had not been set aside in the execution-department, some third person had, by separate suit or in some other manner, established his title to the property sold as belonging to the judgment-debtor and so ousted the auction-purchaser. In a case of that kind it would seem scarcely convenient or appropriate to limit the latter to the machinery of the execution-department to obtain a refund of his money, for questions of difficulty and complexity might arise in reference thereto, that could only be determined in a suit to which the decree-holder, the judgment-debtor, and the person at whose instance the auction-purchaser had been deprived of his purchase were made parties. Having given the matter the best consideration I can, and in the absence of any positive prohibition to such a suit, I would therefore answer the question put in the reference by saying, that an auction-purchaser at a sale in execution of decree can maintain a

(1) 8 C.L.R. 468.

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suit against a decree-holder for recovery of his purchase-money, when it turns out that the judgment-debtor had no saleable interest in the property sold, and he is not limited to the special procedure in the execution-department mentioned in s. 315.

TYRRELL, J., concurred in this opinion.

OLDFIELD, J.—I have had considerable doubt as to the meaning to be placed on the words "no saleable interest" in ss. 313 and 315 of the Civil Procedure Code, whether they refer to a case where the auction-purchaser is deprived of the property purchased because the judgment-debtor has no interest in it, or only to a case where the interest of the judgment-debtor is by law not liable to be sold, and the sale is for that reason set aside, or the auction-purchaser is deprived of the property.

[587] By s. 258, Act VIII of 1859, whenever a sale of immoveable property was set aside, the auction-purchaser was entitled to receive back his purchase-money with or without interest; in such manner as it might appear proper to the Court to direct in each instance. This provision has been held to meet those cases where the sale was set aside for irregularities under s. 256, and the ground for the relief is, that it is inequitable that the decree-holder should retain the purchase-money when the sale is set aside, and there is a guarantee on his part that the sale shall not be set aside or the auction-purchaser be evicted by the judgment-debtor, but he did not guarantee that the judgment-debtor had any right or interest in the property sold, and his not having any interest in it was in consequence no ground for setting aside the sale, or allowing a refund of the purchase-money, so far as the right to that relief rested on any obligation arising out of a guarantee of interest by the decree-holder and apart from other considerations. The following cases may be referred to:—*Sowdamini Chowdrain* v. *Krishna Kishor Poddar* (1), *Ram Tuhul Singh* v. *Biseswar Lall Sahoo* (2) and *Dorab Ally Khan* v. *The Executors of Khajah Moheeooddeen* (3).

The present Civil Procedure Code, by ss. 313 and 315, has, in addition to the relief allowed to an auction-purchaser by s. 258, Act VIII of 1859, empowered him to apply to have a sale set aside on the ground that the person whose property purported to be sold had no saleable interest therein, and to recover his purchase-money with or without interest when the sale has been set aside on that ground, or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it.

I was at first inclined to consider that it was intended by the alteration in the sections to allow of a sale being set aside and refund of the purchase-money only in cases when the judgment-debtor's interest was not saleable, and on that ground the purchaser had been deprived of the property by the judgment-debtor, and not when he had been evicted by title paramount, as the decree-holder, though not guaranteeing the interest of his judgment-debtor in the property, certainly guaranteed that the property, being the property [588] of his judgment-debtor, is liable to be sold, and that the sale will not be set aside or the purchaser be evicted by the judgment-debtor.

But the term "no saleable interest" is wide enough to embrace cases when there is found to be no interest at all in the judgment-debtor in the property sold, and it appears to be equitable that the sale should be set aside and the purchase-money refunded, when there is a total failure

(1) 4 B.L.R. F.B. 11. (2) 2 I.A. 131. (3) 3 C. 806 = 3 Suth P.C.C. 519.

of consideration, as there will be in such a case, and such may have been the intention of the Legislature in introducing the alterations in question.

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In my opinion the auction-purchaser is not limited to his remedy to recover the purchase-money in the execution-department, but is at liberty to bring a suit. There is nothing in s. 315 to show that the purchase-money can only be recovered by order of the Court executing the decree, and when a suit is not expressly barred, it must be held to be maintainable, with reference to the provisions of s. 11 of the Code.

BRODHURST, J.—Clauses 2, 3 and 4 of s. 315 are as follows:—"Or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid. The re-payment of the said purchase-money and the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money."

Thus the purchaser "shall be entitled to receive back his purchase-money from any person to whom the purchase-money has been paid," and "repayment may be enforced against such person under the rules provided by this Code for the execution of a decree for money."

It is, however, nowhere laid down in the Procedure Code that re-payment of the purchase-money can be enforced only under the said rules, and for the Legislature to have added in s. 315, that a suit on the above account might also be brought, would have been to adopt not only an unusual course, but, moreover, an unneces-[589]sary one, for it had already, at almost the commencement of the Code, *i.e.*, in s. 11, been expressly stated that "the Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a Civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force." The suit out of which this reference has arisen can then be heard, as it is not barrred either by the provisions of the Civil Procedure Code or of any other enactment.

There is, I consider, in this case, as in other instances mentioned at the hearing, a double remedy, and my answer therefore to the reference is that, under the circumstances stated, the auction-purchaser is not limited to the special procedure in the execution-department, but is also competent to bring a suit for the recovery of the purchase-money.

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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

HIMAYAT HUSAIN (*Judgment-debtor*) *v.* JAI DEVI (*Decree-holder*).*
[8th May, 1883.]

Execution of decree—The decree to be executed where there has been an appeal—Costs.

The defendant in a suit appealed from so much of the decree of the Court of first instance as related to the amount of costs payable by him to the plaintiff. The decree of the appellate Court directed "that the order of the lower Court

* Second Appeal No. 15 of 1883, from an order of E. B. Thornhill, Esq., Judge of Aligarh, dated the 10th October 1882, affirming an order of Maulvi Sami-ul-lah Khan, Subordinate Judge of Aligarh, dated the 9th October, 1882.

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be upheld, and the appeal be dismissed: the appellant to pay the costs." *Held*, that the amount of costs awarded by the Court of first instance, although they were not specified in the appellate Court's decree, were recoverable in execution of that decree, inasmuch as those costs were the subject-matter of the appeal, and the appellate Court, in affirming the decision of the first Court on that point, made them the substantive portion of its decree.

Shohrat Singh v. *Bridgman* (1), distinguished.

JAI DEVI, the plaintiff in a suit, obtained a decree against the defendant, Himayat Husain, in the following terms:—"The whole claim of the plaintiff be decreed against the defendant with interest amounting to Rs. 33-10-0 at the rate claimed on the prin-[590]cipal, and the entire costs of the Court: the decretal amount be charged against four shops in Guzri Bazar, the shops in Anwarganj and the Sarai in Anwarganj, being the hypothecated property: the plaintiff to recover future interest on the decretal amount and the costs at 8 annas per cent: the defendant to pay the decretal amount within six months: plaintiff's costs, Rs. 295-1-9." The defendant appealed against so much of this decree as related to the item of Rs. 295-1-9 awarded to the plaintiff as costs. The order of the appellate Court was as follows: "It is ordered and decreed that the order of the lower Court be upheld and the appeal be dismissed: the appellant to pay the costs and interest at 6 per cent. per annum: it is further ordered that the defendant-appellant do pay to the plaintiff-respondent Rs. 16-4-0 with interest at 8 annas per cent. per mensem, the costs incurred by the plaintiff in this Court." The decree of the appellate Court contained no specification of the costs awarded by the Court of first instance. Jai Devi thereupon applied for execution of his decree, including the item of Rs. 295-1-9 costs awarded him by the Court of first instance. The defendant objected to the recovery of this item on the ground that the decree of the appellate Court should alone be executed, and that as there was no reference therein to the item in dispute, such item could not be recovered. In support of this contention he relied on *Shohrat Singh* v. *Bridgman* (1). The objection was disallowed by the Court of first instance. On appeal the lower appellate Court affirmed the order of the first Court. The defendant then appealed to the High Court, raising the same contention as he had raised below.

Munshi *Kashi Prasad* and Shah *Asad Ali*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Babu *Aprokash Chandar Mukarji*, for the respondent.

JUDGMENT.

The judgment of the Court (STRAIGHT and OLDFIELD, JJ.) was delivered by

STRAIGHT, J.—The costs which had been decreed by the first Court were alone the subject-matter of appeal to the lower appellate Court, which, in affirming the decision of the first Court upon that point, made the costs of the first Court the substantive portion of [591] its decree, and gave costs in the usual manner against the appellant on failure of his appeal. This distinguishes the case from *Shohrat Singh* v. *Bridgman* (1). The appeal is dismissed with costs.

Appeal dismissed.

(1) 4 A. 376.

5 A. 591=3 A.W.N. (1883) 142.

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5 A. 591=
3 A.W.N.
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APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BALWANT SINGH AND ANOTHER (*Defendants*) v. GUMANI RAM (*Plaintiff*).* [10th and 16th May, 1883.]

Appeal—Limitation—Admission beyond time—Act XV of 1877 (*Limitation Act*), ss. 5, 14—*Specific enforcement of contract—Expiration of time for enforcement.*

The circumstances contemplated in s. 14 of the Limitation Act, 1877, will ordinarily constitute a sufficient cause in the sense of s. 5 for not presenting an appeal within the period of limitation.

A bond for money provided that on failure on the part of the obligor to pay interest as agreed in the bond, and within a certain period from the date of the bond, the obligee might sue for possession of the immoveable property mortgaged in the bond. Default was made in the payment of interest as agreed, but the obligee deferred bringing a suit for possession of the mortgaged property so long that the time mentioned in the bond expired before he could obtain a decree.

Held, that under these circumstances a decree for possession of the property should not be granted to him.

[F., 29 A. 638 (640)=4 A.L.J. 515=A.W.N. (1907) 219; 20 B. 736 (743); 23 C. 526 (531); 184 P.R. 1889 (F.B.); R., 9 B. 452 (453); 23 C. 325 (327); 34 C. 216 (221)=5 C.L.J. 380; 1 L.B.R. 313 (314); 15 M.C.C.R. 143 (144); **Expl**., 10 A. 587 (592); **Cited**, 9 P.L.R. 1914=23 P.W.R. 1914=23 Ind. Cas. 86.]

THE plaintiff in this suit was the holder of a bond for money executed in his favour by the defendants, under the terms of which he was entitled, in default of payment of interest as agreed, and within the period of nine years from the date of the bond, to sue the defendants for possession of the property hypothecated in the bond. This bond was dated the 21st March, 1871. Default was made in the payment of interest as agreed; and on the 14th January, 1880, or two months and seven days before the expiration of the period mentioned in the bond, the plaintiff brought the present suit against the defendants for possession of the hypothecated property. The Court of first instance (Subordinate Judge) dismissed the suit, on the ground that, the term mentioned in the bond having expired, a decree could not properly be granted to the plaintiff for possession of the hypothecated property, as such a decree would be opposed to the terms of the bond. The lower **[592]** appellate Court (District Judge) held that the plaintiff was entitled to a decree for possession of the hypothecated property, inasmuch as the suit had been instituted within the term of nine years, and his right was not affected by the fact that such term had expired while the suit was pending.

The defendants applied to the High Court for revision under s. 622 of the Civil Procedure Code of the lower appellate Court's decree. This application was rejected, on the ground that an appeal would lie in the case, and therefore the High Court was not competent to deal with it in the exercise of revisional jurisdiction. The defendants thereupon preferred the present second appeal. The respondent objected to the hearing of the appeal, on the ground that it had not been preferred within time.

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* Second Appeal No. 1373 of 1882, from a decree of C. W P. Watts, Esq., Judge of Agra, dated the 1st September, 1882, reversing a decree of Maulvi Sultan Husan Khan, Subordinate Judge of Agra, dated the 6th June, 1881.

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5 A. 591 = 3 A.W.N. (1883) 142.

Munshi *Hanuman Prasad*, for the appellants.

Paudit *Ajudhia Nath* and Babu *Baroda Prasad*, for the respondent.

On the question whether the appeal should be admitted to a hearing the Court (STRAIGHT and TYRRELL, JJ.) made the following order:—

TYRRELL, J.—A preliminary objection has been taken by the respondent to the hearing of this appeal, which was presented one day after the period of limitation prescribed for its admission had expired. It is explained for the appellants that they had been occupied, down to the last day open for the presentation of such an appeal as the present, in making an application to this Court in revisional jurisdiction for the same relief against the same party as is now sought; that they had been prosecuting that same civil proceeding with due diligence and in good faith, but that the application was rejected for want of jurisdiction to entertain it in revision. In other words, the appellants pray in aid the saving provision of s. 14 of Act XV of 1877. It is objected for the respondent that s. 14 applies not to appeals, but to suits and original applications only. This is true; and I observe that the provisions of this section are mandatory; the time occupied in proceedings of the kind described in the section "*shall be* excluded." But by s. 5 of the Limitation Act appellate Courts have power to admit [593] any appeal after the period of limitation prescribed therefor, subject only to the condition that the appellant satisfies the Court that he had sufficient cause for not presenting his appeal in time. It is obvious that the circumstances contemplated in s. 14 might, and ordinarily would, constitute a sufficient cause in the sense of s. 5. And the reason why s. 14 is limited to Courts of original jurisdiction is merely because the earlier section had given a larger and unfettered power in the same behalf to appellate Courts. Applying the reasonable principle of s. 14 to our unquestioned powers under s. 5, I would overrule the objection under the peculiar circumstances of this case, and would admit the appeal to a hearing.

STRAIGHT, J., concurred.

The appeal having been heard, the Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—We do not think that the decision of the Judge can be upheld. As the plaintiff-respondent deferred bringing his suit for possession until a time when no decree he might obtain could give it him within the stipulated period of nine years, it is obvious that no Court could have power to enforce his rights under a contract that to this extent had expired. The view of the Subordinate Judge was right, and this appeal being decreed without costs, the decision of the first Court will be restored.

Appeal allowed.

5 A. 593=3 A.W.N. (1883) 136.

1883
MAY 11.
APPELLATE CIVIL.
5 A. 593=
3 A.W.N.
(1883) 136.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

ABDUL RAHIM (*Defendant*) v. ZIBAN BIBI (*Plaintiff*).*
[11th May, 1883.]

Registration—Registered and unregistered documents—Priority—Act III of 1877 (*Registration Act*), *s* 50.

Held, that a document which was registered under the Registration Act, 1877, took effect, as regards the property comprised therein, as against a document relating to the same property, the registration of which under the Registration Act, 1871, was optional and which was not registered thereunder.

Lachman Das v. *Dip Chand* (1), followed.

[R., 13 B. 229 (232).]

[594] THE plaintiff in this suit claimed the amount due on a bond, bearing date the 25th December, 1873, in which certain immoveable property was mortgaged, and asked for an order for the sale of the mortgaged property. Under the terms of this bond the principal amount, Rs. 75, was payable, together with interest at one rupee per cent. per mensem, on the 6th June, 1876. The bond was not registered under the Registration Act, 1871. The mortgaged property having been sold under an instrument, dated the 30th July, 1877, the plaintiff joined the purchaser, Abdul Rahim, as a defendant with the obligors of the bond. The sale-deed had been registered under the Registration Act, 1877. The defendant Abdul Rahim set up as a defence to the suit that under s. 50 of that Act his sale-deed, being registered, took effect as regards the property in question against the plaintiff's mortgage, and therefore the plaintiff was not entitled to an order for the sale of the property. Both the lower Courts disallowed this defence.

In second appeal the defendant again contended that, having regard to the provisions of s. 50 of the Registration Act, 1877, the plaintiff was not entitled to an order for the sale of the property.

Maulvi *Obaidul Rahman*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the respondent.

The Court (STRAIGHT and OLDFIELD, JJ.) delivered the following judgment :—

JUDGMENT.

STRAIGHT, J.—Assuming that the hypothecation-bond of the plaintiff-respondent was an optionally registrable instrument, under the Full Bench ruling in *Luchman Das* v. *Dipchand* (1), the registered sale-deed of the defendant takes precedence of it as against the property in respect of which the plaintiff seeks to enforce her lien. We must therefore decree the appeal and modify the decision of the lower Courts, in so far as they declare the right of the plaintiff to enforce her lien against the property in the hands of the defendant Abdul Rahim, in respect of whom the suit must stand dismissed. The costs in this and the lower Courts incurred by the appellant will be paid by the respondent.

Appeal allowed.

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* Second Appeal No. 61 of 1883, from a decree of Hakim Shah Rahat Ali, Additional Subordinate Judge of Ghazipur, dated the 14th September, 1882, affirming a decree of Maulvi Azizul Rahman, Munsif of Sayyidpur, dated the 7th November, 1881.

(1) 2 A. 851.

1883
MAY 12.

APPELLATE CIVIL.

5 A. 595 = 3 A.W.N. (1883) 140.

5 A. 595 = 3 A.W.N. (1883) 140.

[595] APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

GANESH RAI (*Defendant*) *v.* KALKA PRASAD (*Plaintiff*).*
[12th May, 1883.]

Res judicata—*Civil Procedure Code, s. 13, Expl. III and s. 373—Dismissal of suit "in present form."*

K, the purchaser of certain immoveable property in execution of a decree, sued for possession of the same. The suit was dismissed "in the form in which it was brought" because the plaintiff had not filed with the plaint the sale-certificate. *K* subsequently brought a fresh suit.

Held, that the dismissal of the former suit "in the form it was brought" did not amount to permission to sue again contemplated by s. 373 of the Civil Procedure Code, and such dismissal must be regarded as a "decision" thereof in the sense of s. 13, *Expl.* III, and therefore as a bar to the fresh suit.

[**Diss**, 8 A. 282 (288); **F.**, 9 A. 155 (158); **Expl.**, 11 A. 187 (191).]

THE plaintiff in this suit, Kalka Prasad, sued the defendant, Ganesh Rai, for possession of certain immoveable property which he had purchased at an execution-sale. The Court (Munsif) before whom this suit was brought dismissed it on the 23rd May, 1881, "in the form in which it was brought" (*ba haisiyat maujuda*), on the ground that the plaintiff had not filed his certificate of sale with the plaint. Kalka Prasad thereupon brought a fresh suit against Ganesh Rai and obtained a decree. The defendant appealed to the District Judge, *inter alia*, on the grounds (i) that the plaintiff could not bring a fresh suit without leave obtained from the Court under Chap. XXII of the Civil Procedure Code; and (ii) that the decree of the 23rd May, 1881, in the former suit operated as *res judicata* in this suit. The lower appellate Court dismissed the appeal. The defendant thereupon appealed to the High Court.

Munshi *Kashi Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

The Court (BRODHURST and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—We must give effect to this appeal, and hold that the decree of the Munsif of Shahjahanpur, dated the 23rd May, 1881, dismissing the respondent's suit on account of legal defects in respect to the evidence tendered by the respondent, is a bar to **[596]** the present suit between the same parties raising the same issues on the same or similar evidence. The mere use by the Munsif in the decision of the words "*ba haisiyat maujuda*" cannot have any effect on the case: for they do not amount to the permission to sue again contemplated by Chap. XXII of the Civil Procedure Code: and indeed it is not pretended that any of the procedure of that chapter was adopted by the respondent or used by the Court.

We must regard the dismissal of the respondent's former suit as a "decision" thereof in the sense of s. 13 and its *Expl.* III, Act XIV of

* Second Appeal No. 1297 of 1882, from an order of Maulvi Muhammad Nasrulla Khan, Subordinate Judge of Shahjahanpur, dated the 19th July, 1882, reversing an order of Muhammad Amir-ullah, Munsif of Shahjahanpur, dated the 1st May, 1882.

1882. And that decision became final by reason of the respondent's omission to challenge it in appeal, as he might have done. We decree this appeal with costs in all Courts.

1883 MAY 12. — APPELLATE CIVIL. — 5 A. 593= 3 A.W.N. (1883) 140.

Appeal allowed.

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5 A. 596=3 A.W.N. (1883) 143.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

SHAM KARAN AND ANOTHER (*Decree-holders*) v. PIARI AND ANOTHER (*Judgment-debtors*).* [18th May, 1883.]

Execution of decree—Civil Procedure Code, s. 257-A—Act XV of 1877 (Limitation Act), sch. ii, Nos. 178, 179.

On the 27th August, 1878, the holder of a decree for money and the judgment-debtor agreed that the amount of the decree should be payable by instalments, and that, if default were made in payment of any one instalment, the whole decree should be executed. The Court executing the decree sanctioned this agreement. On the 28th November, 1881, default having been made, the decree-holder applied for recovery of the whole amount of the decree. *Held*, that the application was not one to which No. 179, sch. ii of the Limitation Act, 1877, was applicable, but No. 178, and the period of limitation began to run from the date of default. The principle recognized in *Raghubans Gir* v. *Sheosaran Gir* (1) and *Kalyanbhai Dipchand* v. *Ghanashamlal Jadunathji* (2), applied.

[N.F., 26 P.R. 1894; R., 12 A. 571 (576); 14 Ind. Cas. 335=155 P.L.R. 1912=80 P.W.R. 1912.]

THE decree of which execution was sought in this case was one for money, bearing date the 9th August, 1877. On the 4th May, 1878, the decree-holders applied for the arrest of the judgment-debtor and the attachment of certain property belonging to him in execution of the decree. The judgment-debtor was arrested and sent to jail, and the property was attached and advertised for sale. On the 27th August, 1878, an application was made on behalf of the judgment-debtor to the Court executing [597] the decree, in which it was stated that it had been agreed by the parties that the amount of the decree should be paid by instalments, and that on default in payment of any instalment the decree-holders should be at liberty to apply for execution of the whole decree, and it was prayed that the judgment-debtor might be released from jail and the sale of his property be postponed. On the following day, the judgment-debtor, having been brought from jail before the Court, verified the application, and the decree-holders expressed their consent to the arrangement, and to the release of the judgment-debtor, and the postponement of the sale. Thereupon, on the same day, the Court ordered the release of the judgment-debtor and the postponement of the sale. On the 28th November, 1881, the decree-holders applied for execution of the whole decree, default having occurred. Both the lower Courts held that the application, being governed by No. 179 (2) of the Limitation Act, 1877, was barred by limitation.

In second appeal the decree-holders contended that they were entitled to have the decree executed, in accordance with the terms of the

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* Second Appeal No. 16 of 1883, from an order of J. M. C. Steinbelt, Esq., Judge of Banda, dated the 13th October, 1882, affirming an order of Kazi Wajih-ul-lah Khan, Subordinate Judge of Banda, dated the 25th February, 1882.

(1) 5 A. 243. (2) 5 B. 29.

1883 MAY 18.

APPELLATE CIVIL.

5 A. 596 = 3 A.W.N. (1883) 143.

arrangement between the parties, default having occurred, and the application was within time.

Pandit *Ajudhia Nath* and Mr. *Simeon*, for the appellants.

The legal representatives of the judgment-debtor did not appear.

The Court (STRAIGHT and OLDFIELD, JJ.) delivered the following judgment :—

JUDGMENT.

OLDFIELD, J.—The appellant holds a decree against respondent, dated 9th August, 1877. He took out execution on the 4th May, 1878, by imprisonment of the judgment-debtor and attachment of his property. On the 27th August, 1878, the judgment-debtor represented to the Court that he had come to terms with the decree-holder by which time was given to pay the decree by instalments, and the decree-holder was empowered on default of payment to proceed with the execution of the decree for principal with interest. On the 28th August the decree-holder signified his assent to the arrangement, and the Court ordered the release of the judgment-debtor, and the property remained under attachment.

[598] The application which is the subject of this appeal was made by the decree-holder on the 28th November, 1881, to recover the amount due to him with reference to the above arrangement by imprisonment of the judgment-debtor. The question raised in this appeal is whether the application is barred by limitation; and if it is to be regarded as an application to which art. 179 applies, it is undoubtedly barred. But agreements made to give time for the satisfaction of a decree, with the sanction of the Court, are agreements which can be given effect to by the Court executing the decree; and this has been now recognized by s. 257-A, Civil Procedure Code, as amended by Act XII of 1879, and the effect of the former proceedings in execution was, that the Court sanctioned the arrangement which the parties entered into, and the execution then in progress was deferred, but liable to be again proceeded with if the judgment-debtor made default in paying instalments, and the present application of the decree-holder may be regarded as one to enforce the agreement rather than an application for execution of the decree in its strict sense to which art. 179 would be applicable. It will come under art. 178, and time will run from the date of default, and the application is within time. The principle which we are applying to the decision of this case has been recognized in other cases—*Raghubans Gir* v. *Sheosaran Gir* (1), and *Kalyanbhai Dipchand* v. *Ghanashamlal Jadunathji* (2).

We decree the appeal with costs, and set aside the order of the lower appellate Court, and remand the case to be disposed of on the merits.

Appeal allowed.

(1) 5 A. 243. (2) 5 B. 29.

5 A. 598=3 A.W.N. (1883) 149.

1883
MAY 22.

APPEL-
LATE
CRIMINAL.

5 A. 598=
3 A.W.N.
(1883) 149.

APPELLATE CRIMINAL.

Before Mr. Justice Brodhurst.

EMPRESS *v.* PARAHU. [22nd May, 1883.]

Act XLV of 1860 (*Penal Code*), *s.* 211—*False charge.*

Where no criminal proceeding is instituted on a false charge of an offence of the nature described in the latter part of s. 211 of the Indian Penal Code, the person making such charge is punishable only under the first part of that section.

[Diss., 4 Cr. L.J. 240=2 N.L.R. 119 (120); F., 16 A. 124 (125); 14 C. 633 (634); R., 22 B. 596 (599).]

[599] THIS was an appeal from a conviction by Mr. R. J. Leeds, Sessions Judge of Gorakhpur, dated the 19th February, 1883. The appellant was convicted under s. 211 of the Penal Code, and sentenced to transportation for seven years. The charge against him was that, with intent to cause injury to one Udit Narain, he had falsely charged him with committing murder, knowing that there was no just ground for such charge. It appeared that the appellant presented a petition to the District Superintendent of Police, in which he alleged that a serious offence had been committed regarding which he would give information; and that he subsequently made a statement to the police in which he accused Udit Narain of murder. On inquiry by the police the charge was found to be false; and criminal proceedings were subsequently instituted against the appellant on the charge on which he was convicted.

The appellant was not represented.

JUDGMENT.

BRODHURST, J.—The evidence on the record leaves no room for doubt as to the prisoner's guilt; but it appears that in this case no criminal proceeding was instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, and therefore, in accordance with several rulings of Judges of this Court (1), and in which I concur, the accused was punishable only under the first part of s. 211, Indian Penal Code. The sentence consequently is modified, being reduced to two years' rigorous imprisonment and to a fine of Rs. 50, or, in default of payment, to a further term of six months' rigorous imprisonment.

(1) See *Empress* v. *Pitam Rai*, 5 A. 215.

1883
MAY 28.

APPELLATE CIVIL.

5 A. 599=
3 A.W.N.
(1883) 155.

5 A. 599=3 A.W.N. (1883) 155.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SHANKAR DAS (*Plaintiff*) *v.* JOGRAJ SINGH AND OTHERS (*Defendants*).* [28th May, 1883.]

Hindu Law—Joint Hindu family—Execution of bond by father on minor son's behalf—Registration of bond without the minor being represented—Act III of 1877 (*Registration Act*), *s.* 35—*Minor son's right in ancestral property.*

At the registration of a bond executed by *H* and *B*, and by *H* on behalf of *J*, a minor, the minor was not represented for the purpose of registration by any one. [600] *Held*, that the bond should not affect any immoveable property comprised therein in so far as *J* was interested in the same. *Muhammad Ewaz* v. *Brij Lal* (1), and s. 35 of the Registration Act, 1877, referred to.

[Overruled, 21 A. 281 (285) (F.B.) = A.W.N. (1899) 59.]

THE plaintiff in this suit sued Harbans Singh and his two sons Jograj Singh and Balbir Singh, a joint Hindu family, on a registered bond for Rs. 25,000, dated the 4th January, 1880. This bond was executed by Harbans Singh for himself and as guardian of Jograj Singh, who was a minor in January, 1880, and by Balbir Singh. The consideration for the bond was Rs. 20,000 due on a bond executed by Harbans Singh and Balbir Singh, dated the 7th October, 1879, and an advance of Rs. 5,000. Certain joint ancestral property was hypothecated in the bond. The certificate of registration indorsed on the bond in suit ran as follows:—"This document was presented for registration on Tuesday, the 13th January, 1880, at 9 A.M., by Harbans Singh, in the Sub-Registrar's office . . . . Signed *Tulsi Ram*, Sub-Registrar; *Harbans Singh*: *Balbir Singh*. Harbans Singh and Balbir Singh admitted before me the receipt of Rs. 20,000 entered in the former document, dated and registered in this office on the 7th October, 1879. and having also received before me five currency notes of the Calcutta Circle, aggregating Rs. 5,000, admitted the execution of the aforesaid document." The plaintiff stated in his plaint that the bond had not been registered on behalf of the defendant Jograj Singh; but that, as the money had been borrowed for joint family purposes he was also liable on the bond. The defendant Jograj Singh set up as a defence that the bond, not being registered so far as he was concerned, could not affect his share of the joint ancestral property mortgaged; and that he was not personally liable on it, as the money had not been borrowed for family purposes. The Court of first instance gave the plaintiff a decree against the defendants Harbans Singh and Balbir Singh personally, and a two-thirds share of the joint ancestral property hypothecated in the bond, but dismissed the suit as regards the defendant Jograj Singh and one-third of the property. Its reasons for dismissing the suit as regards the defendant Jograj Singh and one-third of the property were, that the bond not being registered, so far as Jograj Singh was concerned, it could not take effect against [601] his interest in the property, and that Jograj Singh was not personally liable on the bond, as it had not been executed for his benefit. The plaintiff appealed to the High Court, contending that the debt due on the bond was one for which

* First Appeal No. 25 of 1882, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 24th December, 1881.

(1) 1 A. 465.

the defendant Jograj Singh and his share of the joint ancestral property were liable.

Mr. *Conlan*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and Mir *Zahur Husain*, for the appellant.

Pandit *Nand Lal* and Mr. *Simeon*, for the respondents.

The judgment of the Court (STRAIGHT and TYRRELL, JJ.), so far as it is material for the purposes of this report, was as follows :—

JUDGMENT.

TYRRELL, J.—There is no question but that Jograj Singh was an executing party to the bond by representation of his father. But he was not represented in the registration of the instrument. Now, under s. 35 of the Indian Registration Act, as explained and applied by the Judicial Committee of the Privy Council in *Muhammed Ewaz* v. *Brij Lal* (1), this document was unregistered *quoad* Jograj Singh, disabled from executing or registering it by reason of minority, and not represented for the purpose of registration by any person, far less by such a person as alone is capable of representation under Part VI of the Registration Act. This being so, the instrument on which the suit is founded " shall not affect any immoveable property comprised therein," in so far as Jograj Singh is interested in the same; and whatever might be the result of further inquiry into the character of the loan, the needs of the estate, and the fact of the minor having been a beneficiary in the transaction, the utmost that we could do would be to give the appellant a personal decree against Jograj Singh. But under the peculiar circumstances surrounding all the transactions of October-November, 1879, and January, 1880, between the parties, and in the absence of any allegation that Jograj Singh as separate non-ancestral estate or personal property, we do not feel ourselves called on to disturb the decree as it stands in this respect, or to direct any further trial in this direction.

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5 A. 602 = 3 A.W.N. (1883) 155.

[602] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

HIRA LAL (*Plaintiff*) *v.* BHAIRON AND OTHERS (*Defendants*).*
[1st June, 1883.]

Co sharer—Suit by one of several co-sharers against others affecting joint land—Civil Procedure Code, s. 30.

A share-holder of an undivided piece of land sued three of his co-sharers, who, he alleged, had trespassed on the land by building thereon, for restoration of the land to its original condition. The Court of first instance tried and determined the suit as brought and framed. The lower appellate Court dismissed the suit on the ground that, there being many co-sharers, the plaintiff could not alone sue, and under s. 30 of the Civil Procedure Code the suit was bad.

Per STUART, C.J.—That the lower appellate Court was right in holding that s. 30 of the Civil Procedure Code applied to the case, but that it was not right in dismissing the suit, but should have remanded it for the procedure provided by that section.

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* Second Appeal No. 1087 of 1882, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 7th August, 1882, reversing a decree of Maulvi Aminuddin, Munsif of Muhammadabad Gunah, dated the 20th March, 1882.

(1) 1 A. 465.

1883 JUNE 1.

APPELLATE CIVIL.

5 A. 602= 3 A.W.N. (1883) 155.

Also, that the permission mentioned in s. 30 is express and not constructive.

Per BRODHURST, J.—That s. 30 was not applicable to the case, that section contemplating a case, in which there are numerous parties, having the same interest in a suit, who are all before the Court, and are all anxious to have the matter in dispute disposed of, but, in order to save trouble and expense, are desirous that one or more of them shall sue or defend on behalf of all in the same interest.

Per STRAIGHT and TYRRELL, JJ.—That s. 30 was not applicable to the case, the first part of that section implying that the plaintiff therein contemplated wishes to sue on behalf of other persons similarly interested in suing, they also wishing the same.

[**Diss**., 21 C. 180 (187. 189); **F**., A.W.N. (1901) 36; 2 L W. 460=17 M.L.T. 387=28 M.L.J. 598=29 Ind. Cas. 60; **Appl**, 11 A. 18 (27) (F.B.); **R**., 18 B. 699 (701); 31 C. 839 (845); 91 P R. 1901=113 P.L.R. 1901; 105 P.R. 1901; **D**., 10 A.L.J. 518; 39 M. 501.]

THE plaintiff in this case sued the three defendants for joint possession of nine biswas of land, valued at Rs. 13-8, by demolition of enclosure walls erected thereon and valued at Rs. 16-8. He alleged that plots Nos. 152 and 153, in a village called chak Manu *alias* Durga, were jointly held by both parties to the suit and by other zamindars; that on the 28th April, 1881, the defendants, without any right and in spite of his remonstrances, began to erect an enclosure wall on these plots; and he therefore prayed that a decree for joint possession as formerly, of nine biswas of land, by demolition of the enclosure wall, might be passed in his favour. The defendants set up as a defence to the suit "that all the proprietors of the sixteen annas share have not been **[603]** impleaded, and therefore no question of joint possession can be disposed of." The Munsif trying the suit framed five issues, the second and third of which were as follows:—"Whether or not the plaint is defective by reason of all the proprietors of the sixteen annas share not being impleaded? Whether or not a suit for joint possession against all the defendants is lawful?," He observed as to these two issues as follows:—"As to the 2nd and 3rd issues the Court holds that the fact that all the proprietors of the sixteen annas share have not been impleaded does not affect the plaint, for the defendants have erected the enclosure on joint lands, and the plaintiff sues for *joint* and not *exclusive* possession, hence there is no defect, and a suit for joint possession against the defendants is valid, for the suit is not such as would injure the right of all the co-sharers." On appeal by the defendants the lower appellate Court (District Judge) held in appeal as follows:—"The claim is faulty in itself. The plaintiff is one of many co-sharers, having an equal right and interest in the joint waste land, the subject of the suit, with him. He cannot alone sue, and under s. 30 of the Civil Code the claim is bad. I decree the appeal with costs and interest, the suit being dismissed."

The plaintiff appealed to the High Court, contending that s. 30 of the Civil Procedure Code had no application to the present suit; and that one of several co-sharers had a right to sue for the removal of obstructions placed on joint land by other co-sharers.

Pandit *Nand Lal*, for the appellant.

Munshi *Sukh Ram*, for the respondents.

The appeal came for hearing before STUART, C.J., and BRODHURST, J., by whom the following judgments were delivered:—

STUART, C.J.—In my opinion the Judge was right in holding that s. 30 of the Procedure Code applied to the case, and the provisions of that section have obviously not been complied with, either as to the permission of the Court, by which, of course, is meant the first Court, having been

given, or with respect to the notice of the suit to the other sharers in the property. No doubt the permission of the first Court may be inferred from the fact of the suit having been allowed to proceed before it, issues prepared, [604] and the suit determined on such issues. But however distinctly such procedure may show the Court's permission or sanction, it is, I fear, *express*, and not constructive permission, that the section requires, such express permission duly appearing on the record. As to notice of the institution of the suit being given to the parties interested, the section is very distinct: such notice must be given by the Court, either, of course, of its own motion or on that of any of the parties in the suit, and at the plaintiff's expense.

1883 JUNE 1. — APPELLATE CIVIL. — 5 A. 602 = 3 A.W.N. (1883) 185.

But while I agree with the Judge that s. 30 regulates the procedure in such cases, I do not consider he was right in dismissing the suit altogether. He should have remanded it to the Munsif for the procedure provided by the section, and I must now direct him to do so. The case will therefore go back to the Judge, that he may remand the case in the terms and for the purpose I have explained, and thereafter the case will be proceeded with according to law. The costs of this appeal will be costs in the cause.

BRODHURST, J.—The plea in appeal is, I think, valid. The plaintiff had no object in making the other co-sharers co-plaintiffs in his suit; none of them could have been added as a plaintiff "without his own consent thereto," and the present plaintiff might have had to pay the costs of the rest of co-sharers whom he had caused to be added as plaintiff. The plaintiff did not allege that he had the right to any relief against the other co-sharers, and therefore he had no cause under the provisions of s. 28 of the Code to make them defendants; but, as shown in s. 31, "the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it," and if the Munsif had thought it "necessary, in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit," to add the names of all the co-sharers as plaintiffs or defendants, he might have passed an order to that effect under s. 32, or if he found that the plaint was wrongly framed by reason of non-joinder of parties, he might, under clause (*f*), s. 53, have passed any order sanctioned by the first clause of this section. The Munsif, however, did not find it requisite to adopt any of the procedure here referred to, but [605] having framed and tried issues, he held that the plaint was not defective, and that the suit for joint possession against the defendants was valid, and would not injure the rights of other co-sharers who had not been made parties to the suit, and therefore decreed the claim.

This case was pending in the lower Courts for more than a year, and two years have nearly elapsed since it was first instituted, and there is no reason whatever to believe that any of the other co-sharers had desired to be made a party to the suit, or had been prejudiced by the decree of the Court of first instance.

Section 30, Civil Procedure Code, appears to me to contemplate a case of quite a different description,—a case, for instance, in which there are "*numerous parties*," having the same interest in a suit, who are all before the Court, and are all anxious to have the matter in dispute disposed of, but, in order to save trouble and expense, are desirous that "*one or more of such parties*" shall, with permission of the Court, sue or defend on behalf of all in the same interest.

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The order of the lower appellate Court dismissing the suit appears to me, under the circumstances above stated, to be inequitable, and to be otherwise also wrong, and I would therefore allow the appeal and remand the case under s. 562, Civil Procedure Code, to the lower appellate Court for disposal on the merits.

In consequence of this difference in opinion between the learned Judges, the appeal was referred under s. 575 of the Civil Procedure Code to STRAIGHT and TYRRELL, JJ., by whom the following judgment was delivered :—

JUDGMENT.

STRAIGHT and TYRRELL, JJ.—We are of opinion that the rule of s. 30, Act XIV of 1882, does not apply to this case, which is a suit brought by one co-sharer in a 16-anna zamindari against three other co-sharers to restrain them from usurping exclusive possession of a piece of land included in the "*shamilat*" or recorded common land of all the co-parcenary body. The suit is called a suit "for joint possession," but this is a clumsy misnomer: it is really a suit to get a certain area of common land restored to its *status quo ante* the alleged trespass of the defendants, who do not **[606]** in their answer or pleadings in the suit allege permission or acquiescence on the part of other co-sharers. It has been ruled by a Bench of this Court that a single co-sharer is competent to sustain such a suit. In Second Appeal No. 47 of 1882 (1) the plaintiff's appeal was allowed with the following remarks:—"The District Judge has upheld the decree of the first Court on the ground that the land in suit not having been found to be the exclusive property of the plaintiffs, they could not maintain the suit without joining the other co-sharers in the village as plaintiffs. This view is opposed to law. Even if the land in suit is joint land belonging to all the co-sharers, the plaintiffs had a perfect right to come into Court by themselves to eject the defendants whom they regarded as trespassers on the land. There is no rule of law which prohibits one or more joint co-sharers from asking the Court to eject persons trespassing upon common land. The reason of the rule is clear. If trespassers were allowed to remain in possession, they might by prescription defeat the rights of the owners of the land; and if the view of the law taken by the Judge were correct, any joint co-sharer declining to join the suit for ejectment would defeat not only his own share in the common lands, but also the right of the other joint co-sharers. This would be a result which the law cannot allow." The language of s. 30 of the Civil Procedure Code is: "Where there are numerous parties having the same interest *in one suit*, one or more of such parties may, with the permission of the Court, sue * * * on behalf of all parties so interested." Now, though it is admitted that the other co-parceners of the plaintiff have a co-parcenary or "joint" interest with him in the *subject matter* of the suit, the "shamilat" lands, there is nothing to show that "they have the same interest as he has in the suit," that they are "so interested" in like manner as he is. It may be indifferent to them whether the defendants usurp exclusive rights in the "*shamilat*;" or it may be inconvenient to them at this moment to assert their own rights. We read the first part of this section as implying that the plaintiff therein contemplated wishes to sue on behalf of other persons similarly interested in suing, they also wishing the same. But

(1) Not reported.

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apart from this view of the section, we should not hold that its rule is applicable to the case before us. The section is [607] based on the general rule of English Courts of Equity, which refuse ordinarily to adjudicate on any matter, to bind any man's interest, or to make any declaration of any man's right in his absence.

But the determination of the issues raised between the single plaintiff and the defendants in this suit does not involve the consideration of any question affecting the rights or interests of the other co-sharers in this "*shamilat*" land.

The plaintiff's case against the defendants is simply this. "I, like yourselves, have a joint undivided interest and right of enjoyment in and over every inch of this '*shamilat*' area, and I will not submit to your assumption of exclusive possession of any part of it by enclosing it with walls or otherwise. Those walls must be removed, and the land must be restored to its common condition as before."

We discern no necessity either of principle or of convenience for the joinder of the other co-sharers in such a suit, and Mr. Justice BRODHURST has pointed out some inconveniences, if not hardships, that might conceivably follow from the adoption of the contrary view. We would allow the appeal and remand the case under s. 562 of the Civil Procedure Code for determination on the merits by the lower appellate Court. The costs of this appeal to be costs in the cause.

Appeal allowed.

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5 A. 607 = 3 A.W.N. (1883) 163.

CRIMINAL REVISIONAL.

Before Mr. Justice Tyrrell.

BENI NARAIN v. ACHRAJ NATH. [11th June, 1883.]

Criminal Procedure Code*, ss. 145, 147—*Dispute as to immoveable property—Collection of rent—Joint undivided property.

A dispute existing between one of the co-sharers of an undivided estate and the lessee of another co-sharer, as to the right of the latter to collect rent, such right being denied on the ground that the lessor was not in possession of her share, an inquiry was made under Chapter XII of the Criminal Procedure Code and the lessor was declared to be in possession of her share. *Held*, that the provisions of that chapter were not applicable to the dispute in question.

[**Appl.**, 10 C.W.N. 1088 (1090); **Appr**, 23 C. 80 (83); **R.**, 1 S.L.R. 50 (60) = 8 Cr. L J. 170.]

THIS was a case reported to the High Court for orders by Mr. R. J. Leeds, Sessions Judge of Gorakhpur, at the instance of the Magistrate of the Basti District. From the statement of the case by the Magistrate, it appeared that there was a dispute regarding [608] the right of one Achraj Nath to collect rents, as lessee of one Bachhi, in six undivided villages. These six villages belonged to three persons jointly,—Bachhi, Beni Narain, and a third person not a party to the case. Beni Narain maintained that Bachhi was not in possession of her share, but that he was in possession of it. The Deputy Magistrate, Muhammad Amjad Ali passed an order under s. 145 of the Criminal Procedure Code declaring Bachhi to be in possession of her third in each village. The Magistrate of the District observed :—" The effect of this order appears to me to be uncertain. If the third had been partitioned off, and the whole of the

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rents of the plot of land so partitioned off were payable to a single person, the effect (whether or not the order was legal) would be certain. But the villages appear to be undivided, and a third can hardly be regarded as 'tangible immoveable property.'

JUDGMENT.

TYRRELL, J.—Assuming the facts as stated by the Magistrate of the District, the provisions of Chapter XII of Act X of 1882 have no reference to the matters about which Beni Narain has a controversy with the lessee of his aunt Bachhi. Nor does there seem to be such sufficient evidence of the present and imminent danger of a breach of the peace as would justify the interference of the Deputy Magistrate under s. 145 *id.* The Deputy Magistrate misunderstands and has applied the provisions of s. 147 *id.* His proceedings are cancelled.

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5 A. 608=3 A.W.N. (1883) 161.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

HAIT RAM AND OTHERS (*Defendants*) *v.* DURGA PRASAD AND OTHERS (*Plaintiffs*).* [14th June, 1883.]

Trust—Transfer of trust property—Purchaser without notice.

B, having been sentenced to transportation for life, presented a petition in the Revenue Court in which, stating that he owned a certain zemindari estate, that he had been so sentenced, and that it was necessary to make arrangements for the payment of the Government revenue and the management of the estate, he prayed that his name might be removed from the revenue registers and that of *P* be recorded in its stead. *P* sold the property, for consideration, his vendee purchasing without notice of any trust, and it was subsequently put up for sale in execution of a decree against *P*'s vendee and was purchased without notice of any trust.

[609] *Held*, that the transfer of the property by *B* to *P* was in the nature of a trust.

Held, also, that the property could not be followed into the hands of the purchaser at the execution-sale.

Durga Prasad v. *Asa Ram* (1), observed on.

THIS was a suit to recover possession of a 16½ biswas zamindari share in a village called Samore. The plaintiff Durga Prasad alleged that he and his father and grandfather had some forty years before been sentenced to transportation for life, at which time his father had made over the whole of their joint ancestral property, including the property in suit, to one Bhawani Prasad, in trust that he should manage it, and allow the wives of the father and grandfather to enjoy the profits thereof during their lives. The plaintiff further alleged that his father and grandfather had died in imprisonment, but that he himself was released on the 12th December, 1876; and that he then found that Bhawani Prasad and his adopted son Kannu Lal had dishonestly transferred the property by sale to Raghunath Das and Baldeo Das, through whom the property came into the possession of the defendants Hait Ram and Chhaj Mal Das by sale in execution of decree. The suit was brought against

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* First Appeal No. 100 of 1881, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Mainpuri, dated the 1st June, 1881.

(1) 2 A. 361.

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the legal representatives of Raghunath Das and Baldeo Das, and Hait Ram and Chhaj Mal Das. The Court of first instance gave the plaintiff a decree. The defendants appealed to the High Court, mainly on the ground that no trust had been created as between the plaintiff's father and Bhawani Prasad, and that the transaction was in the nature of an absolute transfer of the property to Bhawani Prasad. The remaining facts of this case are fully set out in the judgment of STUART, C.J.

Mr. *Conlan*, Munshi *Hanuman Prasad*, and Pandit *Bishambhar Nath*, for the appellants (defendants).

Mr. *Aminuddin*, for the respondents (plaintiffs).

The Court (STUART, C.J. and STRAIGHT, J.) delivered the following judgments :—

JUDGMENTS.

STUART, C.J.—This is an appeal from a decree by the Subordinate Judge of Mainpuri, in a suit in which one Durga Prasad [610] seeks to recover a zamindari share in mauza Samore. There were associated with him two female plaintiffs, Durga Prasad himself being the real plaintiff. The claim of Durga Prasad as made in his plaint was, that upwards of forty years ago his father Balkishen and himself were convicted of murder and sentenced to transportation for life; that after their conviction, Balkishen made over his property by a written transfer, in the form of a petition, to the Revenue Court, to Bhawani Prasad, who was his own brother, in trust; that Balkishen, the plaintiff's father, died long ago while undergoing his sentence, but that the plaintiff Durga Prasad, was released by a free pardon on the 12th December, 1876, when a general amnesty was proclaimed on the occasion of the visit in that year of the Prince of Wales to this country; that on his return the plaintiff came to Farukhabad in November, 1878, and then became aware of what Bhawani Prasad and his adopted son, one Kannu Lal, had been doing with his property, and he complains, especially, that they, Bhawani Prasad and Kannu Lal, did, in 1850, dishonestly transfer the property in suit to two persons, Raghunath Das and Baldeo Das, from whom it was acquired by Munshi Hait Ram and Chhaj Mal Das as auction-purchasers in 1872. The defendants all file written statements, in which they deny the trust set up by the plaintiff, pointing out that the convicts, both father and son, had been transported for life, and that the return of Durga Prasad was a mere accident, owing to the amnesty declared on the occasion of the Prince of Wales' visit to India, and never contemplated or intended when the transfer to Bhawani was made; that the transfer of the property to Bhawani was absolute, and could not, under the circumstances, be anything less; and that he had throughout acted in perfect good faith, and that one of the uses he had made of the possession of the property was to defray the marriage expenses of the plaintiff's own daughter.

The Subordinate Judge, however, held that a trust had been proved as against Bhawani, and he therefore decreed the plaintiff's claim against Kannu Lal, his adoptive father Bhawani Prasad having in the meantime died, and also against Munshi Hait Ram and Chhaj Mal Das, the auction-purchasers.

[611] From the judgment and decree of the Subordinate Judge an appeal was preferred to this Court, and it came on for hearing before Mr. Justice MAHMOOD, who has since left the Court, and myself, and after considering the evidence we remanded it for trial of the issue, "what was the nature of the transfer said to have been made by Bhawani

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Prasad and Kannu Lal in favour of Baldeo Das and Raghunath Das, and whether such transfer had been made for valuable consideration," and the case has now come back on the Subordinate Judge's return to our remand, and is now to be disposed of by the present Bench, consisting of STRAIGHT, J., and myself.

The Subordinate Judge finds on the evidence taken by him that the sale-deed by Bhawani and Kannu to Raghunath Das and Baldeo Das had been made *bona fide* and for good consideration, naming Rs. 1,000 as the price given. It is satisfactory to know this, and the only material question that remains is whether, if Bhawani Prasad held the property in trust for Balkishen and Durga Prasad, the sale by him and his adopted son to Raghunath Das and Baldeo Das was made with notice to these persons of such trust, the property having been ultimately purchased by the defendants Hait Ram and Chhaj Mal Das.

The transfer or conveyance in favour of Bhawani is, as I have stated, recorded in a petition filed by Balkishen in the Revenue Court, and is in these terms:—"I exclusively own a 15-biswas zamindari share in mauza Samore............................it having been purchased by me. I have now been sentenced to transportation for life owing to the enmity of the enemies. As it is necessary to make arrangements for the payment of the revenue and the management of the said mauza, I of my own free will request that my name may be expunged from the public records, and that of my real brother Bhawani Prasad entered in lieu of mine." Now it cannot, I think, be maintained that such a transfer as this is not of a fiduciary character. It recites the fact of Balkishen having been sentenced to transportation for life and the necessity for making arrangements for the payment of the revenue and the management of the property, and it declares that he, Balkishen, of his own free will, requests that his name may be expunged from [612] the revenue records, and that of Bhawani substituted. Balkishen, however, the maker of the transfer, was leaving his village for life with no possible expectation of ever returning, and Bhawani Prasad, his transferee, was his own brother, and while a trust is not very unequivocally declared, the intention may have been to leave the property in Bhawani Prasad's hands, to be used by him according to his discretion, and that such discretion was not intended to be fettered; and as for Balkishen's son, the plaintiff, he was precisely in the same position as his father, with no hope whatever of returning to his village, and it was, as I have already said, the mere accident of the Prince of Wales' declaration of amnesty that enabled him to return. Thus it might be argued that it was Balkishen's intention that his brother Bhawani Prasad should hold the property without any fiduciary responsibility.

If there was no trust, the question of notice would not of course arise; but if we hold, as I think we may reasonably, that the transfer to Bhawani was really in the nature of a trust, and put him in a position of fiduciary liability, I am quite clear that the evidence to which our attention was directed at the hearing does not prove notice to Bhawani's original vendees of such a trust; that in dealing with Raghunath Das and Baldeo Das Bhawani held himself out to these persons as absolute owner; and that there was nothing even to put them on the inquiry as to whether Bhawani Prasad held the property in trust or not. Therefore in any event the transfer by Bhawani Prasad to Raghunath Das and Baldeo Das was a good and valid conveyance to these persons.

The Subordinate Judge refers in his judgment to a decision of this Court in *Durga Prasad* v. *Asa Ram* (1), the latter party being the same person who is plaintiff in the present suit and suing for a declaration of trust against the same Bhawani. I am not prepared to accept the view of the law of trusts laid down in that case; but that was a second appeal, the Division Bench being bound by the findings of the District Judge. It is, however, to be observed that that case differed considerably from the present, the property in suit was different, being a moiety of a shop, and there were no questions raised in it respecting notice of the trust, and the trust [613] itself does not appear to have been proved by a written instrument, as in the present case, but by the evidence of witnesses from which it was contended a trust might be inferred. The purpose of the trust there, too, was considered to have been clearly shown, *viz*.. to pay the rent of the shop to the two widows, one after the other, and the rents appear to have been so paid to these widows up to their respective deaths, after which Bhawani held the moiety of the shop in his own right. On such facts and evidence this Court held that a trust had been made, and they gave judgment in favour of Durga Prasad. Here, however, as I have pointed out, there are elements to be considered which take the present case out of the ruling of the other, even if it be held to be right, the principal of these being the absence of any question as to notice of the trust to Bhawani's vendees.

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The auction-purchasers' title in the present case being perfectly good by reason of the want of notice by Bhawani to the defendants-vendors, who were the auction-purchasers' immediate vendees, the present appeal must be allowed, and the suit dismissed with costs.

STRAIGHT, J.—Looking to all the circumstances attending the transfer to Bhawani Prasad, it seems to me altogether inconsistent with those circumstances to infer that Balkishen ever intended to surrender his beneficial interest to the property transferred. It therefore seems to me only reasonable to say that Bhawani Prasad held that property for the benefit of the transferor; in other words, that the transaction created an obligation in the nature of a trust.

Whether this be a correct view or not, however, I concur with the learned Chief Justice that there is no evidence to show that the appellants, auction-purchasers, bought with notice of any trust or obligation creating a trust, and that consequently the property cannot be followed into their hands. With regard to the case of *Durga Prasad* v. *Asa Ram* (1), the learned Chief Justice rightly observes that it was a very different one from the present. There the question was purely that of limitation, though I wish to say, so far as my own judgment in it is concerned, that I regret I [614] omitted to qualify my remarks by observing that they should be confined to the particular case as to which they were made.

I concur with the Chief Justice that this appeal must be decreed with costs in both Courts, and that the suit should stand dismissed.

Appeal allowed.

(1) 2 A. 361.

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APPELLATE CIVIL.

5 A. 614=
3 A.W.N.
(1883) 165.

5 A. 614=3 A.W.N. (1883) 165.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

NATHU (*Plaintiff*) *v.* BADRI DAS AND OTHERS (*Defendants*).*
[22nd June, 1883.]

Suit to set aside execution-sale—Suit for possession of immoveable property—Act XV of 1877 (*Limitation Act*), *sch. ii, No.* 12.

The plaintiff, alleging that certain immoveable property belonging to him had been sold in execution of a decree as the property of another, sued the purchaser to have the sale set aside, and to recover possession of the property. *Held*, that the suit was one for possession of immoveable property to which the period of limitation of twelve years was applicable.

[F., 26 A. 346 (353)=1 A.L.J. 53=A.W.N. (1904) 35; 3 C.P.L.R. 162 (164).]

THE plaintiff in this suit stated in his plaint that his father had died, leaving a house, which came into his and his mother's possession; that the defendant Badri Das caused the house to be put up for sale in execution of a decree which he held against one Chheda; and purchased it himself, and appropriated the materials of the house; that the plaintiff's mother was dead, and he was her heir; that the house had not belonged to Chheda; and that the plaintiff was a minor when the house was sold. On these allegations the plaintiff sued Badri Das and his transferee to have the sale set aside, and recover possession of the site of the house, and the value of the materials of the house. The lower Courts held that the suit was governed by the limitation provided by No. 12, sch. ii of the Limitation Act, 1877, and finding that the plaintiff had not brought the suit within one year from the date he attained his age of majority, dismissed it.

In second appeal the plaintiff contended that the suit was one for possession of immoveable property, and the period of limitation applicable to it was therefore twelve years.

[615] Munshi *Hanuman Prasad*, for the appellant.

Munshi *Kashi Prasad*, Lala *Lalta Prasad* and Mir *Zahur Husain*, for the respondents.

The Court (OLDFIELD and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the one year's bar of limitation does not apply to this suit, for which twelve years' limitation, as a suit for possession of immoveable property, will apply. The appeal is decreed: the decree of the lower appellate Court is set aside; and the case is remanded to the Court of first instance for trial on the merits. Costs to follow the result.

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* Second Appeal No. 147 of 1883, from a decree of Maulvi Muhammad Abdul Qayum, Subordinate Judge of Bareilly, dated the 29th September, 1882, affirming a decree of Maulvi Azizuddin, Munsif of Pilibhit, dated the 7th July, 1882.

5 A. 615=3 A.W.N. (1883) 167.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

AGHORE NATH (*Judgment-debtor*) v. SHAMA SUNDARI AND ANOTHER (*Decree-holders*).* [25th June, 1883.]

Execution of decree—Property attached in execution of decrees of Munsif and District Judge—Sale of property under order of Munsif—Civil Procedure Code, s. 285.

Where certain immoveable property, which had been attached in execution of two decrees, one made by a Munsif and the other by the District Court to which such Munsif was subordinate, was sold under the order of the Munsif. *Held,* following *In the matter of the petition of Badri Prasad* (1), that the sale was bad, by reason of the Munsif's want of jurisdiction to order it.

[N. F., 19 C. 651 (655); Appr., 18 A. 348 (350); R., 22 B. 88 (91); 13 C.P.L.R. 145 (147).]

ON the 3rd May, 1882, certain immoveable property belonging to the judgment-debtor in this case was sold in execution of a decree. The sale was made under the order of the Munsif of Benares. At the time of the sale the property was under attachment by virtue of an order of the District Judge of Benares, dated the 22nd January, 1882, made in execution of a decree passed by him. The judgment-debtor applied to have the sale set aside, under s. 311 of the Civil Procedure Code, but the Munsif rejected the application. The judgment-debtor appealed to the High Court, contending that the Munsif was not competent to order the sale, as the property had been attached by a superior Court, and the sale was therefore void.

[616] Babu *Jogindro Nath Chaudhri,* for the appellant.

Munshi *Hanuman Prasad,* for the respondents.

The Court (STRAIGHT and OLDFIELD, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—We see no reason to depart from our ruling in *In the matter of the petition of Badri Prasad* (1), which is directly applicable to the present case. Upon the authority of that decision we hold that the sale under the order of the Munsif was bad by reason of his want of jurisdiction to direct it to be held, and that it must on this ground be set aside. We accordingly decree the appeal with costs in both Courts, and set the sale aside.

* First Appeal No. 164 of 1882, from an order of Babu Madho Das, Munsif of Benares, dated the 2nd September, 1882.

(1) 4 A. 359.

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APPELLATE CIVIL.

5 A. 616 = 3 A.W.N. (1883) 169.

5 A. 616 = 3 A.W.N. (1883) 169.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

KASIM MIAN AND ANOTHER (*Defendants*) *v.* BANDA HUSAIN AND OTHERS (*Plaintiffs*).* [26th June, 1883.]

Landholder and tenant—Transfer by occupancy-tenant of his holding—Effect on occupancy right—Transfer of trees—Act XII of 1881 (*N.-W.P. Rent Act*), s. 9.

The presumption of law and the general rule is that property in timber on a tenant's holding rests in the landlord in the same way as, and to no less an extent than, the property in the soil itself.

Faqueer Soonar v. *Khuderun* (1), *Ajudhia Na'h* v. *Sital* (2), *Abdool Rohoman* v. *Dataram Bashee* (3), *Ruttonji Edulji Shet* v. *The Collector of Tanna* (4), referred to.

Held, therefore, where an occupancy-tenant transferred his holding, that the transfer was not only invalid in respect of the holding, but in respect also of the trees on the holding.

Where an occupancy-tenant, under the impression that he was a tenant at fixed rates, sold his holding, and the landholder sued the tenant and his vendee to set aside the transfer, as contrary to law, and for possession of the holding, *held*, that the transfer could not be treated as a relinquishment by the tenant of the holding to the landholder, and that the proper decree to make was that the transfer should be cancelled, that the plaintiff was entitled to eject the vendee from the land, but the plaintiff was not entitled to take the holding from the vendor.

[R., 10 A. 159 (161); 22 C. 742 (751); A.W.N. (1899) 25; 7 O.P.L.R. 7 (8); 28 Ind. Cas. 352; 1 O.C. 231 (233) (F.B.); 2 O.C. 281 (283); D., 6 A. 19 (20).]

[617] THE facts of this case, so far as they are material for the purposes of this report, were as follows:—The occupancy-tenants of certain land, covered with trees, situate in a village in the Benares district, and known as the "*bagh* (grove) of Babu Sheo Shankar," sold the "*bagh* or land" to the defendant Kasim Mian. It was stated by the vendors in the deed of sale as follows:—"We have put the vendee in proprietary possession of the property sold just as we were, and from the date of the execution of this deed he acquires the same right and power as we possessed with respect to the property sold." The vendors made this sale under the impression that they were tenants at fixed rates of the land, and therefore were competent to alienate it, whereas they were merely occupancy-tenants. The present suit was brought by the zamindars of the village against the vendors and the vendee to set aside the sale, and to eject the vendee, on the ground that the transfer by an occupancy-tenant of his holding was illegal under s. 9 of the N.-W.P. Rent Act. The Court of first instance gave the plaintiffs a decree as claimed. On appeal by the defendants the lower appellate Court modified this decree to the effect that the plaintiffs should have possession of the land as against the vendee, the defendant Kasim Mian, on payment of Rs. 133, the price of trees, his property, standing on the land. On second appeal by the defendants the plaintiffs objected, under s. 561 of the Civil Procedure Code, to the decree of the lower appellate Court in respect of the trees.

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* Second Appeal No. 652 of 1882, from a decree of D. M. Gardner, Esq., Judge of Benares, dated the 27th February, 1882, modifying a decree of Babu Mritonjoy Mukarji, Munsif of Benares, dated the 8th November, 1881.

(1) N.W.P.H.C.R. (1870) 251.
(2) 3 A. 567.
(3) W.R. Jan.-July (1864) 367.
(4) 11 M.I.A. 295.

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The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellants.

Pandit *Bishambhar Nath*, Munshi *Kashi Prasad* and Shah *Asad Ali*, for the respondents.

The judgment of the Court (STRAIGHT and TYRRELL, JJ.) so far as it is material for the purposes of this report, was as follows :—

JUDGMENT.

TYRRELL, J.—There remains the question of the validity of the transaction in respect of the trees standing on the land, that is to say, what is the character and extent of the cultivator's right of property in such trees ?

The settled law of the English Courts is, that "the general property in trees is in the landlord," but in this part of India [618] tenants ordinarily possess by local usage or by prescription considerable rights in the timber and in the produce of trees planted by them or by their predecessors in title on or around the lands cultivated by them. In some parts of the North-Western Provinces the tenants have an unrestricted power to remove and sell their trees, subject only to the landlord's right to receive a fixed portion of the price. Elsewhere the tenant pays a tree-tax, *peri*, for every tree to the landlord and is then free to appropriate the produce and loppings of the trees. And it may be that there are districts where the tenant has an exclusive and absolute property in the trees he has grown or inherited on his lands. But apart from such local and particular conditions, which would, of course, be made questions in issue in the case in which they might be alleged, the presumption of law and the general rule would be that the property in timber on a tenant's holding rests in the landlord in the same way as, and to no less an extent than, the property in the soil itself, and such has been the current rulings on the subject by this Court. In *Faqueer Soonar* v. *Khuderun* (1), TURNER, Offg. C.J., and TURNBULL, J., "had no hesitation in holding that trees, so long as they are not severed or cut, are *prima facie* to be taken as passing with the land on which they grow."

In Second Appeal No. 931 of 1880 (2), it was held by PEARSON and OLDFIELD, JJ., that in the Banda district a cultivator's right in timber planted by him in his cultivatory holding ceased with the determination of his holding.

In *Ajudhia Nath* v. *Sital* (3), the same Division Bench ruled that, "looking to the character of the tenure of a right of occupancy-tenant," such tenant "could only make a valid hypothecation of the trees on the land he held for the term of his tenancy. With his ejectment from the land and cessation of his tenancy the hypothecation ceased to be enforceable."

In Second Appeal No. 104 of 1881 (2) this Bench held that certain cultivators, having relinquished their lands, lost all right [619] and title in the trees, which passed with the land on which they stood to the landlord.

The Calcutta High Court in *Abdool Rohoman* v. *Dataram Bashee* (4), applied the rule that the zamindar "has a right in the fruit and other trees grown on the land by the tenant, and although the tenant has a right to enjoy all the benefits of the growing timber during his occupancy,

(1) N.W.P.H.C.R. (1870) 251.
(2) Not reported.
(3) 3 A. 567.
(4) W.R. Jan.-July (1864) 367.

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he has no power to cut down and use the timber." And the Judicial Committee of the Privy Council in *Ruttonji Edulji Shet* v. *The Collector of Tanna* (1), determined the questions at issue in that action, on the principle that "the trees upon the land were part of the land, and the right to cut down and sell these trees was incident to the proprietorship of the land" (p. 313). We see no sufficient reason for dissenting from the general rule thus propounded, and the application of it to the case before us leads us to the decision that the transfer of the trees on her holding by Jeota to Kasim Mian was no less invalid than the transfer of the holding itself; that the contract in both respects was equally void, the vendor having no transferable interest in either the land or the standing trees: and therefore that the transfer altogether must be declared to be null and void. But we are not disposed to hold that the mere fact that the cultivator, under a mistaken notion as to her rights and her competency to deal with the property, took it into the market, and even yielded up possession of it to the vendee, can properly be treated as a relinquishment of the holding or any of its incidents to the zamindars. We think that the proper decree to be made in the case, under all its circumstances, is that the transfer to the vendee, being an invalid and void contract, should be cancelled; that plaintiffs are entitled to eject the vendee from the land and all the appurtenances thereof including the timber in question; but that the plaintiffs are not entitled to take the holding from the appellants-vendors, who have not relinquished it to them: and that all the costs of the litigation should be paid by the said vendors, the vendee being left to his remedy to recover from its vendors such sum or sums as he may have paid to them on account of the sale in question. We direct that a decree be prepared accordingly.

(1) 11 M.I.A. 295.

I.L.R., 6 ALLAHABAD.

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PRIVY COUNCIL.

PRESENT:

Lord Blackburn, Sir B. Peacock, Sir R. P. Collier, Sir R. Couch, and Sir A. Hobhouse.

[*On appeal from the High Court of the North-Western Provinces at Allahabad.*]

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PRIVY COUNCIL.

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BALWANT RAO (*Plaintiff*) *v.* PURAN MAL (*Defendant*). [27th February, 1883.]

Act IX of 1871 (*Limitation Act*), *s.* 10, *and Nos.* 118, 123 *and* 145—*Limitation of suit relating to property held in trust.*

A suit in order to fall within Act IX of 1871, s. 10, excepting suits against trustees from limitation, must be brought for the purpose of recovering the trust property for the benefit of the trust: that section meaning that when trust property is used for some purpose other than that of the trust, it may be recovered, without any bar of time, from the hands of those in whom it has been vested in trust.

Where the plaintiff sued to enforce his own personal right to manage an endowment, dedicated to religious purposes, there being no question whether or not the property was being applied to such purposes by the manager in possession, the above section was *held* inapplicable.

The possession of the defendant having been adverse for more than twelve years, *held*, that the suit might fall within art. 123 or 145 of the 2nd schedule of Act IX of 1871, in force when the suit was brought. Had it fallen within neither of the above, it would be barred under art. 118.

[**F.**, 16 A. 256 (258); 18 B. 551 (562); 7 M. 417 (418); 16 M. 456 (459)=3 M.L.J. 213 (216); **R.**, 7 A. 25; 27 A. 513 (515)=2 A.L.J. 304=A.W.N. (1905) 69; 8 B. 432 (469); 10 B. 242 (247); 20 B. 511 (518); 21 B. 257 (264); 32 B. 364 (373)=10 Bom. L.R. 117=3 M.L.T. 379; 32 B. 394 (401)=10 Bom. L.R. 540; 25 C. 354 (370); 37 C. 263 (278)=11 C.L.J. 304 (314); 10 M. 375 (477); 14 M. 153 (162); 18 M. 342 (347); 19 M 243 (247); 21 M. 278 (287); 11 C.L.J. 2 (13); 56 P.R. 1903 (F.B.)=93 P.L.R. 1903; **D.**, 4 L.W. 186=31 M.L.J. 857.]

APPEAL from a decree of a Divisional Bench of the High Court (10th February, 1879), reversing a decree of the Subordinate Judge of Agra (30th March, 1878).

The endowment to which this claim related consisted of a muafi village named Mandesi in the neighbourhood of Muttra; in which town, at Jeysinghpura, were a temple and grove of Thakur Ganeshji, to maintain whose worship the property had been dedicated.

The plaintiff-appellant claimed as descendant of Gangadhar Jaswant, a Hindu from the Deccan, who built the temple and [2] planted the grove; the muafi village of Mandesi having been acquired by his son Madho Rao, and afterwards dedicated as an endowment for maintaining the worship of Sri Ganeshji at the temple at Jeysinghpura.

The defendant-respondent was the grandson of Mangu Chaube, who was appointed by the appellant's ancestors many years before this suit was brought, to be manager of the property belonging to the temple. The claim was for his removal from that office.

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On the defence of limitation, set up as a bar to this suit, the Subordinate Judge of the Agra district decided that the possession of the endowment by the defendant as manager could not be regarded as adverse to the descendant of the founder of the institution. His decree, in favour of the plaintiff, was reversed on appeal to the High Court (PEARSON, J., and SPANKIE, J.).

The judgment of the High Court was as follows :—

" There is a temple of Thakur Ganeshji in Jeysinghpura, at Muttra, with a garden attached to it. It appears probable that the temple was built and the garden attached to it by the plaintiff's ancestors. Mauza Mandesi is said to have been assigned for the expenses of the temple by Rajah Himmat Bahadur. The grant was confirmed by Madho Rao Sindhia, in the names of Madho Rao and Gangadhar Rao, the plaintiff's grandfather and great-grandfather. The sannad granted by Sindhia bears the date of Sambat, 1843. The grantors were residents of Poona, and employed the defendant's ancestors in the management of the temple services and property. On the introduction of the British rule, mauza Mandesi was resumed, but on an application made by Mangu Chaube, the defendant's grandfather, on the 1st April, 1805, was released on the 15th idem in favour of Mangu Chaube aforesaid and Suraj Narain, for the expenses of the temple. Again in 1817, in consequence of disputes, it was placed under the management of the British authorities, but in 1824 it was released at the instance and in favour of Khande Rao, the real father of Gangadhar Rao aforesaid, who had been adopted as a son by Madho Rao. In 1842 the village was again ordered to be resumed, but the order was reversed in appeal, and the village was once more released in favour, on this occasion, of Triti Chaube (son of Mangu aforesaid, and father [3] of the present defendant) and Daiyal Das, who, if he ever held possession jointly with Titri Chaube, seems not to have retained it. Up to 1842 it is pretty clear that Titri Chaube never pretended to be more than a servant of the Poona family. It is equally clear that after procuring the release of the village, and the entry of his own name as muafidar, he assumed an independent and hostile attitude towards that family, which, it must be observed, neglected its interests and its duties in connection with the temple. The plaintiff, though not uninformed of the state of things, did not come to Muttra until 1865, when his right to interfere was at once disaffirmed and resisted by the defendant's family. His complaint of 1st September, 1865, was rejected. He then remained silent and inactive until 1877, when he put forward a claim in the Settlement Office, and was referred to the Civil Court.

" He has now brought this suit, in which he seeks (i) to remove the defendant from the management of the worship and service of the temple; (ii) to be authorized to appoint a second manager for the purpose of carrying out the object of the endowment; and (iii) to remove the power of control of the defendant from the properties belonging to the temple. In substance and in other words he asks to be recognized as chief manager, with power to dismiss and appoint a sub-manager, and to obtain possession of the temple property by ejectment of the defendant.

" The primary question is, whether the suit is barred by limitation or not. The lower Court has erroneously held the provisions of s. 10, Act IX of 1871, to remove any bar of limitation. This is not a suit of the nature contemplated by that section. Neither of the parties has any personal ownership in the property. In so far as the suit is for a declaration that the plaintiff is by right of inheritance the chief manager

of the temple services and properties, and as such is entitled to dismiss the defendant and appoint another person as sub-manager, art. 123, and in so far as it seeks recovery of possession of the temple properties art. 145, sch. ii, Act IX of 1871, appear to be applicable and to bar the suit; inasmuch as it has not been brought within twelve years from the time when the defendant obtained adverse possession of the office and property.

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[4] "The appeal is therefore decreed and the suit dismissed, with costs of both Courts by reversal of the lower Court's decree."

On this appeal Mr. *T. H. Cowie, Q.C.*, and Mr. *W. A. Raikes* appeared for the appellant.

The respondent did not appear.

Mr. *T. H. Cowie, Q. C.*, contended that this suit was substantially one within the meaning of s. 10 of the Limitation Act IX of 1871, in force at the time when it was brought. The property was held in trust by the manager, as well for the appellant as for the religious purposes to which his ancestors devoted it, he being the heir of Gangadhar Rao, and therefore *malik*, or controller, of the management.

Mr. *W. A. Raikes*, on the same side, referred to the evidence showing the possession of Mangal Chaube, and after him, Titri Chaube, as merely karindas. He referred to proceedings in the Revenue Department, and in the Courts, including a judgment of the Sadr Diwani Adalat, at Agra, in 1852, in *Mahant Narain Das* v. *Triti Chaube*. The latter was hereditary karinda, without any controlling authority. The pujaris, who in previous litigation had objected to his management (their objection showing that they were dissatisfied with his management) were not better entitled than the karinda. But this appellant came forward with a better title, and as the direct heir of the founder was in the position of a *cestui que* trust. His rights were connected with the due administration of the trust in all respect; so that his claim came within s. 10 of the Act in question, and was not barred by limitation.

Reference was made to *Prosunno Moyee Dossee* v. *Koonjo Beharee Chowdhree* (1), showing that a sebait, or mahant, of an endowed institution "was in the position of a trustee for the founder; and that "no prescription derived from him, the mahant, can run against the heirs and representatives of the founder." Also to *Bhurrack Chunder Sahoo* v. *Golam Shuruff* (2) and *Juggulmoheenee Dossee* v. *Sokheemonee Dossee* (3).

[5] In reference to the question how far the private rights of individuals to enforce the due carrying out of temple trusts had been restricted by the legislation of Act XX of 1863, ss. 10 and 14 altering the law administered under Regulation XIX of 1810, he referred to *Agri Sharma Embrandri* v. *Vistnu Embrandri* (4) and *Jeyangarulavaru* v. *Durma Dossji* (5).

The right of instituting a suit such as this might be said to depend upon the law existing previously to and independently of the legislation relating to religious trusts. The right in this case belonged originally to, and was derived from, those whom the appellant represented. The legislation of 1863 was of an enabling effect, and did not restrict the anterior rights of those who claimed by title as the appellant claimed. Accordingly, this suit required no leave of the Court (s. 18, Act XX of 1863).

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(1) W.R. Sup. Vol. (1864) 157. (2) 10 W.R. 458. (3) 10 B.L.R. 19.
(4) 3 M.H.C.R. 198. (5) 4 M.H.C.R. 2.

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[Sir B. PEACOCK referred to two cases decided in the year 1850; *Bhoobun Mohun Deb* v. *Bikram Deb* (1) and *Beejaye Gobind Burral* v. *Kallee Das Dhur* (2)].

This was not a claim for an hereditary office, but to control the management, in virtue of a trust originally created in favour of the appellant's ancestors, to which trust estate he now made title.

JUDGMENT.

At the close of the argument for the appellant, their Lordships' judgment was delivered by

SIR A. HOBHOUSE.—In this case the plaintiff, who is also the appellant, filed his plaint on the 12th September, 1877, and in it he claimed to remove the defendant, who is the respondent, from the management of the worship and service performed at the temple of the god Ganeshji in Muttra; to remove the power and control of the defendant from the properties belonging to the temple; and to be declared authorized to appoint a second manager for the purpose of carrying out the object of the endowment. The plaint then states shortly the history of the temple; that it was founded by the plaintiff's ancestor, who dedicated property to it, especially the village or mauza Mandesi. Then it states that "he"—that is, the plaintiff's ancestor—" entrusted the management of the service and worship to Mangu Chaube, the grand-[6]father of the defendant; and he during his lifetime, and after him his son Titri Chaube, have been, according to the intention of the founder of the temple, taking care of it and superintending its affairs." When, in 1865, the plaintiff came to Muttra on pilgrimage, and asked the defendant's mother how the income of the village used to be spent, she refused to render an account of it. The plaintiff's complaint was rejected by the Collector on the 13th September, 1865, on the ground of his having no jurisdiction. The plaintiff then sued in the Settlement Department, but the defendant himself denied the plaintiff's right, and therefore he could not obtain redress from that department. The claim for entry of name was disallowed on 14th May, 1877, and that is the date of the cause of action.

The precise tenor of the plaint cannot be understood without reference to the dates of the transactions and to some of the documents referred to in it. It appears that the foundation by the plaintiff's ancestor was prior to the commencement of the present century, so that for eighty years or upwards the management has been in the family of the defendant. The appellant became the heir, or one of the heirs, of the founder in the year 1847. The defendant's title or possession as manager accrued on the death of his father, Titri Chaube, in the year 1863, when the defendant himself was a child and under the guardianship of his mother. In the year 1865 the plaintiff presented the petition referred to in the plaint, which was for the purpose of having the trusts of the endowment carried into effect by the Collector's Court under Regulation XIX of 1810, which in fact had been repealed some two and a half years previously. But the petition makes a case which, if it were proved, would entitle the plaintiff to have the proper management provided for by a Court having jurisdiction, for it shows that the funds were applied improperly, and it prays that inquiries may be made from the zamindars and respectable residents of the city of Muttra, and that the expenses of the Thakurji may be entrusted to the management of experienced hands

(1) S.D.A.L.P. (1850) 387. (2) S.D.A.L.P. (1850) 447.

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and learned divines, as provided by the Regulation. The fate of that petition may be divined from the circumstance that the Regulation had been repealed. It was dismissed for want of jurisdiction.

[7] The plaintiff did not then institute any suit in the Civil Court. He took no proceeding until nearly twelve years subsequent to the petition, when he again sought a remedy in the Revenue Department. An order was made by the Settlement Officer on the 14th May, by which it appears that the plaintiff applied to expunge the name of the defendant, who was registered as muafidar of the village Mandesi, and for the entry of the plaintiff's name in lieu of that of the defendant. It was ordered that the plaintiff's claim be dismissed.

That dismissal appears to have led to the present plaint, which has been already stated. It appears then that, in 1865, the plaintiff conceived that he had a case of malversation of the property of the endowment against the then manager, who was the defendant's mother, and that he prayed relief on that ground; that having carried his complaint to the wrong Court, and having failed there, he did not pursue the claim any further, but that nearly twelve years afterwards he simply claimed to be entered himself as muafidar instead of the defendant; and then he brings the present claim, which is for the purpose of either himself removing or getting the Court to remove the defendant from his position as manager, and for the plaintiff to be allowed to appoint another manager.

Now in the defence the defendant does not dispute but that the property is an endowment appertaining to the god Ganeshji. He says that the income of it has all along been spent for the purposes of the temple, and the business of the temple is carried on as before. He then pleads the law of limitation as a bar to the suit. In the plaintiff's written statement, a sort of replication, he states this :—" The defendant has only since a short time begun to misappropriate the income of the endowed property, contrary to the object of endowment and in contravention of his duty; and he, in the Settlement Department, declared himself, as against the plaintiff, to be the proprietor and muafidar." That seems to be in answer to the plea of limitation; namely, that it was only a short time ago that the misappropriation had begun.

The Subordinate Judge finds that the defendant's father in his lifetime repudiated the plaintiff's right to manage the institu-[8]tion, and that the defendant has followed his father's conduct. "This," he says, "was done in bad faith, and with the hope of escaping the control of a superior over his proceedings, so that he might independently deal with the endowment. This is calculated gradually to ruin the property, to divest the donor of his power, and disturb the management proposed by him." On those grounds he holds that the defendant deserves to be dispossessed.

The Subordinate Judge does not find that there has been any malversation or misappropriation of the property on the part of the defendant. All that he finds is that he opposes the right of the plaintiff. He says in the earlier part of his judgment that the plaint specifies the defendant's misconduct and improper acts, on the ground of which he is said to have rendered himself liable to be removed, but on reading the plaint it is clear that the plaint does not specify any misconduct or improper act, unless it be the resistance to the plaintiff's claim. Neither does the written statement carry the case any further, because, although it uses the expression "misappropriate the income," it does not specify any mode in which the income was misappropriated.

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The Subordinate Judge deals with the question of limitation by saying that the defendant has distinctly admitted that the property is an endowment, and that he holds it as manager of an endowment; consequently, he says, his possession cannot, with reference to its very nature, be regarded as adverse. He thinks, therefore, that if the property is affected by trusts, as both the plaintiff and defendant allege, any question is open that may arise between the plaintiff and the defendant respecting the right to manage the trusts. The plaintiff gets his decree upon those grounds, and the defendant appeals to the High Court. The High Court hold that in so far as the suit is for a declaration that the plaintiff is, by right of inheritance, chief manager of the temple services and properties, it falls within art. 123 of the Limitation Act,—the Act applicable to this suit is Act IX of 1871,—and, in so far as it seeks recovery of possession of the temple property, it falls within art. 145 of the same Act. Therefore they reverse the decree of the Subordinate Judge and dismiss the suit with costs. The appeal is [9] now presented from that decree, and the question is whether the suit is barred by the Limitation Act of 1871.

The reasons now given for avoiding the bar of limitation are, first, that the suit is to be treated as one for the administration of the trusts of the endowment, and that it is open to the Court to dismiss the defendant for misbehaviour in his office, and on this point the plaintiff seeks to incorporate in the present plaint the allegations in his petition of 1865. What other difficulties there may be in the way of such a suit—such as the omission to get the leave of the Court under Act XX of 1863,—their Lordships desire not to discuss on the present occasion, because there is a complete answer to the appellant's argument in the fact that no evidence whatever of misbehaviour on the part of the defendant has been adduced. There is, as has been stated, no direct or sufficient allegation of misconduct in the pleadings. There was no issue framed upon that point, neither has anything been found on that subject by the Subordinate Judge. That ground therefore entirely fails.

The next ground is that the case must be taken as falling within s. 10 of Act IX of 1871, which deals with trust property. That section is as follows:—"No suit against a person, in whom property has become vested in trust for any specific purpose, or against his representatives, for the purpose of following in his or their hands such property, shall be barred by any length of time." Their Lordships are of opinion that the expression used by the Legislature, "for the purpose of following in his or their hands such property," means for the purpose of recovering the property for the trust in question; that when property is used for some purpose other than the proper purpose of the trusts in question, it may be recovered, without any bar of time, from the hands of the persons indicated in the section But here there is no question of recovering the property for the trusts of the endowment, because the defendant admits that he is a trustee, and says that he is applying the property to the trusts of the endowment. There is no evidence that he is not applying the property to the trusts of the endowment, and there is no reason to conclude that the property would be more applied to those trusts if the plaintiff were [10] to succeed in his suit than it is at this moment. The plaintiff is suing only for his own personal right to manage or in some way to control the management of the endowment. The consequence is that the case does not fall within s. 10 of the Limitation Act. If it does not, then it must be within one of the articles of the schedule. Their Lordships do not see any reason to differ from the High Court in thinking that it may

fall within art. 123 or art. 145, but they desire to express no opinion upon that point, and there is some difficulty in ascertaining the exact nature of the suit, owing to the obscurity with which the plaintiff's title is stated in the plaint. But if it does not fall within either of those sections, then the case is caught by the general art. 118, which provides for every case that is not previously provided for in the Act. Therefore either the suit is barred in six years or in twelve years,—it matters not which, for the cause of action arose at all events before the year 1865.

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The consequence is that the appeal must be dismissed; and as the respondent does not appear, nothing will be said about costs. Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss this appeal.

Solicitors for the appellant: Messrs. *Oehme & Summerhays.*

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6 A. 10 = 3 A.W.N. (1883) 172.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

KALIAN SINGH (*Defendant*) *v.* CHUNNI LAL AND ANOTHER (*Plaintiffs*).*
[2nd July, 1883.]

Small Cause Court suit—Suit for damages—Objection to attachment of property.

C, a decree-holder, alleging that *K*, a lambardar of a village, had objected to the attachment in his hands of money due as profits to the judgment-debtor, a co-sharer, on the ground that he had paid such money to the judgment-debtor, before the attachment, by reason whereof the attachment had been removed; and that such objection was dishonest and wrongful, inasmuch as such money was still in *K's* hands, sued *K* for the amount of such money and the costs of the attachment proceedings. *Held* that the suit was one for damages, and, the amount claimed not exceeding Rs. 500, one of the nature cognizable in a Court of Small Causes, and consequently a second appeal in the suit would not lie.

[11] THE plaintiffs in this suit, Chunni Lal and Tulsi Ram, held a decree against one Umrao Khan, who was a co-sharer in a village or mauza called Asadpur, in execution of which they, on the 12th May, 1882, obtained an order attaching, in the hands of Kalian Singh, the lambardar of the village, the share of profits due to Umrao Khan for 1289 fasli. Kalian Singh, on the 2nd June, 1882, objected on the ground that prior to service of the order he had paid the money to Umrao Khan. Upon this objection being preferred the Court executing the decree withdraw the attachment. Thereupon Chunni Lal and Tulsi Ram, alleging that Kalian Singh had dishonestly and wrongfully preferred this objection, and that the money was still in his hands, and had not been paid over to Umrao Khan, brought the present suit against Kalian Singh for the amount of the money and the costs of the attachment, the total amount claimed being Rs. 92-10. Kalian Singh defended the case chiefly on the ground that the plaint was improperly framed, inasmuch as it contained no prayer that the defendant might be directed to deposit in Court the money attached as due to the judgment-debtor, so as to enable the plaintiffs to realize it in execution of their decree, but instead sought to recover the money directly from the defendant. The Court of first instance

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* Second Appeal No. 111 of 1882, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 8th December, 1882, reversing a decree of Syed Akbar Husain, Munsif of Khurja, dated the 1st September, 1882.

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allowed the defendant's contention and dismissed the suit. On appeal by the plaintiffs the lower appellate Court gave them a decree. On second appeal by the defendant it was contended for the plaintiffs that a second appeal in the case would not lie, as the suit was of the nature cognizable in a Court of Small Causes.

Pandit *Ajudhia Nath* and Babu *Barada Prasad Ghosh*, for the appellant.

Messrs. *Leach* and *Simeon*, for the respondents.

The Court (STRAIGHT and BRODHURST, JJ.) delivered the following judgment:—

STRAIGHT, J.—Upon further consideration and a close examination of the terms of the plaint, we think the preliminary objection taken by the plaintiffs' pleader, that the suit being one for damages and of a nature cognizable by a Small Cause Court, no second appeal can be entertained by us, is a well-founded one and must prevail. The case of the plaintiffs is that "the [12] defendant dishonestly and wrongfully filed an application in Court on the 2nd June, 1882, to the effect that prior to the receipt of the Court's order the aforesaid money was paid up to the judgment-debtor, but he made no mention of any receipt or when it was paid: that no money has up to this time been paid to the judgment-debtor, nor is there such a practice to pay the profits before payment of the revenue." They further allege that by reason of these assertions of the defendant, the attachment of the money due to Umrao Khan was removed, and it remains still in the hands of the defendant. Such being the grounds upon which the plaintiffs come into Court, we think their suit sound in damages, the fair measure of which would be the amount of the debt itself, with interest, and any costs or expenses naturally resulting to the plaintiffs from the tortious acts of the defendant. The appeal is dismissed with costs.

Appeal dismissed.

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6 A. 12=3 A.W.N. (1883) 173.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

PUSAI (*Decree-holder*) *v.* MAHADEO PRASAD AND ANOTHER (*Judgment-debtors*).* [2nd July, 1883.]

Execution of decree—Question for Court executing decree—Fresh suit—Question of title between decree-holder and third person.

The plaintiff in a suit for money obtained a decree against all the defendants except *P* and among them *K*. On appeal the Court of first appeal gave them a decree against *P*. In execution of this decree they attached and were paid, as belonging to *P*, certain money deposited in the Government Treasury in *K*'s name. On appeal by *P* the Court of second appeal reversed this decree, and restored the decree of the first Court dismissing the suit as regards *P*. *P* thereupon applied in execution of his decree for a refund of the money. The plaintiffs objected on the ground that the money belonged to *K*. *Held* that the Court executing *P*'s decree was not competent to decide the question whether the money belonged to *P* or to *K*, such question not being one between *P* and them only, but involving and raising a question of title between him and *K* as to their conflicting claims, *inter se*, to the money.

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* Second Appeal No. 1 of 1883, from an order of J. S. Denniston, Esq., Officiating District Judge of Farakhabad, dated the 7th October, 1882, affirming an order of Syyad Zakar Husain, Munsif of Farakhabad, dated the 10th July, 1882.

1883 JULY 2. APPELLATE CIVIL. 6 A. 12= 3 A.W.N. (1883) 173.

THE facts of this case were as follows:—Certain persons sued, amongst other persons, one Pusai and one Khaggi on a bond; and obtained in the Court of first instance (Munsif) a decree against all the defendants except Pusai. On appeal the District Court made a decree against Pusai. In execution of the District Court's decree [13] a sum of Rs. 752, which had been awarded as compensation for land acquired for public purposes, and was deposited in the Government Treasury to the credit of Khaggi, was attached as belonging to Pusai, and was paid to the plaintiffs. Subsequently the District Court's decree was reversed by the High Court and the Munsif's decree restored. Pusai thereupon applied to recover in execution of decree the sum of Rs. 752 above mentioned, claiming that it was his property. The plaintiffs objected to the application on the ground that the money belonged to Khaggi, and contended that the question whether it belonged to Pusai or to Khaggi was not a question which should be determined in execution of decree. The Court of first instance allowed this contention; and on appeal by Pusai the appellate Court affirmed the first Court's decision. In second appeal Pusai contended that the question as to whom the money belonged should be determined in execution of decree.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

Pandit *Bishambhar Nath*, for the respondents.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—We cannot allow the pleas of this appeal. The question which Pusai, appellant, claims to have decided by the Court executing his decree against the respondents, is not a question between him and them only, but it also involves and raises a question of title between himself and Khaggi as to their conflicting claims, *inter se*, to a sum of money awarded as compensation to Khaggi for land taken up for railway purposes under Act X of 1870. This is a question which cannot be decided between Pusai and Khaggi by the Court executing the former's decree against the respondents; and till this question be determined by a competent Court, no order for the refund of this sum by the respondents to Pusai, on the ground that the sum belongs to Pusai, although it stands recorded in the Collector's office as belonging to Khaggi, can be made by the Court executing Pusai's decree. The other pleas were not pressed and they are without weight. We dismiss the appeal with costs.

Appeal dismissed.

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6 A. 14=3 A.W.N. (1883) 179.

[14] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

BASANT LAL AND ANOTHER (*Decree-holders*) *v.* NAJMUNNISSA BIBI (*Judgment-debtor*).* [3rd July, 1883.]

Execution of decree—Limitation—Act XV of 1877 (*Limitation Act*), *sch. ii, No.* 179 (2).

B, the mortgagee of certain property, sued *N*, the mortgagor, and *T*, to whom a part of the mortgaged property had been transferred by sale, for the

* Second Appeal No. 34 of 1883, from an order of H. D. Willock, Esq., Judge of Azamgarh, dated the 31st March, 1883, reversing an order of Rai Soti Behari Lal, Subordinate Judge of Azamgarh, dated the 26th January, 1883.

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6 A. 14 = 3 A.W.N. (1883) 179.

mortgage-money, and the sale of the mortgaged property. On the 24th September he obtained a decree, which directed *N* to pay the money, and that it might be realized by the sale of the mortgaged property. *T* appealed, contending that as the instrument of mortgage was not registered, it was not receivable as evidence of the mortgage, and therefore the sale of the property had been improperly ordered. *N* did not appeal. The Court of first appeal allowed this contention and set aside the order for the sale of the property. The mortgagee preferred a second appeal, and on the 15th January, 1880, the Court of last appeal modified the decree of the lower Court, directing that a part of the mortgage-money might be recovered by the sale of the mortgaged property. On the 14th September, 1882, *B* applied for execution of the decree against *N*. *Held* that the period of limitation for the application was governed by art. 179 of the Limitation Act, and such period would run from the final decree of the appellate Court.

[Appr., 16 C. 598 (602); D., 20 C.W.N. 178.]

THE facts of this case were as follows:—Basant Lal and Ganga Prasad brought a suit against Najmunnissa, Muhammad Aiya, and Tapeshri Rai, on an instrument called a "*sattah*," in which they claimed to recover the money due thereon by the sale of a 4-annas share of a village called Burha Makbulpur, which had been mortgaged therein as security for payment of the money, and to set aside a sale of a portion of such share to Tapeshri Rai. On the 24th September, 1878, they obtained a decree to this effect:—"That the suit for recovery of the sum claimed with costs be decreed with this specification; that the decree for the sum claimed be made against Najmunnissa Bibi and Muhammad Aiya without interest, and the money may be realized by sale of the four annas share of Burha Makbulpur, by invalidation of the sale-deed executed in favour of Tapeshri Rai; and that costs with interest at eight annas per cent. per mensem be decreed against Tapeshri Rai." Najmunnissa Bibi and Muhammad Aiya did not appeal. Tapeshri Rai appealed, contending that, inasmuch as the "*sattah*" was a docu-[15]ment of which the registration was compulsory and it was not registered, it could not be received in evidence of the mortgage of the share in question, and therefore the Court of first instance had improperly ordered the sale of the share. On the 16th January, 1879, the appellate Court allowed the appeal, and made a decree modifying the decree of the first Court by setting aside so much of it as ordered the sale of the share. The plaintiffs appealed to the High Court, contending that the "*sattah*" did not require registration. On the 15th January, 1880, the High Court made a decree modifying the decree of the lower Court, so far as to allow recovery of a portion of the amount decreed by the first Court by the sale of the mortgaged share. On the 14th September, 1882, the decree-holders applied for execution of the decree of the 24th September, 1878, as modified by the decree of the High Court. The judgment-debtor Najmunnissa objected to the execution of the decree on the ground that the application was barred by limitation. The Court of first instance disallowed this objection, holding that under No. 179 (2), sch. ii of the Limitation Act, 1877, limitation should be computed from the date of the High Court's decree. On appeal by the judgment-debtor the lower appellate Court held that the application, so far as Najmunnissa Bibi was concerned, was barred by limitation. It held so on the ground that limitation must be computed from the date of the first Court's decree, and not of the decree of the High Court, as Tapeshri Rai, the defendant who had appealed, had not appealed on a ground common to him and Najmunnissa Bibi. It referred to *Sangram Singh* v. *Bujharat Singh* (1). The

(1) 4 A. 36.

decree-holders in second appeal contended that limitation should be computed from the date of the High Court's decree.

Mr. *Spankie*, for the appellants.

Pandit *Bishambhar Nath*, for the respondent.

The Court (OLDFIELD and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the limitation is governed by sch. ii, art. 179, Limitation Law, and the period will run from [16] the date of the final decree of the appellate Court. We reverse the order of the lower appellate Court, and remand the case for disposal on the merits: costs to follow the result.

Cause remanded.

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6 A. 16 = 3 A.W.N. (1883) 174.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

CHAMPAT RAI (*Defendant*) v. PITAMBAR DAS AND OTHERS (*Plaintiffs*).*
[3rd July, 1883.]

Execution of decree—Agreement to give time—Suit on agreement.

The parties to a decree presented a petition to the Court executing the decree, in which they stated that they had agreed that the principal amount of the decree was to be paid within eight years; that a sum of Rs. 50 was to be paid annually as interest on the principal amount; and that upon default of payment of the interest the whole amount due should be realized by execution of the decree. On this petition being presented the Court struck the case off its file. *Held* that, upon default being made, the decree-holder's remedy was by execution of his decree, and not by suit to enforce the terms of the agreement.

[F., 6 A. 228 (230); R., 12 A. 571 (576); D., 29 P.R. 1908 (F.B.) = 61 P.L.R. 1907 = 71 P.W.R. 1907.]

THE plaintiffs in this suit applied for execution of a decree for money which they held against the defendant, and certain immoveable property belonging to the latter was attached. On the 17th January, 1873, the parties presented a petition to the Court executing the decree to the following effect:—"The parties have come to an arrangement; the defendant has paid Rs. 20-13 to the plaintiffs. As regards the balance Rs. 900, it has been agreed that the defendant shall pay the plaintiffs Rs. 50 annually as interest on the principal amount of the decree, and that he shall pay whatever he can in satisfaction of the principal amount through the Court; that in default in payment of the interest the plaintiffs shall be competent to sue out execution, and realize the whole of the principal amount out of the property possessed by the defendant; that the principal amount shall be paid within eight years; that until it be paid the defendant shall not transfer his ancestral zamindari share by sale or mortgage; that any such transfer shall be void; that all payments in satisfaction of interest or principal shall be made through the Court; that should the property of the defendant be brought to sale in execution of a decree, or should the defendant transfer it, the plaintiffs shall be competent to sue

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* First Appeal No. 11 of 1883, from an order of F. E. Elliot, Esq., District Judge of Mainpuri, dated the 6th December, 1882.

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out execution before the expiration of the term; and that the attached [17] property shall remain under attachment." On this petition being presented to it, the Court executing the decree struck the case off its file. The defendant made the annual payments of interest up to 1879. In 1880 he failed to pay the interest. On the 4th February, 1881, the plaintiffs applied for execution of the decree. This application was rejected by the Court executing the decree as barred by limitation, and its order was affirmed on appeal. The plaintiffs thereupon brought the present suit in which they sought to recover the principal amount of the decree and interest, basing the suit on the agreement contained in the petition of January, 1873. The Court of first instance held that the suit was not maintainable, the remedy of the respondents being by execution of the decree. On appeal by the plaintiffs the lower appellate Court held that the suit was maintainable, and remanded it for trial on the merits. The defendant appealed to the High Court.

The *Junior Government Pleader* (Babu *Dwarka Nath Banerji*) and *Hanuman Prasad*, for the appellant.

Munshis *Sukh Ram* and *Kashi Prasad*, for the respondents.

The Court (OLDFIELD and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the order of the lower appellate Court, that the suit is maintainable, is wrong, and we concur with the first Court that the remedy was by execution of decree and not by suit. We reverse the order of the lower appellate Court with costs.

Appeal allowed.

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6 A. 17=3 A.W.N. (1883) 177=9 Ind. Jur. 40.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

DILA KUARI (*Plaintiff*) *v.* JAGARNATH KUARI AND OTHERS (*Defendants*).* [4th July, 1883.]

Pre-emption—Hindu widow—Possession of share of village in lieu of maintenance—Right of pre-emption.

Possession for life by a Hindu widow of a share of a village in lieu of maintenance under a decree of Court does not give her such an interest in the share as to entitle her to enforce the right of pre-emption on the sale of another share of the village.

[F., 3 O.C. 306 (307); R., 4 O.C. 397 (405).]

[18] THE facts of this case were as follows:—Two Hindu widows named Dila Kuari and Kishen Kuari were each in possession of an eight annas share of a village named Mukhlispur and of a six annas eight pies share of a village named Lawapur. Dila Kuari was in possession under a decree of the High Court, which had awarded her possession for life in lieu of maintenance. The two widows entered into an agreement regarding the right of pre-emption in the village of Mukhlispur and caused the following entry to be made in the *Wajib-ul-arz*:—" We, Dila Kuari and

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* First Appeal No. 121 of 1882, from a decree of Rai Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 27th September, 1882.

Kishen Kuari, the pattidars of Mukhlispur, do give it in writing that in the event of either of us being desirous of alienating her share, she shall do so in favour of the other, and on her refusing to accept it, in favour of a stranger." In the *wajib-ul-arz* of Lawapur it was recorded that co-sharers should alienate in the first place to a near co-sharer and after that to a stranger. Kishen Kuari having died, her daughter, Jadunath Kuari, succeeded to her property, and made a conditional sale of her shares in the villages above named to one Ishri and certain other person; after making this transfer Jadunath Kuari died. The present suit was instituted by Dila Kuari against Jagarnath Kuari, the daughter of Jadunath Kuari, and Jadunath Kuari's vendees, the plaintiff claiming to enforce a right of pre-emption based upon the *wajib-ul-arz* of Mukhlispur and of Lawapur. The Court of first instance held that the agreement recorded in the *wajib-ul-arz* of Mukhlispur was not binding on the representatives of Kishen Kuari, and dismissed the claim as regards the eight annas share of that village; but gave the plaintiff a decree for the six annas eight pies share of Lawapur.

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The plaintiff appealed to the High Court from the decree of the lower Court in so far as it dismissed the claim in respect of the eight annas share in Mukhlispur; and the defendants objected to the decree on the ground that the plaintiff's interest in the shares held by her was not such as entitled her to enforce the right of pre-emption.

Munshi *Sukh Ram* and Maulvi *Mehdi Hasan*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondents.

[19] The Court (STRAIGHT, J. and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—The plaintiff-appellant is in possession of eight annas and six annas eight pies shares under the decree of this Court in lieu of maintenance for her life; but that does not invest her with any such interest in the land itself as entitles her to assert a right to pre-emption against the defendant Jagarnath Kuari, in respect of the eight annas and six annas eight pies acquired by the latter. The appeal of the plaintiff is dismissed, and the objections of the defendants are allowed, the plaintiff's claim being dismissed with costs.

Appeal dismissed.

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6 A. 19 = 3 A.W.N. (1883) 175.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

LALMAN (*Plaintiff*) v. MANNU LAL AND ANOTHER (*Defendants*).*
[3rd July, 1883.]

Landholder and tenant—Trees planted by occupancy-tenant with landholder's consent—Sale of trees in execution of decree—Transfer of right of occupancy—Act XII of 1881 (N-W.P. Rent Act), s. 9.

An occupancy-tenant, whose orange trees, planted with the landholder's consent had been sold in execution of a decree against him, made a collusive

* Second Appeal No. 760 of 1882, from a decree of H. A. Harrison, Esq., Judge of Farakhabad, dated the 11th May, 1882, affirming a decree of Maulvi Wajid Ali, Munsif of Kaimganj, dated the 15th March, 1882.

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APPELLATE CIVIL.

6 A. 19= 3 A.W.N. (1883) 175.

resignation of his land to the landholder, who thereupon sued the purchaser and the occupancy-tenant for possession of the land with or without the trees. *Held* that as the purchase did not involve a transfer of the tenancy of the land in the sense of s. 9 of the N-W.P. Rent Act, nor any change in the relations between the landholder and the occupancy-tenant such as was prohibited by that law, the landholder was not entitled to possession of the land.

THE facts of this case were as follows:—The occupancy-tenant of certain land, with the consent of the zamindar, planted orange trees on the land. He subsequently borrowed money from one Mannu Lal on the security of the trees. Mannu Lal sued him to recover the money by the sale of the trees, and obtained a decree. In execution of this decree the trees were attached with a view to sale. A few days after the attachment the tenant ostensibly resigned his holding. He did so in collusion with the zamindar, in order to defraud the decree-holder. Lalman, the zamindar, did not contest the attachment of the trees, but claimed that they should be cut down and the land cleared. The trees were put up for sale, and were purchased by Mannu Lal. Lalman subsequently brought the present [20] suit against Mannu Lal and the tenant for possession of the land, with or without the trees. The Court of first instance dismissed the suit. It made the following provision in its decree:—"It should be borne in mind that the dismissal of this claim will not constitute or create any right of proprietary possession in favour of the replying defendant (Mannu Lal) in respect of the land in suit: the replying defendant shall only remain in possession of the orchard in dispute as long as the trees are in existence, by paying the fixed rent due to the plaintiff, and shall not in future be competent to replace the trees that may fall down by new trees without the consent of the plaintiff." On appeal by the plaintiff the lower appellate Court (District Judge) affirmed this decree.

In second appeal the plaintiff contended that, as the defendant Mannu Lal only purchased the trees, he was not entitled to retain possession of the land by keeping the trees standing on it, nor could he be constituted the plaintiff's tenant without his (plaintiff's) consent.

Munshi *Hanuman Prasad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—This case is essentially different from *Kasim Mian* v. *Banda Husain* (1) in which it was found as a fact that the occupancy-tenant had transferred his land as well as the timber standing on it. In the case now before us the lower Court has found distinctly, and rightly in our judgment, that no transfer has taken place of the *land* held by the occupancy-tenant Bhimman, the alleged resignation thereof, after the trees standing on it had been attached by his creditor, Mannu Lal, being made in collusion with the landlord (plaintiff in the case), and being ostensible only and inoperative. The property affected by the auction-sale of the 2nd June, 1881, in favour of Mannu Lal, was the batch of orange trees, which, with the acquiescence of the landlord, has for many years formed the crop of the twelve biswas in dispute. So long as [21] the tenancy of Bhimman subsists, it is found by the Judge that he

(1) 5 A. 616.

has power to deal with timber, of the sort at least planted by him on his land; and no plea to the contrary has been raised in the suit. It is indisputable that he has so dealt with his orangery, having borrowed money on its security, and the creditor Mannu Lal has enforced his lien on it and bought it.

The landlord did not assert any right in the timber, or prefer a claim to a portion of its price; and, indeed, it is obvious that timber so intrinsically worthless as orange wood would be unsusceptible of any such claim or "*haqq.*" In fact, the case may be regarded as practically analogous to the hypothecation by a tenant of his ordinary crop, say, of indigo or tobacco, to a creditor, and the purchase and appropriation by the latter of such a crop would not involve a transfer of the tenancy of the land in the sense of s. 9 of the North-Western Provinces Rent Act, or any such change in the relations between the landlord and his occupancy-tenant in respect of the twelve biswas in dispute as is prohibited by that law. In this view of the facts and the law of the case we affirm the judgment of the Court below, and dismiss this appeal with costs.

Appeal dismissed.

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6 A. 21=3 A.W.N. (1883) 177.

CIVIL REVISIONAL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

IN THE MATTER OF THE PETITION OF RAGHU NATH DAS *v.* BADRI PRASAD AND OTHERS.* [4th July, 1883.]

Execution of decree—Objection to attachment of property—Objection allowed—Costs—Suit to establish right—Appeal—Refund of costs—Civil Procedure Code, ss. 244, 280, 283.

An objection to the attachment of property attached in execution of a decree was allowed, the decree-holder being ordered to pay the costs of the objector. The decree-holder thereupon brought a suit to contest the order allowing the objection. He did not seek in this suit relief in respect of the costs. He obtained a decree setting aside the order allowing the objection. He then applied to the Court which had made the order to order a refund of the amount of the costs which had been paid to the objector. *Held* that the application being regarded as one with regard to a portion of an order made under s. 280 of the Civil Procedure Code, the Court was *functus* in the matter and could not make [22] or enforce such an order as was sought for; and that its order disallowing the application was not appealable as it was not one made under s. 244, and if taken to be one passed with reference to s. 280, an appeal was barred by s. 283.

[D., 5 M.L.J. 252 (253).]

THIS was an application for revision under s. 612 of the Civil Procedure Code. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit *Nand Lal*, for the applicant.

Munshi *Hanuman Prasad*, for the opposite parties.

The Court (OLDFIELD and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—On the 27th February, 1879, the Subordinate Judge of Agra, engaged in the execution of a decree held by Sham Sunder Das

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* Application No. 57 of 1883, from an order of C. W. P. Watts, Esq., Judge of Agra, dated the 28th June, 1882, reversing an order of Maulvi Sultan Hassan Khan, Subordinate Judge of Agra, dated the 20th June, 1881.

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and Badri Das, entertained an objection presented by Mahant Badri Das under s. 280 of the Civil Procedure Code, and, allowing it, awarded to the successful objector Rs. 20-4-0 as costs payable by the decree-holders abovementioned. That order was contested and defeated in a regular suit, but no relief was sought or given in that litigation in respect to this sum of Rs. 20-4-0. But Sham Sunder Das and Badri Das now come to the Subordinate Judge in the miscellaneous department, as it is called, and ask him to order a refund to be made in their favour by the recipient of that sum.

This cannot be regarded otherwise than as an application with regard to a portion of an order made under s. 280. The Subordinate Judge rightly held that he was *functus* in the matter, and that he could not make or enforce such an order as was sought for The applicants appealed to the District Judge, who wrongly entertained the appeal. The order was not made under s. 244 of the Civil Procedure Code, for it was not made regarding the execution of a decree pending in the Court. And if it be taken to be an order passed with reference to s. 280, an appeal is barred by s. 283, which makes an order under s. 280 conclusive save as by regular suit. We allow the application and reverse the lower appellate Court's order with all costs.

Application allowed.

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6 A. 23=3 A.W.N. (1883) 181.

[23] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

BASANT LAL (*Decree-holder*) *v.* BATUL BIBI AND OTHERS (*Judgment-debtors*).* [9th July, 1883.]

Execution of decree—Suit to establish right—Stay of execution—Limitation—Act XV of 1887 (*Limitation Act*), *sch. ii, Nos.* 178, 179.

On the 28th May, 1878, application was made for execution of a decree, in pursuance of which certain property was attached and proclaimed for sale. On the day fixed for the sale the Court issued an injunction to stay the same until a suit, which certain persons who claimed the property had instituted, had been decided. On the 14th September, 1882, the suit having been finally decided on the 24th January, 1881, the decree-holder applied for execution. *Held* that the application might properly be considered to be for revival of the former proceedings, after removal of the injunction, to which art. 178 of the Limitation Act, 1877, rather than art. 179, was applicable, and was within time from the date of accrual of the right to apply on the final decision of the suit.

[Diss., 10 M. 22 (25); R., 23 A. 13 (19); D., 19 A. 71 (72).]

THE decree-holder in this case, whose decree was dated the 5th December, 1876, applied, on the 28th May, 1878, for the attachment and sale of certain shares in certain villages, in execution thereof. The 20th July, 1878, was fixed for the sale of the property. On that day, on the application of certain persons, who claimed the shares in one village and had instituted a suit for them, the Court executing the decree issued an injunction to stay execution by sale of the property until the suit was decided. The attachment remained in force. The suit was finally decided on the 24th January, 1881. On the 14th September, 1882, the decree-holder applied again for execution of the decree, asking for the attachment

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* Second Appeal No. 33 of 1883, from an order of H. D. Willock, Esq., Judge of Azamgarh, dated the 31st March, 1883, affirming an order of Rai Soti Behari Lal, Subordinate Judge of Azamgarh, dated the 26th January, 1883.

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of property of which he had not sought attachment in his former application. The lower Courts held that this application was barred by limitation, computed from the date of the former application.

The decree-holder in second appeal contended that the application was within time, inasmuch as execution of the decree having been stayed until the dispute as to the validity of the attachment made under the application of the 28th May, 1878, was decided, [24] limitation should be computed from the date when such dispute was decided, *viz.*, the 24th January, 1881.

Mr. *Spankie*, for the appellant.

Pandit *Bishambhar Nath*, for the respondents.

The Court (OLDFIELD and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—The present application by the decree-holder is one which may properly be considered to be for revival of the former proceedings after removal of the injunction, and to which art. 178 of the Limitation Act, rather than 179, is applicable, and is within time from the date of accrual of the right to apply on the final decision of the suit. The decree-holder has asked to attach and sell some property of his judgment-debtors which he did not include in his previous application for execution, and there is no objection to his doing so, since the decree must be held to be still in force and capable of execution. The orders of the Courts below are set aside, and the case remanded to the Court of first instance for disposal on the merits.

Appeal allowed.

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6 A. 24=3 A.W.N. (1883) 182.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

GULZAR ALI (*Defendant*) v. FIDA ALI (*Plaintiff*).* [13th July, 1883.]

Trustee—Transfer by trustee in breach of trust—Suit by trustee to recover possession— Bona fide *transferee for value without notice—Estoppel.*

A trustee, alleging that the trust property, consisting of land, was his own property, mortgaged it. The mortgagee took the mortgage in good faith, for valuable consideration, and without notice of the trust. The mortgagee obtained a decree against the trustee for the sale of the land, and the land was sold in execution of that decree. The trustee subsequently brought a suit to recover the land from the purchaser on the ground that it was trust property and that he had no power to transfer it. To this suit none of the beneficiaries under the trust were parties. *Held* that the plaintiff was estopped by his conduct from recovering possession of the land.

[R., 27 Ind. Cas. 400 (403)=42 C. 455=20 C.L.J. 183=19 C.W.N. 208; 17 C.L.J. 233 =18 Ind. Cas. 969; 13 C.P.L.R. 50 (51); 6 O.C. 331 (336); 10 A.L.J. 278=34 A. 660; D., 6 O.C. 355 (359).]

THE facts of this case were as follows:—One Sharafat Begam, by her will directed that certain land belonging to her should, after her death, be recorded in the name alone of Fida Ali, her [25] younger brother; that Fida Ali should apply the income of the property to the payment of a debt due to one Sham Lal, to the maintenance of the

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* Second Appeal No. 1295 of 1882, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 2nd June, 1882, reversing a decree of Shah Ahmadullah, Munsif of the environs of Bareilly, dated the 24th April, 1882.

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mother of the testatrix and himself, and to certain religious purposes; and that he should not be competent to sell or mortgage the property, nor should it be liable for his debts. The testatrix died leaving as her heirs her mother, named Begam Jan, a sister, and three brothers, including Fida Ali. The validity of the will was disputed by some of her heirs, and the matter was referred to arbitration. The arbitrators decided that the will was valid, and directed that Fida Ali's name should alone be recorded in respect of the land. They also directed that the debt due to Sham Lal should be paid from the income of the property. Fida Ali subsequently borrowed money from one Dilawar Husain for purposes of his own, and on the 6th January, 1876, gave him a mortgage on the land as security for the payment of such money, alleging that the land was his. Dilawar Husain sued to enforce the mortgage and obtained a decree, which he transferred to one Gulzar Ali. Gulzar Ali brought the land to sale in execution of the decree, and purchased it himself, and obtained possession. Begam Jan, Sharafat Begam's mother, sued to set aside the sale, and obtained a decree setting it aside. In the course of this litigation she died, and Fida Ali and Umda Begam, the surviving members of the family, were made parties as her legal representatives. Fida Ali subsequently brought the present suit against Gulzar Ali for possession of the land, claiming as trustee thereof under his sister's will.

The defendant set up as a defence to the suit that under s. 115 of the Evidence Act, the plaintiff was estopped from denying his proprietary title to the land, and setting up his title to it as a trustee, and the suit therefore failed. The Court of first instance (Munsif) allowed this contention and dismissed the suit. On appeal by the plaintiff, the lower appellate Court disallowed the contention, and gave him a decree. The defendant appealed to the High Court.

Babu *Jogendro Nath Chaudhri*, for the appellant.

Pandit *Nand Lal*, for the respondent.

[26] The Court (STRAIGHT, J., and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—The plaintiff-respondent, Fida Ali, virtually asks us to allow him to take advantage of his own wrong, and to recover the land in suit, by denying the title he asserted himself to possess when he mortgaged it to Dilawar Husain on the 6th January, 1876. There is no reason to believe that the latter was "*in pari delicto*," or that he had any notice of the trust; on the contrary, he seems to have taken the charge in good faith and for valid consideration. In the former suit by Begam Jan there was no prayer for possession, and though the auction-sale, at which the defendant-appellant purchased the property now claimed, was set aside, he remains in possession. Under such circumstances it would be most inequitable for us to allow the plaintiff-respondent to oust the defendant-appellant from the land upon the strength of a title which is directly antagonistic to his own original representation and statements. To do this would only place him in the position to repeat on some other person the deceit he practised on Dilawar Husain. We make no remark with regard to the beneficiaries under the trust, as they, having made no effort to figure in the suit, do not appear to be interesting themselves in the matter. The appeal is decreed with costs in all the Courts, and the suit of plaintiff-respondent will stand dismissed, the judgment of the Munsif being restored.

Appeal allowed.

6 A. 26 (F.B.)=3 A.W.N. (1883) 208.

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CRIMINAL REVISIONAL.

6 A. 26 (F.B.)= 3 A.W.N. (1883) 208.

CRIMINAL REVISIONAL—FULL BENCH.

Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

IN THE MATTER OF THE PETITION OF JAI PRAKASH LAL.
[14th and 21st August, 1883.]

Security to keep the peace—Power of the Magistrate of a District to call on a person residing in another District to furnish security—Criminal Procedure Code, s. 107.

Held, by the Full Bench, that the terms of s. 107, Criminal Procedure Code, do not empower a Magistrate to issue process to a person not residing within the limits of his district.

Held, by the Divisional Bench, that "information" of the kind mentioned in that section, must be clear and definite, directly affecting the person against [27] whom process is issued, and should disclose tangible facts and details so that it may afford notice to such person of what he is to come prepared to meet.

[F., 23 B. 32 (35); 11 C. 737 (738); 12 C. 133 (135); R., 26 M. 592; 8 S.L.R. 207=16 Cr. L.J. 235=27 Ind. Cas. 907; D., A.W.N. (1896) 73; 24 C. 344 (347).]

THIS was an application for revision under s. 439 of the Criminal Procedure Code of proceedings under s. 107, instituted by Mr. W. Irvine, Magistrate of the Ghazipur District. It appeared that the Magistrate of the Ghazipur District, having received a report from a sub-inspector of police that the servants of the Maharaja of Dumraon, in the Shahabad District in Bengal, were preparing to sow certain land in the Ghazipur District, an act which would likely lead to a breach of the peace. called upon Jai Prakash Lal, the Dewan of the Maharaja, who was residing in the Shahabad District, to show cause why, under s. 107 of the Criminal Procedure Code, he should not be ordered to execute a bond for Rs. 30,000 to keep the peace. Jai Prakash Lal, while the proceedings were pending, made the present application for revision of the Magistrate's order calling for security, on the ground that it was made without jurisdiction.

The application was laid before STRAIGHT, Offg. C.J., and TYRRELL, J., who referred the following question as to the construction to be placed on s. 107 of the Criminal Procedure Code, which was raised by the application to the Full Bench, *viz* —"Is the Magistrate of Ghazipur competent under that section and s. 114 to issue process to a person residing in another Magistrate's District."

Messrs. *Colvin*, *Conlan*, and *Hill*, for the applicant.

It was contended for the applicant that the powers of a Magistrate of a District under s. 107 of the Criminal Procedure Code are limited to the issuing of processes to persons residing within the local limits of his jurisdiction.

Mr. *Spankie*, for the Crown, contended that the terms of s. 107 re-enacted the provisions of the former Criminal Procedure Code, Act X of 1872. As they stand, they plainly and clearly empower the Magistrate of a District to issue process to a person, residing within the limits of another District, who is likely to commit a breach of the peace within the local limits of the Magistrate's jurisdiction. The jurisdiction of the Magistrate in such a case would only be excluded by inserting the words "within the local limits of such Magistrate's jurisdiction," after the words "any person." The Court interpreting a statute cannot add to the letter of any portion of it [28] where the words used are plain

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and unambiguous. He referred to "Maxwell on the Interpretation of Statutes."

The following opinion was delivered by the Full Bench :—

OPINION.

STRAIGHT, Offg. C.J., and OLDFIELD, BRODHURST and TYRRELL, JJ.—As at present advised, we are not prepared, in advertence to the language of s. 107 of the Criminal Procedure Code, to hold, in answer to this reference, that the Magistrate of Ghazipur has power under the law to issue process for taking sureties of the peace from a resident of another Magistrate's district, concerning whom he has received information that such person is likely to commit a breach of the peace in his district. We freely admit that the point is not without difficulty, which would have been obviated had the provisions of paragraph 7 of s. 502 of the old Code, that the proceeding could be taken "in any district where the person it is desired to bind may be," been repeated. These terms, however, are not to be found in s. 107 of Act X of 1882, and despite the able argument of Mr. Spankie in favour of giving the wider operation to that section, we think that the second paragraph thereof indicates an intention to limit it in the direction we have intimated. There are besides many reasons of convenience which recommend the less extended construction of the section, as to some of which the case out of which this reference has arisen might afford a striking illustration. Under the last paragraph of s. 107, for example, application might have been made to the Magistrate of the Shahabad District against the Dewan of the Maharaja of Dumraon, who is a resident therein, on the ground that he was likely to commit a breach of the peace within the district of the Magistrate of Ghazipur. Supposing the Magistrate of the Shahabad District to have refused to issue process, there was nothing to prevent the dissatisfied party applying to the High Court at Calcutta to revise his proceedings, and meanwhile, if the view of s. 107 contended for by Mr. Spankie is correct, moving the Magistrate of Ghazipur himself to take cognizance of the matter. Supposing the Magistrate of Ghazipur to have issued process, his decision in turn could have been brought up to this Court for revision, with the possible result that if the Calcutta Court reversed the order of its Magistrate and we upheld that of ours, the Di-[29]wan would find himself called upon in two different places to give sureties of the peace in respect of the same subject-matter. Moreover, it is readily conceivable that a person summoned into one district from another might be subjected to much unnecessary expense and inconvenience in and about obtaining sureties from the district in which he resides, to say nothing of the cost of witnesses he might wish to bring thence for the purpose of showing that the information given to the Magistrate was incorrect or untrue, and that he was not liable to be called on for recognizances. It is obvious that if we are to give s. 107 the scope contended for it, a Magistrate in these Provinces may send his process to a person in any other part of India in which the Criminal Procedure Code is in force, and *vice versa*. As we remarked at the outset, we are not prepared, under such circumstances, to place so wide a construction on s. 107, and the question referred to us must be answered in the negative.

Upon the case being returned to the Divisional Bench (STRAIGHT, Offg. C.J., and TYRRELL, J.) the following judgment was delivered :—

STRAIGHT, Offg. C.J.—The answer of the Full Bench to the question submitted by us leaves us no alternative but to quash the whole of the

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Magistrate's proceedings with reference to the applicant, Babu Jai Prakash Lal, and we hereby set them aside. In doing so we feel ourselves bound to point out to the Magistrate that the sub-inspector's report upon which he appears to have issued process was of the vaguest and most inadequate description, and that, so far as the Diwan was concerned, it did not contain a particle of information directly justifying the inference that he personally contemplated committing, or had instigated others to commit, a breach of the peace. The lands which it was said were to be sown were lands which had admittedly passed to the Maharajah of Dumraon in execution of decree, and there was nothing illegal or improper in his servants being instructed to sow them. The Magistrate should understand that the provisions of Part B. of Chap. VIII of the Criminal Procedure Code are not to be arbitrarily used to prevent persons from legally exercising their rights of property, nor is a person in the position of the [30] applicant to be subjected to the indignity of being called upon to find sureties of the peace to the extent of Rs. 30,000 simply because of that position. Information of the kind mentioned in s. 107 must be of a clear and definite kind, directly affecting the person against whom process is issued, and it should disclose tangible facts and details, so that it may afford notice to such person of what he is to come prepared to meet. Moreover, in the case before us the Magistrate has failed to state that in his opinion a breach of the peace was likely to take place. This he was bound to do before issuing process. With these remarks the record may be returned.

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6 A. 30=3 A.W.N. (1883) 215.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

MUHAMMAD SULAIMAN AND ANOTHER (*Judgment-debtors*) v. MUHAMMAD YAR AND ANOTHER (*Decree-holders*).* [16th August, 1883.]

Suit for possession of immoveable property—List of properties sued for appended to plaint—Omission to specify in decree properties decreed—Execution of decree—Civil Procedure Code, s. 206.

The plaintiff in a suit claimed possession of villages said in the plaint to be "detailed below." No details of the villages were given in the plaint itself, but a separate paper containing a list of villages was filed with the plaint. The plaintiff obtained a decree for possession of "all the villages claimed," but there was no indication in the decree what those villages were.

Held that the Court executing the decree was not justified in reading the contents of the list of villages attached to the plaint into the decree, and awarding the decree-holder possession of the villages named in such list. S. A. No. 310 of 1882, decided the 11th August, (1) 1882, followed.

Debi Charan v. *Pirbhu Din Ram* (2), referred to.

[Diss., 18 A. 344 (346)=A.W.N. (1896) 87.]

THIS was an appeal against an order disallowing the objections of the judgment-debtors in this case to the delivery of possession over some shares of various villages in execution of the decree, which did not specify the shares or the villages affected by it. The lower Court said :—" There

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* First Appeal No. 53 of 1883, from an order of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 6th April, 1883.

(1) Not reported. (2) 3 A. 388.

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is certainly no detail of mauzas (villages) in the decree, but the plaintiff's claim for possession of all the mauzas claimed, left by Allawardi Khan, was decreed," and "a list [31] annexed to the plaint contains the names of the mouzas whereof possession is sought. There will be no impropriety in the plaintiff's taking possession according to the detail given in the plaint, and it would not be illegal if the Court renders this slight assistance owing to the want of detail in the decree." Execution therefore was allowed. It was contended on behalf of the appellants, judgment-debtors, that it was illegal for the Court executing the decree to import into it the contents of a list appended to the plaint.

Pandit *Ajudhia Nath*, for the appellants.

Shaikh *Maula Bukhsh* and Lala *Harkishen Das*, for the respondents.

The Court (STRAIGHT, Offg. C.J., and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—The decree is as follows:—

"Claim valued at Rs. 20,906-15-11.—*Claim*—(1) To obtain proprietary possession of 1-10th share out of the property detailed by virtue of paternal inheritance. The five times of the Government revenue of the shares owned by the plaintiff, and the proportionate amount as regards the property held in mortgage, comes to Rs. 3,184-2; the value of the zamindari is Rs. 13,318-7; that of house Rs. 100; and that of *babul* trees situated at Raman Mai and cut and sold by the defendants within a year is Rs. 150.

"(2) To recover Rs. 4,094-6-11 as mesne profits from 1282 to 1285 fasli, and interest, and also future mesne profits up to date of possession: total claim valued at Rs. 20,906-15-11.

"(3) The costs of this suit with interest may also be awarded.

"After hearing this suit on the 24th December, 1878, in the sitting of Sayyid Farid-ud-din Ahmad, the presiding officer of this Court, and in the presence of Khwajah Muhammad Yusuf, pleader for the plaintiff, and Lala Badri Prasad and Muhammad Zafaryab Khan, pleaders for the defendants, it is ordered and decreed that the plaintiff's claim for possession of all the villages claimed, left by Allawardi Khan, be decreed against all the defendants, and that the claim for Rs. 4,094-6-11, the amount of mesne profits, Rs. 150, the price of the trees, and Rs. 100, the value of the house, [32] aggregating Rs. 4,344-6-11, be dismissed. Both the parties will bear the costs in proportion to the claim dismissed. It is further ordered that the defendants do pay Rs. 643-6 to the plaintiff, the amount of costs of this Court charged to them, and that the plaintiff will pay to the defendants Rs. 90-13, the amount charged to her."

Possession was thus decreed of "all the villages claimed, left by Allawardi Khan," but there is no indication what those villages were or how much of them was decreed, or whether there were any *not* left by Allawardi Khan, and, if so, which they were. Nor will the plaint help in this respect, if, giving the largest effect to the Full Bench ruling in *Debi Charan* v. *Pirbhu Din Ram* (1), we turn to it to find what "the plaintiff's claim was," and what "the villages claimed" were.

The plaint was:—"(1) Allawardi, the ancestor of the parties, died on the 30th June, 1866; the names of his heirs are to be found in the genealogical table given below. Amirunnisa, the wife of Allawardi Khan, died leaving the other heirs.

(1) 3 A. 388.

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"(2) According to the Muhammadan law the estate of Allawardi Khan was divided into ten shares, to one of which the plaintiff is entitled as daughter of Allawardi Khan.

"(3) The property *detailed below* was left by Allawardi Khan, and the plaintiff is entitled to a tenth share in it.

"(4) After the death of Allawardi Khan, the plaintiff had been in receipt of profits of the estate of her deceased ancestor, after deducting her share of the ancestral debts, for six years, but the defendants have paid nothing to her during the last six years out of the said profits. The defendants now neither will give the plaintiff her share of the property, nor of the profits, and therefore she seeks the following reliefs:—(i) That the plaintiff be awarded proprietary possession of a tenth share of the properties *detailed below* as heiress to her father: the five times of the Government revenue of the property held by proprietary right, and the proportionate amount as regards the property held in mortgage, comes to Rs. 3,184-2; and the value of the zamindari is Rs. 13,318-7; that of house Rs. 100; and of *babul* trees situate at Raman Mai and cut and sold by the defendants within a year, Rs. 150. (ii) That from [33] 1282 fasli to 1285 fasli Rs. 4,094-6-11 are due as mesne profits and interest; these and future mesne profits to date of possession may be awarded; total claim valued at Rs. 20,906-15-11. (iii) That the costs of this suit with interest may also be awarded."

In this document no village is named, and no share of the village is denoted. Allusion is twice made to "details" to be given "below," but no such details are in the plaint, which ends with the verification and signature of the plaintiffs after the prayer for costs with interest. It is true that a separate paper containing a list of villages was filed with the plaint by the plaintiff's pleader. But this forms no part of the plaint; and we cannot go the length of holding that the Court executing the decree was justified in reading its contents into the decree. In taking this view we follow the law as laid down in S.A. No. 310 of 1882, decided the 11th August, 1882 (1), and in other rulings of this Court on the subject. It is plain that the decree was defective in that it did not contain "the particulars of the claim," and failed to "specify clearly the relief granted." The proper and only course open to the decree-holders was to procure the remedy of these defects according to law.

We must set aside the order of the Subordinate Judge and allow the appeal with costs.

Appeal allowed.

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6 A. 33=3 A.W.N. (1883) 183.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

GOBIND SINGH AND OTHERS (*Defendants*) v. ZALIM SINGH AND ANOTHER (*Plaintiffs*).* [19th July, 1883.]

Civil Procedure Code, s. 276—Alienation of property under attachment.

A private alienation of property under attachment is void, under s. 276 of the Civil Procedure Code, "as against all claims enforceable under the attachment."

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* Second Appeal No. 750 of 1882, from a decree of J. W. Power, Esq., District Judge of Ghazipur, dated the 18th April, 1882, reversing a decree of Maulvi Mahmud Bakhsh, Subordinate Judge of Ghazipur, dated the 19th December, 1881.

(1) Not reported.

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only. *Held*, therefore, where property attached in execution of a decree was alienated, and was after such alienation again attached, the first attachment having expired, and was brought to sale in pursuance of the second attachment, and the purchaser sued for possession of the property claiming on the ground that the alienation of the property was void under the provisions of s. 276, that as no claim was enforced or was enforceable under the first attachment under which the [34] property was alienated, but the purchaser was claiming under the second attachment, such alienation could not be assailed under the provisions of s. 276.

[Appr., 7 A. 702 (709) = A.W.N. (1885) 179 ; D., 15 A. 112 (114).]

THE facts of this case were as follows :—One Bachu Lal held a decree for money against one Behari Singh, and sold the decree to one Kauleshar. Kauleshar put this decree in execution in 1865. The property, the subject of the present suit, was attached in execution of this decree on the 20th February, 1866, and on the 20th June, 1867, the property was advertised for public sale. On the 17th June, 1867, while the attachment was subsisting, the judgment debtor, Behari Singh, executed three conditional sale-deeds in respect of the attached property, conveying—(i) one-third thereof to Shankardial Singh, (ii) another third to Durga Singh and Dulli, ancestors of the plaintiffs, and (iii) the remaining third to the ancestors of the defendants. Possession was given to the vendees under these three deeds. In 1867 Kauleshar's application for execution was struck off the pending execution file. In February, 1868, Kauleshar made a fresh application for execution, and the property attached in 1866-67 was again attached on the 4th May, 1868. On the 18th September, 1875, another application for execution was made, the property conveyed to Durga Singh and Dulli by sale-deed No. (ii) being attached, and the property conveyed by sale-deed No. (i) to Shankardial Singh being exempted on the allegation that he had made some payment towards satisfaction of the decree. The case was struck off. In 1876 the judgment-debtor's sons, Nand Kishore and Deonarain Singh, brought a suit against the conditional vendees under sale-deed No. (iii), the ancestors of the defendants in the present suit, to set aside the sale made to them on the ground that it was made *ultra vires* by their father, and whilst he was of unsound mind. This suit was dismissed by the Court of first instance (Subordinate Judge) on the 21st June, 1876 ; and that decree became final as no appeal was preferred therefrom. In 1878 Kauleshar resumed proceedings in execution of his decree, and moved the Court to sell one-half of the two-thirds bought by the vendees under the sale-deeds Nos. (i) and (iii), the other moiety being exempted from sale. This application, like the others, was "struck off" on the 15th October, 1879. Finally, in 1880, Kauleshar executed his decree; and [35] brought to public sale the property conditionally sold, in 1867, to the ancestors of the defendants in the present suit (sale-deed No. iii). The plaintiffs in this suit, the descendants of Durga Singh and Dulli (sale-deed No. ii), bought the property and brought this suit against the defendants, the vendees under the deed (No. iii) to set aside that deed, and to recover possession from them, claiming on the ground, among others, that the alienation of the property was made while it was under attachment, and it was therefore void, under s. 240 of Act VIII of 1859 and s. 276 of Act X of 1877. The Court of first instance held in respect of this ground of claim that the attachment of 1866-67 did not affect the validity of the alienation to the defendants, as such attachment had been inoperative ; and it dismissed the suit. On appeal by the plaintiffs the lower appellate Court held that

the alienation was void, under s. 240 of Act VIII of 1859, having been made while the property was under attachment, and gave the plaintiffs a decree. The defendants appealed to the High Court, contending that the attachment of 1866-67 did not affect the validity of the alienation to them.

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APPELLATE CIVIL.

6 A. 33 = 3 A W N. (1883) 183.

Messrs. *Conlan* and *Howard*, for the appellants.

Mr. *Hill* and Lala *Lalta Prasad*, for the respondents.

The judgment of the Court (BRODHURST, J., and TYRRELL, J.) after stating the facts, continued as follows :—

JUDGMENT.

TYRRELL, J.—The single question raised is one of law, and it is whether s. 240, Act VIII of 1859, corresponding to s. 276 of the present Civil Procedure Code, gives the plaintiffs, as auction-purchasers, the protection and the relief that these provisions of the law were certainly designed to afford to attaching decree-holders. And granting the general proposition in the affirmative, are there circumstances in this case which would disentitle the plaintiffs to the benefit of the Code of Civil Procedure in this behalf?

Having sent for and considered all the execution records, we are of opinion that this appeal must prevail. The title of the decree-holder must be held to date from the time when he procured the attachment which immediately preceded the sale in execution in 1880, which has given rise to this suit. It is incontro-[36]vertible that the attachment of 1866-67 expired in 1867. Indeed the decree-holder recognized this when he sued out a fresh attachment in his execution proceedings of 1868. We must, therefore, apply to this case the rule of s. 276 of Act X of 1877, rather than that of s. 240, Act VIII of 1859. Under s. 276 a private alienation of property under attachment is void "*as against all claims enforceable under the attachment*" only. But it was under the old and long-extinct attachment of 1866-67 that the alienation impugned in this suit was made, and under that attachment no claim was enforced or is now enforceable by the decree-holder, or by any person claiming through or under him.

The claim which the respondents here seek to enforce has had its origin in the attachment of 1880; and therefore, as against them, the purchase made by the appellants cannot be assailed as invalid or "void" on the strength of the rule of s. 276 of the Civil Procedure Code.

In this view of the law applicable to the peculiar circumstances of the case, it is needless to go into the other question we proposed for consideration above, and it is sufficient to add that, setting aside the decree of the lower appellate Court, we restore that of the Court of first instance, and decree this appeal with all costs.

Appeal allowed.

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JULY 20.

APPELLATE CIVIL.

6 A. 36= 3 A.W.N. (1883) 185.

6 A. 36=3 A.W.N. (1883) 185.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

RAM PRASAD AND OTHERS (*Plaintiffs*) *v.* RAI KISHEN (*Defendant*).*
[20th July, 1883.]

Act XII of 1881 (*N.-W.P. Rent Act*), ss. 189, 206, 207, 208—*Jurisdiction—Transfer of appeal to Subordinate Judge.*

The defendant in a suit instituted in a Civil Court set up as a defence that it was cognizable in the Revenue Court. The Court of first instance (Munsif) disallowed this defence, and gave the plaintiff a decree. The defendant appealed to the District Judge, again contending that the suit was cognizable in the Revenue Court. The appeal was transferred by the District Judge to the Court of the Subordinate Judge. The Subordinate Judge dismissed the suit on the ground that it was not cognizable in the Civil Courts, but in the Revenue. *Held* that looking to the terms of ss. 189, 206, 207 and 208 of the N.-W. P. Rent Act, the District Judge had no power to transfer the appeal to the Subordinate Judge, who had not the powers vested in the appellate Court by s. 208.

[F , 6 A. 295 (297)=A.W.N. (1884) 90.]

[37] THIS suit was instituted in the Court of the Munsif of Bisauli, in the district of Shahjahanpur, that is to say, in a Civil Court. The defendant set up as a defence that the suit was cognizable in the Revenue Court. The Munsif disallowed this defence and gave the plaintiffs a decree. The defendant appealed to the District Judge, again contending that the suit was cognizable in the Revenue and not in the Civil Court. The District Judge transferred the appeal for hearing to the Subordinate Judge. The Subordinate Judge reversed the Munsif's decree, holding that the suit was cognizable in the Revenue and not in the Civil Court, that is to stay, the Subordinate Judge dismissed the suit. The plaintiffs appealed to the High Court, contending that the Subordinate Judge's decree was opposed to the provisions of ss. 206 and 207 of the Rent Act, 1881.

Pandit *Ajudhia Nath* and Babu *Ratan Chand*, for the appellants.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the respondent.

The Court (STRAIGHT, Offg. C.J. and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—We think, looking to the pleas in appeal and to the terms of ss. 189, 206, 207 and 208 of the Rent Act, that the Judge should not have transferred the case to the Subordinate Judge for disposal, who has not the powers vested in the appellate Court by s. 208. In our opinion he had no authority to do so, and could not give the Subordinate Judge jurisdiction. We allow this appeal, and, reversing the Subordinate Judge's decision in its entirety, we direct that the record be forwarded to the Judge for restoration of the appeal to his register of pending cases for disposal. Costs of this appeal will be costs in the cause.

Appeal allowed.

* Second Appeal No. 362 of 1883, from a decree of Maulvi Nasr-ullah Khan, Subordinate Judge of Shahjahanpur, dated the 20th December, 1882, reversing a decree of Munshi Ganga Prasad, Munsif of Bisauli, dated the 5th August, 1882.

6 A. 37=3 A.W.N. (1883) 211.

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LATE
CIVIL.

6 A. 37=
3 A.W.N.
(1883) 211.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Oldfield.

BHUP KUAR AND OTHERS (*Defendants*) v. MUHAMMADI BEGAM (*Plaintiff*).* [21st August, 1883.]

Vendor and purchaser—Sale—Mortgage.

Held that an agreement by the purchaser of certain immoveable property that it should, on payment by the vendor of a certain sum within a specified time, [38] be restored to the vendor, and that on failure of such payment it should become the absolute property of the purchaser, did not create the relation of mortgagor and mortgagee between the parties, and that upon the vendor's failure to comply with the terms of the agreement, the property vested in the purchaser.

[R., 2 Bom. L.R. 1058 (1067); 12 Bom. L.R. 886 (887); D., 19 A. 434 (446).]

THE facts of this case were as follows:—One Ali Husain, by an instrument of sale, dated the 19th November, 1862, transferred for Rs. 602 a certain share of a certain village to persons called Kuar Singh and Badam Singh. On the 6th March, 1866, the purchasers executed an agreement in which they agreed that, if the vendor paid them Rs. 430 in the course of ten years, the property should be restored to him, but that he should not be able to recover the property after the expiration of ten years. In April, 1882, the plaintiffs in this case, claiming through Ali Husain, brought the present suit for possession of the property by redemption of mortgage, contending, with reference to the agreement of March, 1886, that the defendants, the representatives of Kuar Singh and Badam Singh, held it as mortgagees. The Court of first instance allowed this contention, and gave the plaintiff a decree for the property. The defendants appealed to the High Court, contending that the lower Court had placed a wrong construction on the agreement of the 6th March, and that that agreement did not create a mortgage.

Shaikh *Maula Bakhsh*, for the appellant.

Munshi *Kashi Prasad*, for the respondent.

The judgment of the Court (STRAIGHT, Offg. C.J., and OLDFIELD, J.), so far as it is material for the purposes of this report, was as follows:—

JUDGMENT.

STRAIGHT, Offg. C.J.—We do not think, upon a proper construction of the instrument of the 6th March, 1866, that it can be regarded as creating the relation of mortgagor and mortgagees between Ali Husain on the one hand and Kuar Singh and Badam Singh on the other. On the contrary, all it did was to give the former the power of buying back the 1 biswa 8 biswansis share of Tajpura within ten years from the date of the document, and in the event of his failing to do so, declared that the latter would acquire an absolute proprietary title thereto. The share, not having been re-purchased within the stipulated period, vested in Kuar Singh [39] and Badam Singh at the expiration of the ten years, namely in March, 1876, and no portion of it can now be claimed by the plaintiff from them.

* First Appeal No. 127 of 1882, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 20th September, 1882.

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APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

HUSAIN ALI AND ANOTHER (*Defendants*) *v.* MATUKMAN AND OTHERS (*Plaintiffs*).* [23rd July, 1883.]

Ghat—*Right to use for collecting religious offerings.*

Certain Brahmans, on the allegation that a custom existed whereby they had an exclusive right to use a *ghat* for the purpose of collecting alms, the land of which did not belong to them, sued for a declaration of their exclusive right to the use of the *ghat* for that purpose. *Held* that, as the plaintiffs had no right of any kind in the land of the *ghat*, the suit was not maintainable.

[F., 20 A. 200 (204, 205).]

THE plaintiffs in this suit, Brahmans by caste, claimed a declaration of their exclusive right to use a *ghat*, or bathing place, on the bank of the river Ganges, in the city of Benares, at certain periods of the year, for the purpose of collecting certain religious offerings, and for the removal of a "*chabutra*" (platform). It appeared that the land of the *ghat* belonged to the Benares Municipality, and they had leased it to the defendant Husain Ali. The defendant Jhelu, also a Brahman, built a "*chabutra*" on the land, as a tenant of Husain Ali, and used it for the purpose of collecting the religious offerings, which the plaintiffs claimed the exclusive right of collecting. The plaintiffs thereupon brought the present suit for a declaration of their exclusive right to use the *ghat* for the purpose in question, and for the removal of the *chabutra*. The Court of first instance gave the plaintiffs a decree, observing as follows:—"From the evidence on the record, I think that it is fully proved that the plaintiffs have every year occupied the land in dispute, as well as other lands adjoining it, at particular seasons every year, and by such continuous user have acquired in it a right of which they cannot now be deprived." On appeal by the defendants, the lower appellate Court held that the plaintiffs were by custom entitled to the exclusive use of the *ghat* for the purpose of making the collections in question, and modified the decree of the first Court, giving the plaintiffs an injunction restraining the defend-[40]ants from making such collections on the land in dispute or doing any acts for the purpose of making the same.

The defendants in second appeal contended that the plaintiffs were not entitled to occupy the land without the consent of the owner or his assigns, and that the custom on which the decree of the lower Court was based could not confer on the plaintiffs any interest in respect of the land.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellants.

Munshi *Sukh Ram*, for the respondents.

The Court (OLDFIELD and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the appeal must be decreed. The question is whether the plaintiffs possessed such a right as to be able

* Second Appeal No. 343 of 1883, from a decree of D.M. Gardner, Esq., District Judge of Benares, dated the 23rd December, 1882, modifying a decree of Munshi Madho Das, Munsif of Benares, dated the 5th June, 1882.

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to prevent defendant from occupying the *ghat* for the purpose of collecting alms. Now no right of any sort to the soil of the *ghat*, or any portion thereof, is asserted by the plaintiffs, or shown, and under such circumstances they cannot maintain a claim to the exclusive use of the *ghat*, for the purpose of collecting alms to the exclusion of other persons. The decision of this Court in S. A. No. 151 of 1871, dated the 15th March, 1871 (1), is in point. We decree the appeal, and dismiss the suit of the plaintiffs with costs.

Appeal allowed.

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6 A. 40=3 A.W.N. (1883) 186.

CRIMINAL REVISIONAL.

Before Mr. Justice Straight.

EMPRESS *v.* RAM LAL SINGH AND OTHERS. [23rd July, 1883.]

High Court's powers of revision—Criminal Procedure Code, s. 439—Improper discharge of accused—Power to order commitment.

The High Court has power, under s. 439 of the Criminal Procedure Code, 1882, if it considers that an accused person has been improperly discharged, to order him to be committed for trial.

[F., 27 B. 84 (87).]

THIS was a case reported to the High Court for orders by Mr. C. W. P. Watts, Sessions Judge of Saharanpur. It appeared that certain persons were charged before a Magistrate with offences un-[41]der ss. 147 and 325 of the Penal Code. The Magistrate committed one of the accused for trial before the Court of Session, and discharged the rest. The Sessions Judge, being of opinion that two others of the accused should have been committed for trial, reported the case to the High Court, in order that the Magistrate might be ordered to commit those persons for trial. Notice was issued by the High Court to those persons, and to two more of the accused, to show cause why the order of discharge of the Magistrate, passed upon the charges preferred against them under ss. 147 and 325 of the Penal Code, should not be set aside, and why the High Court should not direct that they should be committed to the Court of Session for trial on those charges.

Mr. *C. H. Hill*, for the accused, contended that the High Court was not empowered by s. 439 of the Criminal Procedure Code to order that an accused person, who had been discharged, should be committed for trial.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENT.

STRAIGHT, J.—It will be most convenient at once to dispose of the legal point raised by the learned counsel, who has shown cause against the rule, which questions the competency of this Court to order the committal of his clients to take their trial before the Sessions Judge. I do not concur in his contention that under the new Code of Criminal Procedure I am debarred from so directing; nor do I think that it was the intention of the Legislature to deprive the High Courts of the useful power

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(1) Not reported.

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they had in this respect under the old law. It is true that paragraph 2 of s. 297 of Act X of 1872 does not in terms re-appear in s. 439 of Act X of 1882, and that s. 437 of the latter Statute contains a new provision, authorizing the High Court, Court of Session, and District Magistrate to make "further inquiry into the case of any accused person who has been discharged." But I do not read this as exhaustive of the discretion of the High Court in such matters, nor so limiting its power of revision under s. 439. Under this last-mentioned section, in the case of any proceeding, "the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal," among others, by s. 423. Turning to s. 423, it will be [42] found that numerous powers are given to the appellate Court, and among them that of directing a committal for trial. But it is said those powers are confined to cases where there has been an acquittal or a conviction, and there must be the same limitation to the High Court in revision. I do not think so in face of the words of s. 439, "in the case of any proceeding," which are wide and comprehensive enough to cover one in which a person has been improperly discharged. I am therefore of opinion that the learned counsel's argument fails. Adverting to the facts of the case, it must not be supposed that by reversing the Magistrate's order of discharge, I am making any reflection on him. He heard the matter with the greatest care, patience and industry, and his record is a most creditable one. His fault was that, as he was merely sitting to hold a preliminary inquiry, it was not his business to try the case, but simply to see if there was *prima facie* evidence to justify a committal. With respect to the persons who were charged before him other than the respondents, I accept his remarks and criticisms as showing that there was no such *prima facie* evidence. But with regard to the respondents, it seems to me that there was sufficient material disclosed to warrant the case being sent for trial before the Sessions Judge and assessors. I think it undesirable to make any further remarks on this head, and in quashing the Magistrate's order of discharge as to the respondents, and directing him to commit them for trial, which I now do, I must not be supposed to express any opinion on the merits one way or the other. The rule is therefore made absolute for the reversal of the Magistrate's order of the 20th of June last, and he is hereby ordered to commit them to take their trial in the Court of Session for offences under ss. 147 and 325 of the Penal Code.

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6 A. 42 = 3 A.W.N. (1883) 189.

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

EMPRESS *v.* GAURI SHANKAR. [24th July, 1883.]

Act XLV of 1860 (*Penal Code*), ss. 192, 218—*Fabricating false evidence—Public servant framing an incorrect record.*

A police-officer, who had suppressed a document intrusted to him to forward to his superior officer, made a false entry in his official diary that the document [43] had been so forwarded, intending that if he were prosecuted under the Police Act for suppressing the document such entry might be used as evidence in his behalf that he had so forwarded the document.

Held that inasmuch as to constitute the offence of fabricating false evidence defined in s. 192 of the Penal Code, the evidence fabricated must be admissible evidence, and as, if such police-officer had been prosecuted under the Police

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Act, the entry in the diary would not have been admissible in his behalf though contrary to his intention it might have been used against him, such police-officer was, improperly convicted in respect of such entry of fabricating false evidence punishable under s. 193 of the Penal Code.

Held also, that such police officer's intention in making such entry being to screen himself from punishment, he was not punishable, under s. 218 of the Code.

[Overruled, 19 A 305 (307); F., U.B.R. (1897—1901) 356 (358); R., 14 A. 354 (355); 21 A. 159 (161) = A.W.N. (1899) 5; 13 B. 384 (388); 1 P.R. 1914 (Cr.) = 139 P.L.R. 1914 = 15 Cr. L.J. 344 = 23 Ind. Cas. 696 (699).]

THIS was an appeal from a judgment of conviction of Mr. J. D. LaTouche, Sessions Judge of Banda, dated the 18th June, 1883. It appeared that two police-reports, containing information of the commission of the offence of overloading a stage-carriage by the respective servants of two dâk contractors named Bhairon Prasad and Mannu Lal, were forwarded to a police-station in the Banda district from a police outpost, in charge of a head-constable called Kale Khan: a third report was also forwarded, containing information that the servants of one Bose Babu, who had license for a bullock train, had overdriven the bullocks. The officer in charge of the police-station directed that the reports should be forwarded to Banda, and they were accordingly given to Gauri Shankar, police muharrir, appellant, to send by post. The two reports first mentioned above did not reach Banda. When asked to explain what had become of those two reports, Gauri Shankar stated that he had sent all three to Banda and as proof that he had done so he produced his official diary of the 11th May, 1883, where, at the end of a list of papers which had been forwarded to Banda, this passage occurred:—"Report of Kale Khan, head-constable, on the subject of a complaint against Bhairon Prasad, Mannu Lal, and Bose Babu, licensees of stage-carriages." He was eventually committed for trial, charged with having suppressed the reports in question, to prevent their production as evidence, an offence punishable under s. 204 of the Indian Penal Code, and, in respect of the entry in his diary, with forgery punishable under s. 466 of the same Code. He was convicted by the Sessions Judge, with reference to such entry, of an offence under s. 193 of the Penal [44] Code, in that he had fabricated false evidence to be used in his own defence on a charge of suppressing documents.

Messrs. *Colvin* and *Dillon*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENT.

STRAIGHT, J.—I am of opinion that this conviction under s. 192 of the Penal Code cannot be maintained. I agree in the Judge's view of the facts, that the appellant is satisfactorily shown to have suppressed the two reports against Bhairon Prasad and Mannu Lal, and that the interpolation in the diary was made by him to conceal his conduct; and, in the event of his prosecution under the Police Act, to cause it to appear that he had forwarded the documents in due course. But this is not enough to constitute the offence of fabricating false evidence, for the evidence fabricated must be admissible evidence which the false entry in the present case would not be, not because of the prohibition of s. 172 of the Criminal Procedure Code, which has no bearing on the question, but because a person cannot make evidence for himself so as to take advantage of it when he is subsequently accused of an offence. Consequently,

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if a prosecution of the appellant under s. 29 of the Police Act had been instituted, the entry in the diary would not have been admissible evidence on his behalf, though it might have been used against him, which was certainly not his intention. The words of s. 192, "so appearing in evidence," obviously assume the admissibility of the false entry or statement. For this reason the conviction is unsustainable and must be reversed.

I cannot adopt the contention of the Government Pleader, that s. 218 of the Penal Code is applicable, and that I should record a conviction for the offence therein mentioned. The appellant's object was admittedly to screen himself, whilst the intent mentioned in that section has reference to other persons..................

The appeal is allowed, the conviction set aside, and the appellant may be released.

Conviction quashed.

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6 A. 45 = 3 A.W.N. (1883) 196.

[45] CRIMINAL REVISIONAL.

Before Mr. Justice Straight, Offg. Chief Justice.

IN THE MATTER OF THE PETITION OF GULAB SINGH *v.* DEBI PRASAD. [28th July, 1883.]

Sanction to prosecution—Expiration of limitation—Fresh sanction—Criminal Procedure Code, s. 195.

It is competent for a Court which has granted sanction to a prosecution under s. 195 of the Criminal Procedure Code to give a fresh sanction, if the one previously granted has expired by efflux of time.

The limitation of six months mentioned in s. 195 means that a Magistrate shall not take cognizance of a case under a sanction which is more than six months' old, not that the whole prosecution must be completed within that period.

Held, therefore, where sanction to a prosecution had been granted under s. 195 and the prosecution had been instituted, and the Magistrate, in consequence of the evidence of the complainant not being procurable, had ordered "the case to be shelved for the present," and the complainant, after the six months mentioned in s. 195 had expired, applied to the Magistrate to re-open the proceedings that it was competent for the Magistrate, having once taken cognizance of the case, and it still remaining on his file undetermined, to take it up again at any moment, and proceed with the prosecution, without fresh sanction.

[R., 18 A. 358 (360); 22 C. 573 (578).]

THIS was an application for revision under s. 439 of the Criminal Procedure Code, 1882. It appeared that the applicant, Gulab Singh, who had brought a suit against one Debi Prasad in the Court of the Munsif of Farakhabad, had applied to the Munsif under ss. 468 and 469 of the Criminal Procedure Code, 1872, for sanction to prosecute the defendant for certain offences alleged to have been committed by him. On the 8th October, 1882, the Munsif granted such sanction. On the 13th October, 1882, Gulab Singh, in pursuance of such sanction instituted, by his vakil, criminal proceedings against Debi Prasad. On the 16th October the accused applied for the personal examination of the complainant. The Magistrate ordered that the complainant should be summoned, and fixed the 3rd November for his appearance. The complainant had in the meantime gone to a place in a Native State, and the summons was not served on him in time. In consequence of his

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non-attendance the following order was made by the Magistrate:—"Let the case be shelved for the present." On the 7th April, 1883, Gulab Singh applied to the Magistrate to renew the proceedings. On the same day the Magistrate made an order on this application, directing [46] Gulab Singh to obtain fresh sanction from the Munsif, as the six months mentioned in s. 195, Criminal Procedure Code, 1882, had expired. Gulab Singh accordingly applied to the Munsif for fresh sanction, and obtained the same on the 11th April, 1883. Debi Prasad thereupon applied to Mr. H. P. Mulock, District Judge of Farakhabad, to revoke the sanction, and the District Judge revoked the same by an order dated the 12th May, 1883. Gulab Singh made the present application to the High Court for revision of the Magistrate's order of the 7th April, 1883, and of the District Judge's order, contending, as regards the former order, that fresh sanction was not necessary, and, as regards the latter, that the sanction had been revoked on insufficient grounds.

Messrs. *Hill* and *Ross*, for the applicant.

Mr. *Dillon*, for Debi Prasad.

JUDGMENT.

STRAIGHT, Offg. C.J.—I do not quite understand whether the Judge holds that no second sanction can be granted, or that the Munsif in this case improperly exercised his discretion by granting it. If the former be his view, it is erroneous, as it is perfectly competent for a Court, before which any of the offences mentioned in s. 195 of the Criminal Procedure Code has been committed, to give a fresh sanction, if one already granted has expired by efflux of time. Were it otherwise, a party against whom sanction had been obtained would only have to keep himself out of the way for six months to determine the sanction. The Judge's remarks as to hardship and so forth are, however, apposite to the question of discretion; and if there was reason to believe that the applicant had wilfully delayed the proceedings, or was only asking for the second sanction with the view of harassing the defendant, the Munsif might have refused the application. I am, however, apart from this, of the opinion that the second sanction in the present matter was unnecessary; for the Magistrate having once taken cognizance of the case, and it still remaining on his file undetermined, it was competent for him to take it up again, at any moment, and proceed with the prosecution. The limitation of six months mentioned in s. 195 means that a Magistrate shall not take cognizance of a case under a sanction that is more than six months old, not that the whole prosecution must be completed within that period. In this [47] view of the case I need pass no order with regard to the Judge's revocation of the second sanction. But having the Magistrate's record before me, I direct him to proceed with the case in virtue of the sanction under which he first took cognizance of it.

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FULL BENCH.

6 A. 47 (F.B.) = 3 A.W.N. (1883) 198.

6 A. 47 (F.B.) = 3 A.W.N. (1883) 198.

FULL BENCH.

Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

KALIAN DAS (*Plaintiff*) *v.* BHAGIRATHI AND ANOTHER (*Defendants*).*
[30th July, 1883.]

"Haqqi-i-chaharum"—Custom—Private sale—Sale in execution of decree.

Proof of a custom whereby the zamindar of a village is entitled to one-fourth of a purchase-money when a house in the village is sold privately, is not proof of a similar custom in respect of sales in execution of decrees.

[F., 1 O.C. 2 (3); R., 8 Ind. Cas. 1092 (1093) = 13 O.C. 366 (368).]

THE facts of this case were as follows:—One Bhagirathi owned a house in a village called Mogal Sarai, which was sold in execution of a decree held by one Ramgir. Kalian Das, the zamindar of this village, claimed one-fourth of the sale-proceeds, on the ground that by the custom of the village the zamindar was entitled to one-fourth of the purchase-money of a house in the village transferred by sale; and he brought the present suit against Bhagirathi and Ramgir to recover one-fourth of the sale-proceeds in question. Both the lower Courts dismissed the suit on the ground that, although the plaintiff had proved that the custom set up by him existed in the case of private sales, he had failed to prove that it existed in the case of sales in execution of decrees. On appeal to the High Court the plaintiff contended that he was entitled under the custom set up to one-fourth of the sale-proceeds, whether the sale was a private one or in execution of a decree. The question raised by this contention was referred by the Divisional Bench (STRAIGHT and TYRRELL, JJ.) before which the appeal came for hearing to the Full Bench.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

Lala *Lalta Prasad*, for the respondent.

[48] The following opinion was delivered by the Full Bench:—

OPINION.

STRAIGHT, Offg. C.J., OLDFIELD, BRODHURST and TYRRELL, JJ.—The claim of the plaintiff to the haqq in suit was based upon custom, but the only custom established was that, upon private sales by contract between vendor and vendee, the zamindar is entitled to one-fourth of the purchase-money. Proof of a custom of this kind is not proof of a custom in respect of public sales by auction under a decree, and proof of this latter custom the plaintiff has failed to bring forward. This reference must be answered accordingly, and the case will go back to the Division Bench for disposal.

* Second Appeal No. 1313 of 1882, from a decree of D. M. Gardner, Esq., Judge of Benares, dated the 14th September, 1882, affirming a decree of Babo Madho Das, Munsif of Benares, dated the 27th June, 1882.

6 A. 48=3 A.W.N. (1883) 202.

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AUG. 2.

APPELLATE CIVIL.

6 A. 48=
3 A.W.N.
(1883) 202.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

BEHARI LAL AND OTHERS (*Decree-holders*) *v.* KHUB CHAND (*Judgment-debtor*).* [2nd August, 1883.]

Execution of decree—Costs—The decree to be executed where there has been an appeal.

The original decree in a suit dismissed the suit with costs which were specified. On appeal the appellate Court directed that the original decree should be affirmed and the appeal dismissed, and that the appellant should pay the respondent's costs in the appellate Court, which were specified. The decree of the appellate Court did not contain any specification of the costs of the original Court. *Held*, that the Court executing the appellate decree might execute it for the costs of the original Court, looking to the decree of the Court to ascertain the amount thereof.

Shohrat Singh v. *Bridgman* (1), referred to.

[R., 11 A. 267 (275) (F.B.).]

THE original decree in this case was made in a suit instituted in the Court of a Subordinate Judge, and was dated the 16th September, 1882. It directed that the suit should be dismissed, and that the plaintiff should pay the defendants a certain sum, being the costs incurred by them. The plaintiff appealed to the High Court, which, by a decree dated the 2nd May, 1881, directed "that the decree of the Subordinate Judge should be affirmed, and that the appeal should be dismissed," and that the appellant should pay a certain sum to the respondents, being the costs incurred by them in the High Court. The decree did not contain any specifi-[49]cation of the costs of the Subordinate Judge's Court. The defendants applied for execution of the decree, seeking thereunder to recover the costs of both Courts. The Subordinate Judge held that the decree could be executed only in respect of the costs of the High Court, as it was silent as to the costs of his Court, citing *Shohrat Singh* v. *Bridgman* (1). The decree-holders appealed to the High Court, contending that the decree was made before the date of the decision in *Shohrat Singh* v. *Bridgman* (1), and that case was therefore not applicable to it; and that execution should be granted as prayed.

Munshi *Hanuman Prasad*, for the appellants.

Pandit *Ajudhia Nath*, for the respondent.

The Court (STRAIGHT, Offg. C.J., and TYRRELL., J.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—The Full Bench ruling in *Shohrat Singh* v. *Bridgman* (1) is of course applicable to all decrees; it did not make but only declared the rules of law on the subject.

But inasmuch as a practice had crept into existence of specifying in figures and terms the cost of the appeal in this Court only in regard to cases when this Court's judgment and decree affirmed absolutely the decrees, the subject of appeal here, we ruled in that Full Bench case that "when the decrees of this Court in appellate jurisdiction are not so prepared as to exhibit in terms the costs of the lower Court, but the decree

* First Appeal No. 69 of 1883, from an order of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 16th February, 1883.

(1) 4 A. 376.

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of the lower Court with all its specifications is simply affirmed by and adopted in our decrees, it would then be open to the Court executing such decrees to refer to the decree thus affirmed for information as to its particular contents." That is to say as to its costs. The Court executing the decree cannot entertain any question as to the correctness of such contents, for they have been affirmed here, and the affirmed decree has become merged in that of this Court.

Without adopting the reason of the plea of the appellant we allow the appeal, and direct the Court below to execute the decree of this Court, for the costs therein affirmed of the Court of first [50] instance, as well as for the costs therein in terms set out, being the costs of this Court. The parties will pay their own costs of this appeal.

Appeal allowed.

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6 A. 50 = 3 A.W.N. (1883) 204.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

ALI MUHAMMAD KHAN (*Defendant*) v. AZIZULLAH KHAN AND OTHERS (*Plaintiffs*).* [3rd August, 1883.]

Muhammadan Law—Inheritance—Dower—Transfer by widow in possession in lieu of dower—Right of purchaser—Heirs.

Held, that a purchaser of a deceased husband's estate from a Muhammadan widow, in possession thereof, pending payment of her dower, is not entitled to plead non-satisfaction of her dower-debt to a claim by her husband's heirs for their share of his inheritance, as the widow's right to dower is personal to herself and does not pass to a purchaser of the estate *Bebee Bachan* v. *Hamid Hossein*(1) and *Bazayat Hossein* v. *Dooli Chund* (2), referred to.

[F., 17 A. 77 (81); 20 A. 262 (263); R., 32 A. 551 (558) = 7 A.L.J. 567 = 6 Ind. Cas. 376 (378); 26 Ind. Cas. 109 (110) = 12 A.L.J. 1141; A.W.N. (1890) 115.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Pandit *Ajudhia Nath*, for the appellant.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the respondents.

The Court (STRAIGHT, Offg. C.J., and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—The short facts relating to this appeal are as follows:—One Fatehmamur Khan died some twenty years ago, leaving a widow, Rahim Begam, three sons—(i) Azizullah Khan, plaintiff; (ii) Daulat Mir Khan, deceased, husband of Hanuman Bibi and father of Abul Husain Khan, plaintiff; and (iii) Hazar Mir Khan, deceased, husband of Nihali Begam, defendant No. 1. He also left two daughters, Umrao Begam and Azzan Begam, plaintiffs. On the death of Hazar Mir Khan, the name of his widow, Nehali Begam, defendant, was recorded under the description of "*waris-o-kabiz*," or "heiress and possessor," in respect of a one-ninth share of a 5 biswas patti, and a one-third

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* Second Appeal No. 476 of 1883, from a decree of Maulvi Muhammad Nasrullah Khan, Subordinate Judge of Shahjahanpur, dated the 17th January, 1883, reversing a decree of Pandit Bansi Dhor, Munsif of Tilhar, dated the 28th September, 1882.

(1) 14 M.I.A. 377. (2) 4 C. 402.

1883 AUG. 3.

APPELLATE CIVIL.

6 A. 50 = 3 A.W.N. (1883) 204.

share of 1 biswa, 13 biswansis, $6\frac{3}{4}$ kachwansis, hitherto standing in the [51] name of her deceased husband. On the 10th March, 1881, she sold her interests as above stated to defendant No. 2 Ali Muhammad Khan. The plaintiffs now sued for their share of this as the heirs of Hazar Mir Khan. Nihali Begum did not appear to defend the suit. Ali Muhammad Khan pleaded that Umrao Begam and Azzan Khan never succeeded as heirs of their father, nor made any claim to his estate, and were barred by limitation; that Nihali Begam was in possession of her husband's share in lieu of her dower-debt of Rs. 50,000; that the plaintiffs never objected to such possession and cannot recover the property, such dower-debt not being paid. The Munsif held there was no limitation as to the two daughters, and that the question of the dower-debt did not affect the case. But he was apparently of opinion that the plaintiffs had by their conduct relinquished their rights to a share in the estate left by Hazar Mir Khan. The Subordinate Judge held with the Munsif that limitation did not bar the two daughters; but he decreed the claim on the ground that Nihali Begam was not in possession of the share of her deceased husband in lieu of dower but as his heiress; and that the plaintiffs therefore were entitled to recover their shares in this estate without first offering to discharge the dower. He also was of opinion that there was no evidence of relinquishment by the plaintiffs of their rights. The only plea we feel called upon to notice in appeal is that which, assuming the answering defendant's vendor, Nihali Begam, to have been in possession in lieu of dower, maintains the incompetency of the plaintiffs to come into Court without offering, as a condition precedent, to satisfy such dower. Even granting for a moment that the Subordinate Judge's finding as to the nature of Nihali Begam's possessions was erroneous, we do not think that a purchaser of a deceased husband's estate from a Muhammadan widow, in possession thereof, pending payment of her dower, is entitled to plead non-satisfaction of her dower-debt to claim by her husband's heirs for their share of his inheritance. The right to dower is personal to herself and does not pass to a purchaser of the estate. For dower stands upon no higher or better footing than any other debt due from her deceased husband; and, except where there is a distinct agreement to that effect, there is no presumption of hypothecation of his estate for her dower to be drawn from the mere [52] circumstance that dower is due. True, if she has "obtained actual and lawful possession of his estate under a claim to hold it in lieu of her dower, she is entitled to retain possession as against the other heirs until her dower is satisfied, with the liability to account to those entitled to the property"—*Bebee Bachan* v. *Hamid Hossein* (1). But this is something short of her having an actual lien upon it, and we are unaware that their Lordships of the Privy Council have ever made any such declaration. Indeed, in *Bazayet Hossein* v. *Dooli Chund* (2) it was ruled "that the creditor of a deceased Muhammadan, *whether in respect of dower or otherwise*, cannot follow his estate into the hands of a *bona fide* purchaser for value to whom it has been alienated by the heir-at-law, whether by sale or mortgage." We cannot regard it as one of the equities of a purchaser from the widow of her husband's estate that, in the absence of any agreement to that effect, he should be considered to have acquired, not only the estate itself, but the right of the widow to hold it until satisfaction of her dower-debt. It seems to us that this

(1) 14 M.I.A. 377. (2) 4 C. 402.

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would be to give her possession a character not contemplated by the Muhammadan Law, and at any rate, until corrected by higher authority, we cannot adopt any such view. This disposes of the main argument urged for the appellant, which, though it scarcely arose on the Subordinate Judge's findings, we have thought it better to consider.

The appeal is dismissed with costs to the plaintiffs in all the Courts, and the decree of the Subordinate Judge in their favour is maintained.

Appeal dismissed.

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6 A. 52=3 A.W.N. (1883) 203.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Oldfield.

PHULAHRA (*Plaintiff*) *v.* JEOLAL SINGH (*Defendant*).*
[3rd August, 1883.]

Landholder and tenant—Ex-proprietary tenant—Suit for arrears of rent—Determination of rent—Act XII of 1881 (*N.-W.P. Rent Act*), ss. 14, 95 (1)—*Act XIX of* 1873 (*N.-W.P. Land-Revenue Act*), s. 190—Res judicata.

Except when there has been an arrangement or agreement between the parties, a landholder cannot sue his ex-proprietary tenant for rent until as a [53] precedent, he or the tenant has obtained a determination of the amount thereof, either by application to the Settlement Officer under s. 14, or to the Revenue Court under cl. (*l*), s. 95, of the Rent Act, or it has been fixed by the Collector or Assistant Collector according to s. 190 of Act XIX of 1873.

A Revenue Court cannot entertain a suit to determine the rate of rent payable by an ex-proprietary tenant, but an application only.

Held, therefore, where a landholder sued an ex-proprietary tenant for arrears of rent at a certain rate, and obtained an *ex-parte* decree for arrears of rent at that rate, and again sued the tenant for arrears of rent at the same rate, that the Revenue Court had not jurisdiction to determine the rate of rent in the first suit, and that therefore the tenant was not precluded from setting up as a defence to the second suit that it was not maintainable, as the rate of rent had not been fixed.

[F., 9 A. 165 (188).]

THE plaintiffs, landholders, sued the defendant, an ex-proprietary tenant, for arrears of rent, under the N.-W.P. Rent Act. The Assistant Collector who heard the suit dismissed it on the ground that the rate of rent payable by the defendant had not been determined, and his decision was affirmed by the District Judge on appeal. It appeared that the plaintiff had formerly sued the defendant for arrears of rent at the same rate at which she claimed arrears in this suit, and had obtained an *ex-parte* decree. The plaintiffs contended in second appeal that this decree was conclusive as to the liability of the defendant to pay the arrears claimed in this suit.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

Munshi *Sukh Ram*, for the respondent.

The Court (STRAIGHT and OLDFIELD, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—In our opinion this appeal fails and should be dismissed. We do not think that the decree obtained by the plaintiff in the former

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* Second Appeal No. 206 of 1883, from a decree of H. D. Willcok, Esq., Judge of Azamgarh, dated the 22nd September, 1882, affirming a decree of Maulvi Inam-ullah, Assistant Collector of Azamgarh, dated the 30th July, 1882.

suit can be said to have determined the rate of rent payable by the defendants, nor that the argument of the plaintiff's pleader based upon s. 13 of the Civil Procedure Code has any force. In accordance with numerous rulings of this Court, to some of which we have been parties, we hold that, except where there has been an arrangement or agreement between the parties, a landlord cannot sue his ex-proprietary tenant for rent until, as a condition precedent, he or the tenant has obtained a determination of the amount thereof, either by application to the Settlement Officer [54] under s. 14, or to the Revenue Court under cl. (*l*), s. 95 of the Rent Act, or it has been fixed by the Collector or Assistant Collector according to s. 190 of Act XIX of 1873. Such being our view, it follows that the Revenue Court cannot entertain a *suit* for determination of the rate of rent but only an *application*, and therefore in the suit, upon the decision of which the plaintiff's pleader relies, it had no jurisdiction to take cognizance of the question, its judgment is argued to have concluded. We cannot possibly hold that, the defendant not having then raised any objection to the Court's entertainment of that suit, because the rate of rent had not been fixed prior to its institution, the rate of rent, which it could not inquire into and fix, except upon *application*, has been finally determined so as to preclude him from making such a defence to the present claim. The appeal is dismissed.

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Appeal dismissed.

6 A. 54 (F.B.) = 3 A.W.N. (1883) 207.

FULL BENCH.

Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

GULABI RAI (*Plaintiff*) v. INDAR SINGH (*Defendant*).*
[8th August, 1883.]

Ex-proprietary tenant—"Transfer" of right of occupancy—Act XII of 1881 (*N.-W. P. Rent Act*), ss. 7, 9.

The words of s. 7 of the N.-W. P. Rent Act, "shall have a right of occupancy in the land held by him as *sir*," are intended by operation of law to confer upon the proprietor who has sold his proprietary rights in a mahal, irrespective of whether he claims it or not, the *status* of an occupancy tenant, to whom the prohibition of s. 9 will apply.

Held, therefore, that where a proprietor in a mahal holding *sir* land, who is selling his proprietary rights, at the same time transfers all his rights, actual, vested or contingent in such *sir* land, such transfer is one of his rights of occupancy in such *sir* land, and as such is prohibited by s. 9 of the N.-W. P. Rent Act.

[R., 7 A. 553 (559) (F.B.); 7 A. 633 (640) (F.B.); 13 A. 396 (398).]

THE plaintiff in this suit, the purchaser of the proprietary rights in a certain mahal of the defendant, sued for possession of the land held by the defendant at the time of the sale as *sir* land, claiming by virtue of the instrument of sale. That instrument transferred to the plaintiff the defendant's proprietary right in the [55] mahal in question "together with *sir* and ex-proprietary tenant's rights." The defendant set up as a defence to the suit that the sale could not legally transfer to the plaintiff

* Second Appeal No. 339 of 1883, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 23rd December, 1882, reversing a decree of Maulvi Azmat Ali, Munsif of Bulandshahr, dated the 20th September, 1882.

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his right of occupancy in the land as an ex-proprietary tenant, as such right was, under s. 9 of the N.-W.P. Rent Act, 1881, not transferable. The Court of first instance disallowed this contention, and gave the plaintiff a decree for possession of the land. On appeal by the defendant the lower appellate Court allowed the contention and dismissed the suit. The plaintiff appealed to the High Court.

The appeal came for hearing before OLDFIELD and TYRRELL, JJ., by whom the following question was referred to the Full Bench :—

"Whether a transaction of the kind out of which this suit arose is statutorily invalid under the terms of ss. 7 and 9 of the N.-W.P. Rent Act, 1881. In other words, when a proprietor, selling his proprietary rights in a mahal and holding land in such mahal at the date of the sale as his *sir*, covenants with his vendee that he conveys to him by the contract of sale all his rights, actual and vested or contingent, in such *sir*, is this part of the conveyance a "transfer of the vendor's right of occupancy, and, as such, subject to the statutory prohibition of s. 9 of Act XII of 1881?"

Pandit *Nand Lal*, for the appellant, contended that the right of occupancy as an ex-proprietor, which a person, on parting with his proprietary rights in a mahal, has in the land held by him as *sir* at the time of such parting, was, as a contingent right, transferable, such transfer not being prohibited by the Rent Act.

Pandit *Sundar Lal*, for the respondent.—Ex-proprietary rights were for the first time conferred by Act XVIII of 1873, s. 7. The object of the enactment was to provide for the maintenance of proprietors who had lost or parted with their estates, and this section conferred upon them this right by operation of law irrespective of the fact whether they claimed it or not. Section 9 of the same Act prohibited all transfers of this right, so that the right which s. 7 conferred on ex-proprietors was preserved for them, by their being disabled from parting with it.

That the words "shall have a right of occupancy, &c.," in s. 7 were not intended to confer upon them a privilege, which it was [56] optional with them to waive, is clear from the following considerations :—In the first place, if it had been so intended, the words would have been "*shall be entitled*, &c., as in s. 50 of Act XIX of 1873. Secondly, similar language is used in ss. 6 and 8 of Act XVIII of 1873, and s. 190 of Act XIX of 1873, in which it cannot have been intended to give an option. Thirdly, it would be absurd to assume that the privilege conferred upon ex-proprietors by s. 7 could be waived, as the object of the law being to confer perforce such a right, and to make them keep it perforce, it would be an anomaly that the creation of such a right, the maintenance of which is so jealously guarded, should be so very uncertain. The High Court of Allahabad held that s. 9 was enacted for the benefit of the zamindar only, with the object of preventing occupancy tenants from introducing strangers. While this view of the law was current, the case of *Umrao Begam* v. *The Land Mortgage Bank of India* (1) was decided. But the Board of Revenue differed in their interpretation, and according to them s. 9 was not enacted for the benefit of the zamindar, but of the tenant.—*Jai Ram Ojha* v. *Salig Ram* (2). Owing to the conflict of opinion an amending Bill was

(1) 2 A. 451.
(2) 1 Legal Remembrancer (N.-W. P.) Rent and Revenue Series, p. 20.

proposed. This was Bill No. 6 of 1880. In the statement of objects and reasons appended to the Bill (*Gazette of India*, 13th March, 1880) the Full Bench decision of the High Court is referred to, and it is stated that the stability of the occupancy right was the fundamental principle of the N.-W. P. Rent Act, and the interpretation given by the High Court would arm the zamindars with an additional power of turning out occupancy tenants, and that therefore s. 9 is so amended as to make it clear that all transfers of such rights, except between co-sharers or their heirs, were invalid. This provision of the Bill has been incorporated in s. 9 of Act XII of 1881. Even if the language of s. 7 be considered doubtful, the object of the law being clear, according to the rules of interpretation recognized by the English Courts, as wide a construction as can possibly be given should be given to the language of the Act, in order to meet evasions of the object of the enactment.—Maxwell on the Interpretation of Statutes, p. 91.

[57] The following opinion was delivered by the Full Bench :—

OPINION.

STRAIGHT, Offg. C. J., and OLDFIELD, BRODHURST and TYRRELL, JJ.—We are of opinion that the words of s. 7 of the Rent Act "shall have a right of occupancy in the land held by him as *sir*" are intended by operation of law to confer upon the proprietor who has sold his proprietary rights in the mahál, irrespective of whether he claims it or not, the *status* of an occupancy tenant, to whom the prohibition of s. 6 will apply. We observe that in the case referred to us the rights that would accrue to vendor upon the completion of the sale of his fractional share under s. 7 were virtually, if not in terms, conveyed to the vendee for consideration, and were not merely surrendered. The question therefore as to how the matter would have stood had there been a simple relinquishment does not arise. The answer to the reference must be that indicated above.

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APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

HIRA LAL (*Defendant*) v. RAMJAS (*Plaintiff*).* [8th August, 1883.]

Pre-emption—Suit to enforce the right of pre-emption—Non-joinder of vendor—Mortgage—Wajibularz—"*Bhai-band.*"

In a suit for pre-emption it was objected by the vendee in second appeal that the vendor had not been made a party. *Held* that, whether the omission to make the vendor a party in a suit to enforce the right of pre-emption renders the suit unmaintainable or not, as the vendee had not been prejudiced by such omission in this case, the objection taken at such a late stage of the case could not be allowed.

Held, also, that the word "*bhai-band*" in the *wajibularz* in this case meant the brotherhood of the village, and not merely those persons who were related by blood.

S.A. No. 1054 of 1881 (1), decided the 1st April 1882, referred to.

[F., 26 A. 549 (553)=1 A.L.J. 278=A.W N. (1904) 130; A.W.N. (1903) 239; R., 32 A. 14 (18); 10 O.C. 49 (53) (F.B.).]

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* Second Appeal No. 532 of 1883, from a decree of H. A. Harrison, Esq., Judge of Meerut, dated the 21st March, 1883, affirming a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 23rd December, 1882.

(1) Not reported.

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THE facts of this case were as follows:—The proprietors of a share of a certain village mortgaged the share to the defendant in this suit, Hira Lal. Thereupon the plaintiff in the suit, Ramjas, a co-sharer of the village, sued Hira Lal to enforce his right to take the mortgage, claiming by virtue of the *wajibularz*, and alleging that the [58] defendant was a "stranger," that is to say, not a co-sharer of the village. The plaintiff did not make the mortgagors defendants in the suit. The clause in the *wajibularz* relating to pre-emption ran as follows:—"If any person wishes to sell or mortgage his property, he is at liberty to do so: he should first transfer it to his *bhai-band*; and if none of them take it, then he is at liberty to transfer it to anybody else." Both the lower Courts held that the plaintiff was entitled to take the mortgage under the terms of the *wajibularz.*

In second appeal the defendant contended—(i) that the lower appellate Court had misconstrued the *wajibularz*, and that on the proper construction of the term "*bhai-band*" only blood relations were entitled to pre-emption; (ii) that the *wajibularz* did not give any right in the case of a mortgage; and (iii) that no decree affecting the mortgagors should have been made in their absence.

Pandit *Ajudhia Nath*, and Babu *Baroda Prasad*, for the appellant.

Pandit *Bishambhar Nath*, for the respondent.

The Court (STRAIGHT, Offg. C.J., and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—Dealing with the third plea first, it is to be observed that the point it raises was not taken in the lower Courts, and the only ground upon which we are invited by the appellant's pleader to consider it now is, that it assails the frame of the suit as bad "*ab initio.*" No doubt it would have been more regular and convenient had the mortgagor been joined as a defendant; but we are not prepared to hold that the failure to make him a party renders the suit unmaintainable. It must be taken as a fact that a mortgage was executed, under which the defendant acquired full rights as a mortgagee, and it is the position he has thus attained which is attacked by the plaintiff. For aught we know to the contrary, the mortgagor may not resist the plaintiff's claim; at any rate he has made no effort to have himself joined as a party to the proceedings under s. 32 of the Code. We do not feel called upon at this late stage of the case, upon the objection of the mortgagee-defendant, who has been in no way prejudiced, to take [59] notice of what at most is an irregularity that does not touch the merits.

With regard to the second plea, we agree with the construction placed upon the *wajibularz*, by the Judge, and hold that it creates a right of pre-mortgage as well as of pre-emption.

The first plea raises a question not without difficulty. Ordinarily speaking, we presume the word "*bhai band*" would be translated brotherhood, kindred, that is, related by blood. But upon consideration, and looking to the passage in the *wajibularz* as a whole, we concur with the Judge that the expression "*bhai-band*," as therein used, means the brotherhood of the village. In this connection we may remark that in S.A. No. 1054 of 1881 (1), decided the 1st April, 1882, it was never intended to lay down that a person can by purchase constitute himself a

(1) Not reported.

blood relation of another. It was decided in reference to the particular state of facts in that case, and must not be regarded as an authority for such a position as that which is indicated above. The appeal fails and is dismissed with costs.

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Appeal dismissed.

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6 A. 59 = 3 A.W.N. (1883) 207.

CRIMINAL REVISIONAL.

Before Mr. Justice Straight, Offg. Chief Justice.

IN THE MATTER OF THE PETITION OF RAHIM BIBI AND ANOTHER. [11th August, 1883.]

" *Pardah-nashin* " *woman—Personal attendance of accused person—Criminal Procedure Code*, s. 205.

Held, where a Magistrate had issued a summons to a "*pardah-nashin*" woman, alleged to be of good position, who was accused of an offence, that the Magistrate should have dispensed with the personal attendance of the accused and permitted her to appear by pleader, until such time as he had before him clear, direct, and reliable *prima facie* proof that the accused had a real charge to answer.

[R., 8 Cr. L.J. 454 = 20 P.W.R. 1908 (Cr.).]

THIS was an application by two "*pardah-nashin*" women, charged before the District Magistrate of Pilibhit with the abetment of an offence punishable under s. 494 of the Penal Code, that they might be exempted from personal appearance in the Court of the Magistrate, and that the High Court would be pleased so to direct. **[60]** It appeared that the petitioners had been summoned by the Magistrate to appear and answer such charge, and had applied to the Magistrate to be exempted from personal appearance, and he had rejected their application by an order dated the 7th June, 1883.

Mr. *Hill*, for the petitioners.

JUDGMENT.

STRAIGHT, Offg. C.J.—I think it would have been more regular and convenient had the Magistrate placed upon record his reasons for refusing the application of the female petitioners for leave to appear in Court by a pleader and not in person, more particularly as they alleged themselves to be "*pardah-nashin*" women of high position. In my opinion he might well have dispensed with their personal attendance, until he had before him some legal and satisfactory evidence indicative of some or all of them having committed a breach of the criminal law, when it would have been time enough to require them to appear. I do not say that it is so in this case, but it is quite possible for proceedings of this character to be instituted for the mere purpose of annoyance and insult, and I cannot help noticing, as a somewhat suggestive fact, that Inayat Rasul, in his complaint, scrupulously avoids asking for any process against his wife Zainab, although upon his own showing she was one of the principal actors in the transaction he alleges to have taken place. He of course knows full well that her appearance in a public Court would not only be a grave degradation to her, but also to himself, as her husband, in the eyes of the Muhammadan community to which he belongs.

I set aside the Magistrate's order of the 7th of June, and, removing the stay of proceedings granted by this Court on the 15th and 21st of

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June, in respect of the two complaints of Inayat Rasul and Najim-ud-din, I direct the Magistrate to proceed with his inquiry and to dispense with the attendance of Badrunnissa Rahim Bibi, wife of Zahur Ahmad, and Rahim Bibi, wife of Ala Bakhsh, allowing them to be represented by a pleader, until such time as he has before him clear, direct, and reliable "*prima facie*" proof, that those persons, or any of them, have a real charge to answer. He will then take such further steps as may appear to him proper and necessary.

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6 A. 61 = 3 A.W.N. (1883) 207.

[61] CRIMINAL REVISIONAL.

Before Mr. Justice Tyrrell.

EMPRESS *v.* ASGHAR ALI. [13th August, 1883.]

Summary trial—Fine—Imprisonment in default—Criminal Procedure Code, ss. 32, 33, 262—*Act XLV of* 1860 (*Penal Code*), s. 67—*Act VIII of* 1882.

In cases of simple imprisonment ordered as a process for enforcement of payment of fine, the rule of s. 262 of the Criminal Procedure Code, limiting the period of imprisonment in summary trials, does not apply, as that section only refers to substantive sentences of imprisonment.

THIS was a case reported to the High Court for orders by Mr. E. B. Thornhill, Sessions Judge of Aligarh. It appeared that a cultivator named, Asghar Ali, was summarily tried by a Magistrate for embezzlement of opium, an offence punishable under s. 19 of Act XIII of 1859. Being convicted, he was sentenced to pay a fine of Rs. 60, or in default to suffer four months' imprisonment in the Civil Jail (ss. 27, 29, *id.*). The Sessions Judge was of opinion, having regard to ss. 33 and 262 of the Criminal Procedure Code, that in a summary trial a Magistrate cannot inflict, in default of payment of fine, imprisonment for a period exceeding three months and reported the case to the High Court for orders.

JUDGMENT.

TYRRELL, J.—There is no reason to interfere. The rule of s. 262 of Act X of 1882 applies to substantive sentences of imprisonment. In cases of simple imprisonment ordered as a process for enforcement of payment of fine, the general rules of ss. 32 and 33 *id.* are applicable, and the principle of s. 67 of the Indian Penal Code (read with Act VIII of 1882) is unaffected by Chapter XXII of Act X of 1882.

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6 A. 61 = 3 A.W.N. (1883) 208.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

SARJU PRASAD (*Plaintiff*) *v.* BENI MADHO (*Defendant*).*
[15th August, 1883.]

Bond—Interest—Penalty.

The obligor of a bond agreed that, if the principal amount were not paid at the end of twelve months with the interest thereon, such interest should be

* First Appeal No. 44 of 1883, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 12th December, 1882.

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added to the principal, which together should represent the principal sum until a further year's interest at the original rate had accrued, when the same process should [62] be followed of adding unpaid interest to the principal and so on until the debt was liquidated. *Held* that the stipulation as to the annual capitalisation of principal and interest, for the purpose of carrying interest could not be regarded as removing the transaction from the region of an ordinary contract on a bond under which an obligor was bound by the terms to which he had agreed.

[F., 1 N.L.R. 9 (12).]

THE plaintiff sued the defendant on a bond, dated the 9th January, 1877. In this bond the defendant agreed to repay Rs. 3,000 which he had borrowed from the plaintiff, together with interest at Re. 1-8-0 per cent. per mensem, within one year. It was further stipulated in the bond that whatever interest should be due on the expiration of the term of the bond should be consolidated with the principal, and interest should be chargeable on it annually, and that the obligor should "continue to pay compound interest to the date of payment at the rate mentioned in the bond." The defendant not having paid anything, the plaintiff claimed Rs. 3,600, the principal amount, and compound interest at the rate of Re. 1-8 per cent. per mensem from the date of the bond to the date of the institution of the suit. The Court of first instance held that the plaintiff was entitled to compound interest, but not at the rate stipulated, but at the rate of Re. 1 per cent. per mensem. In appeal it was contended on behalf of the plaintiff that the lower Court was not competent to reduce the rate of interest.

Mr. *Conlan*, Munshi *Hanuman Prasad*, and Lala *Lalta Prasad*, for the appellant.

Munshi *Ram Prasad* and Babu *Ram Das Chakrabati*, for the respondent.

The Court (STRAIGHT, Offg. C.J., and TYRRELL, J.) delivered the following judgment :—

JUDGMENT.

STRAIGHT, Offg. C.J.—We cannot regard the terms of the bond in this case as disclosing a promise certain to pay the Rs. 3,000 at the expiration of twelve months, for breach of which the interest agreed to be paid could be regarded as in the nature of a penalty. What the defendant undertook was, that if the principal sum was not paid at the end of twelve months with the interest thereon, that such interest should be added to the principal, which together would represent the principal sum, until a further year's interest at the original rate had accrued, when the same [63] process would be followed of adding unpaid interest to principal and so on until such time as the debt was liquidated. There was nothing in the law to prohibit the defendant from entering into such a contract, and we cannot regard the stipulation, as to the annual capitalisation of principal and interest for the purpose of carrying interest, as removing the transaction from the region of an ordinary contract on a bond under which an obligor is bound by the terms to which he has agreed. The appeal must be decreed, and the Subordinate Judge's decision modified by the interest disallowed by him being decreed. Costs of this modification of the decree of the lower Court will be paid to the appellant.

Appeal allowed.

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APPELLATE CIVIL.

6 A. 63 = 3 A.W.N. (1883) 210 = 8 Ind. Jur. 319.

6 A. 63 = 3 A.W.N. (1883) 210 = 8 Ind. Jur. 319.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

BHOLA NATH AND ANOTHER (*Plaintiffs*) *v.* FATEH SINGH AND OTHERS (*Defendants*).* [16th August, 1883.]

Bond—Interest—Penalty—Act IX of 1872 (*Contract Act*), *s.* 74.

The obligor of a bond promised to pay the amount on demand with interest at the rate of Rs. 6-4-0 per cent. per mensem, to pay the interest every six months, and if he made default in the payment of the interest for any six months, to pay interest on such interest at such rate. *Held*, in a suit on the bond, default in the payment of interest as agreed having occurred, that as the obligor expressly undertook to pay such high rate of interest and there was no question of penalty, that is to say, of a liability to damages for breach of the terms of a contract in the sense of s. 74 of the Contract Act, the contract rate of interest stipulated to be paid could not be interfered with.

[F., 1 N.L.R. 9 (12); R., 26 C. 300 (308).]

THE plaintiff sued the defendants on a bond for Rs. 360, dated the 17th February, 1878. In this bond defendants agreed to pay the principal amount on demand, together with interest at the rate of one anna per rupee per mensem (Rs. 6-4-0 per cent.); that they should pay the interest every six months; and that if they failed to pay the interest for any six months, such interest should be added to the principal amount and bear interest at the rate specified in the bond. The plaintiffs stated they made demand on the 15th November, 1882. They claimed the principal amount of the bond, Rs. 360, and Rs. 5,640 interest out of Rs. 6,060-10-10 due as interest or in all Rs. 6,000. The Court of first instance being of opinion [64] that the rate of interest was "extremely high, usurious and exorbitant," allowed the plaintiffs interest at the rate only of Re. 1 per cent. per mensem, and refused to allow compound interest. In appeal it was contended for the plaintiffs that the lower Court was not competent to vary the terms of the contract regarding interest.

Pandit *Ajudhia Nath* and Babu *Ratan Chand*, for the appellants.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the respondents.

The Court (BRODHURST and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—We must allow this appeal. It is clear that the respondents undertook, by the express terms of their bond, to pay the high rate of interest demanded in this suit. There is no question of penalty, that is to say, of a liability to damages for breach of the terms of the contract in the sense of s. 74 of the Indian Contract Act. The Court below was therefore incompetent to interfere with the contract rate of interest stipulated to be paid; and we must amend the decree in this respect. The decree will be given for interest as agreed in the bond to the 15th day of November, 1882, after which date the debt will carry interest at the rate of six rupees per cent. per annum only to the date of realization. We decree the appeal with costs in proportion.

Appeal allowed.

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* First Appeal No. 57 of 1883, from a decree of Maulvi Muhammad Nasrullah Khan, Subordinate Judge of Shahjahanpur, dated the 8th February, 1883.

6 A. 64=3 A.W.N. (1883) 210.

1883 AUG. 16.

APPELLATE CIVIL.

6 A. 64= 3 A.W.N. (1883) 210.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

KUNJBEHARI LAL (*Plaintiff*) v. ILAHI BAKHSH AND OTHERS (*Defendants*).* [16th August, 1883.]

Bond—Interest—Penalty.

The obligor of a bond promised therein to pay the amount on a certain day, without interest, and, if he made default, to pay the amount with interest at the rate of Rs. 2 per cent. per mensem. *Held*, in a suit on the bond, that such interest was not penal in its character, but contract interest, the liability to pay which was not made contingent on any breach of any part of the contract, and therefore should not have been reduced.

[R., 26 C. 300 (308); 13 M.L T. 20=24 M.L.J. 135 (F.B.)=36 M. 229=18 Ind. Cas. 417; 27 Ind. Cas. 815 (818)=21 O.L.J. 79=19 C.W.N. 775.]

THE plaintiff sued the defendants, the representative of one Imam Bakhsh, deceased, on a bond, dated the 31st May, 1875. It appeared that Imam Bakhsh, being indebted to the plaintiff in the sum of Rs. 679-9-9, gave him the bond in suit, in which to secure [65] the payment of the debt, he assigned to the plaintiff rents payable to him by tenants, and agreed that if the tenants did not pay such rents he would pay the debt himself, without interest, on a certain day, and if he made default, that he would pay it with interest at Rs. 2 per cent. per mensem. The plaintiff claimed the principal amount of the bond, Rs. 679-9-9, and Rs. 1,945-12-0 interest from the date of default to the date of institution of the suit according to the rate mentioned in the bond. The lower Courts held that that rate was penal, and allowed interest at the rate of 8 annas per cent. per mensem only.

In second appeal the plaintiff contended that he was entitled to receive the interest at the rate stipulated in the bond.

Mr. *Niblett*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

The Court (BRODHURST and TYRRELL, JJ.) delivered the following judgment :—

JUDGMENT.

TYRRELL, J.—The Courts below are wrong in holding that the interest claimed by the appellant is penal in its character. It is contract interest, and the liability to pay it was not made contingent on any breach of any part of the contract. Neither was the rate so exorbitant that, even had it been penal, the Courts would have been justified in reducing it as they have done. Allowing the appeal, we decree interest at the rate secured by the bond to the date of suit, and thereafter at six per cent. to the date of our decree. The respondents will pay the appellant's costs in proportion to the modification in all the Courts.

Appeal allowed.

* Second Appeal No. 686 of 1883, from a decree of J. M. C. Steinbelt, Esq., Judge of Banda, dated the 6th March, 1883, affirming a decree of Maulvi Muhammad Wajibullah Khan, Subordinate Judge of Banda, dated the 20th December, 1882.

1883
AUG. 17.

CIVIL REVISIONAL.

6 A. 65 = 8 Ind. Jur. 321.

6 A. 65=8 Ind. Jur. 321.

CIVIL REVISIONAL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

BIBI MUTTO (*Plaintiff*) *v.* ILAHI BEGAM (*Defendant*).*
[17th August, 1883.]

Ex parte decree—Review of judgment—Civil Procedure Code, s. 623.

It is competent to a party against whom an *ex parte* decree has been made to apply for review of judgment.

[66] THE plaintiff in this suit obtained a decree against the defendants, such decree being *ex parte* as regards Ilahi Begam, one of the defendants. The defendant Ilahi Begam applied for a review of judgment on the ground (i) "that, in the copy of the plaint caused by the plaintiff to be sent to the applicant along with the summons at the time the suit was instituted, she (defendant) was entered as a '*pro forma*' defendant, whereas the plaintiff obtained an *ex parte* decree against her in a manner as if she were a regular defendant," and (ii) "that the Court paid no heed to the documents put in by the contesting defendants in the case." The Court of first instance admitted the application on both the grounds set forth above. On appeal by the plaintiff the lower appellate Court affirmed the order admitting the review.

The plaintiff applied to the High Court for revision on the ground (i) that the defendant against whom an *ex parte* decree had been made could not apply for a review of judgment, and the only course open to her was to proceed under s. 108 of the Civil Procedure Code, and (ii) that the order admitting the review was passed in contravention of the provisions of s. 626, and was therefore illegal.

Pandit *Nand Lal*, for the plaintiff.

Pandit *Bishambhar Nath*, for the defendant.

The Court (STRAIGHT, Offg. C.J., and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—We think, looking to the terms of s. 623 of the Civil Procedure Code, that it is competent to a party against whom an *ex parte* decree has been made, to apply for review of judgment. The first plea has no force and cannot be entertained. The second ground taken by the petitioner is not one we feel called upon to give effect to in revision. The application is rejected with costs.

Application dismissed.

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* Application No. 175 of 1883, for revision under s. 622 of the Civil Procedure Code of an order of A. F. Millett, Esq., Judge of Shahjahanpur, dated the 4th May, 1883, affirming an order of Pandit Bansi Dhar, Munsif of Shahjahanpur, dated the 21st March, 1883.

6 A. 67 = 3 A.W.N. (1883) 210.

1883
AUG. 20.

CIVIL REVISIONAL.

6 A. 67 = 3 A.W.N. (1883) 210.

[67] CIVIL REVISIONAL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

DOST MUHAMMAD (*Plaintiff*) v. SANJAD AHMAD (*Defendant*).*
[20th August, 1883.]

Vendor and purchaser—Arrears of Government revenue—Act IX of 1872 (*Contract Act*), ss. 69, 70.

On the date of the purchase of a revenue-paying estate there were arrears of revenue due. The instrument of sale was silent as to the party liable to pay such arrears. The purchaser was compelled to pay such arrears. *Held* that the purchaser could not recover the money so paid from the vendor.

[D., A.W.N. (1901) 37.]

THE plaintiff in this suit claimed Rs. 246-12-9. It appeared that on the 5th July, 1881, the plaintiff purchased from the defendant a certain zamindari estate. On that estate there were then due to Government certain sums of money on account of the May and June instalments of Government revenue and the costs of the measurement of certain *kachar* land. The deed of sale was silent as to the party upon whom these liabilities should fall. To save the estate from sale the plaintiff paid the money. He then brought the present suit against the defendant, his vendor, to recover it. The Court of first instance (Subordinate Judge) gave the plaintiff a decree. On appeal by the defendant the lower appellate Court (District Judge) held that the defendant was not liable to repay the money in question, the deed of sale not containing any covenant in that respect. The plaintiff applied to the High Court for revision, contending that he was entitled to recover the money under s. 69 of the Contract Act, 1872.

Babu *Ram Das Chakarbati*, for the plaintiff.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the defendant.

The Court (STRAIGHT, Offg. C.J., and TYRRELL, J.) delivered the following judgment :—

JUDGMENT.

STRAIGHT, Offg. C.J.—The views expressed by the Judge as to the legal position of the plaintiff are sound in point of law, and he rightly reversed the Subordinate Judge's decision. There was no provision in the contract of sale by which the vendor covenanted to recoup the vendee for any payment he might have to make for [68] arrears of revenue, and no relations existed between them from which any obligations of the character mentioned in ss. 69 and 70 of the Contract Act could be implied as attaching to the vendor. The application is refused.

Application dismissed.

* Application No. 191 of 1883, for revision under s. 622 of the Civil Procedure Code of a decree of W. Duthoit, Esq., D.C L., Judge of Allahabad, dated the 28th March, 1883, reversing a decree of Babu Pramoda Charan Banerji, Subordinate Judge of Allahabad, dated the 13th September, 1882.

1883 AUG. 21.

APPELLATE CIVIL.

6 A. 68 = 3 A.W.N. (1883) 212.

6 A. 68=3 A.W.N. (1883) 212.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

AMRIT LAL AND ANOTHER (*Plaintiffs*) *v.* BALBIR AND ANOTHER (*Defendants*).* [21st August, 1883.]

Civil Procedure Code, s. 13—Res judicata—*Landholder and tenant—Application for tenant's ejectment for building on land—Suit for demolition of building.*

A decision of a Revenue Court disallowing an application to eject a tenant because he has built on his land, does not under s. 13 of the Civil Procedure Code bar a suit in the Civil Court to have the buildings demolished.

[Overruled, 23 A. 486 (489) (F.B.); Appl., 8 A. 446 (448).]

THE plaintiffs in this suit sued the defendants, tenants at fixed rates of certain land belonging to the plaintiffs, for the demolition of a building erected by the defendants on the lands. They claimed on the ground that the building had been erected without their consent. The Court of first instance gave the plaintiffs a decree. On appeal by the defendants the lower appellate Court held that the suit was barred by the provisions of s. 13 of the Civil Procedure Code, as an application by the plaintiffs for the ejectment of the defendants, on the ground that they had built on the land occupied by them, thereby doing an act detrimental to the land, made under the N.-W.P. Rent Act, had been rejected by the Revenue Court.

In second appeal the plaintiffs contended that the suit was not barred by s. 13 of the Civil Procedure Code.

Munshi *Sukh Ram*, for the appellants.

Babu *Jogindra Nath Chaudhri*, for the respondents.

The Court (OLDFIELD and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—The ground on which the lower appellate Court has ruled the suit to be barred is not tenable. The decision of the [69] Revenue Court, disallowing an application to eject a tenant because he has built on the land, is no decision to bar this suit (which is to have the building demolished) in the Civil Court, under s. 13 of the Civil Procedure Code. We decree the appeal and remand the case for trial on the merits.

Appeal allowed.

* Second Appeal No. 675 of 1883, from a decree of Hakim Shah Rahat Ali, Additional Subordinate Judge of Ghazipur, dated the 21st February, 1883, reversing a decree of Munshi Kulwant Prasad, Munsif of Balia, dated the 11th September, 1882.

6 A. 69 = 3 A.W.N. (1883) 211 = 8 Ind. Jur. 320.

1883 AUG. 21.

APPELLATE CIVIL.

6 A. 69 = 3 A.W.N. (1883) 211 = 8 Ind. Jur. 320.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

FARZAND AND ANOTHER (*Decree-holders*) v. ABDULLAH (*Judgment-debtor*).* [21st August, 1883.]

Execution of decree—Joint decree-holders—Conditional decree—Refusal of some to join in applying for execution—Civil Procedure Code, s. 231.

The provisions of s. 231 of the Civil Procedure Code are not applicable to the case of joint decree-holders, the execution of whose decree is conditional on their joint performance of a particular act.

THE decree in this case, which had been made in accordance with the term of a compromise, directed that, if the holders caused mutation of names in respect of certain land to be effected in the revenue registers in favour of the judgment-debtor within one year, they should be entitled to possession of certain immoveable property but if they failed to perform this condition, the decree should become void. Three of the decree-holders, stating that they were ready and willing to perform the condition, applied for execution of the decree. The remaining decree-holders, who did not join in the application, expressed their unwillingness to accede to the condition. The Court executing the decree allowed the application, with reference to the terms of s. 231 of the Civil Procedure Code. On appeal by the judgment-debtor, the lower appellate Court held that under the circumstances the application should not be allowed, and s. 231 did not in this case authorize the decree to be executed at the instance of some of the decree-holders. In second appeal the decree-holders applying for execution contended that, so far as they were concerned, execution should be allowed.

Munshi *Kashi Prasad*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent.

[70] The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—The decree-holders obtained a decree for certain property, the execution of which is conditional on their conveying certain other property to the respondent judgment-debtor. Some of the decree-holders take out execution, but the others refuse to join them in taking out execution or in making a conveyance. Under such circumstances, the application for execution was properly dismissed. This was not a case to which the provisions of s. 231 of the Civil Procedure Code were applicable, in which partial execution in favour of decree-holders who made the application for execution could be allowed. The execution was dependent on all the decree-holders joining. The appeal is dismissed with costs.

Appeal dismissed.

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* Second Appeal No. 8 of 1883, from an order of H. D. Willock, Esq., Judge of Azamgarh, dated the 6th January, 1883, reversing an order of Rai Soti Behari Lal, Subordinate Judge of Azamgarh, dated the 13th October, 1882.

1883
AUG. 21.

CIVIL REVISIONAL.

6 A. 70= 3 A.W.N. (1883) 211.

6 A. 70=3 A.W.N. (1883) 211.

CIVIL REVISIONAL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

ISHAR DAS AND OTHERS (*Plaintiffs*) *v.* MASUD KHAN (*Defendant*).*
[21st August, 1883.]

Act I of 1879 (*Stamp Act*), *s.* 41—*Fresh suit—Costs—Civil Procedure Code, ss.* 13, 43.

The plaintiff in a suit upon a certain instrument not duly stamped was compelled to pay the amount of duty and penalty. The defendant was the person bound to bear the expense of providing the proper stamp for such instrument. The plaintiff, with reference to s. 41 of the Stamp Act, 1879, sued the defendant to recover such amount.

Held, that such amount could not be regarded as part of the costs in the suit in which it was paid, and a separate suit to recover it was maintainable.

THE plaintiffs in this suit claimed to recover from the defendant Rs. 100, the amount of stamp-duty and penalty for insufficient stamping which they had paid in respect of a certain instrument. It appeared that the plaintiffs had sued the defendant on the instrument in question, and had been compelled, in the course of that suit, to pay the duty and penalty, the amount of which they now sought to recover. The defendant was the person bound by law to bear the expense of providing the proper stamp for the instrument. The Court of first instance gave the plaintiffs a decree. [71] On appeal by the defendant, the lower appellate Court (Subordinate Judge) held that the present suit was not maintainable, observing as follows:—"The amount paid as penalty and for deficiency of stamp was a part of the costs of the former case, and should have been taken into account in that case. No separate regular suit can be maintained for the account, which may not have been included either intentionally or by mistake in the costs of that suit. S. 41 of Act I of 1879 does not direct a separate suit, nor does that Act refer to the obtaining of permission." The plaintiffs applied to the High Court for revision, contending their remedy was by suit, as contemplated by s. 41 of Act I of 1879.

Shaikh *Maula Bakhsh*, for the plaintiffs.

Munshi *Hanuman Prasad*, for the defendant.

The Court (STRAIGHT, Offg. C.J., and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—We do not concur with the Subordinate Judge's view. Unless the suit is in terms prohibited by s. 13 or s. 43 of the Procedure Code, there is no reason why it should not be maintained. S. 41 of the Stamp Act certainly does not prohibit it; indeed, the words "any certificate granted in respect of such instrument under s. 39 shall be conclusive evidence of the matters therein specified" seem to indicate the possibility of such a suit. Ss. 43 and 13 have obviously no application,

* Application No. 104 of 1883, for revision under s. 622 of the Civil Procedure Code of a decree of Maulvi Mahammad Samiullah Khan, Subordinate Judge of Aligarh, dated the 28th September, 1882, reversing a decree of Munshi Mata Prasad, Munsif of Aligarh, dated the 30th June, 1882.

nor can the penalty mentioned in s. 41 be regarded as strictly within the designation of costs. This application is allowed, and the Subordinate Judge's decision being reversed, he will restore the appeal to his file and dispose of it according to law.

1883 AUG. 21. CIVIL REVISIONAL. 6 A. 70= 3 A.W.N, (1883) 211.

Application allowed.

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6 A. 71=3 A.W.N. (1883) 216.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

GULAB RAI (*Defendant*) *v.* MANGLI LAL (*Plaintiff*).*
[23rd August, 1883.]

Suit for cancellation of bond—Value of subject-matter of suit—Jurisdiction.

The value of the subject-matter of a suit for the cancellation of a bond is to be determined with reference only to the principal amount, and not that amount together with the interest payable thereon when the suit is instituted.

[72] THE facts of this case were as follows :—On the 9th May, 1881, the plaintiff gave the defendant a bond for Rs. 5,000, payable with interest at 24 per cent. per annum, within one year or on demand, at the option of the obligee. The consideration for the bond consisted in part of Rs. 1,600 paid to the obligor. On the 24th June, 1881, the plaintiff brought the present suit for the cancellation of the bond on the ground of fraud, expressing his willingness to pay Rs. 1,600 or a part thereof, with or without interest, should the Court think it equitable that he should do so. The Court of first instance (Subordinate Judge) gave the plaintiff a decree, directing 'that on payment of Rs. 1,600, without interest, by the plaintiff, the bond for Rs. 5,000, dated the 9th May, 1881, with all the covenants and contracts specified therein, be declared null and void." The defendant appealed to the High Court. It was contended for the respondent that inasmuch as the principal amount of the bond did not exceed Rs. 5,000, the appeal should have been preferred to the District Court. For the appellant it was contended that, as the principal and interest due on the bond at the time of the institution of the suit exceeded Rs. 5,000, the appeal had been properly preferred to the High Court.

Mr. *Conlan*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and Mir *Zahur Husain*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the respondent.

The Court (STRAIGHT, Offg. C.J., and TYRRELL, J.) delivered the following judgment :—

JUDGMENT.

STRAIGHT, Offg. C.J.—We do not think that the value of the subject-matter of this appeal exceeded Rs. 5,000, and in this view of the matter the appeal lay to the Judge and not to this Court. We therefore allow the preliminary objection urged for the respondent, and return the appellant his memorandum of appeal for presentation to the proper Court. The respondent will bear his own costs in this Court.

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* First Appeal No. 34 of 1882, from a decree of Maulvi Muhammad Qayum Khan, Subordinate Judge of Bareilly, dated the 14th February, 1882.

1883 AUG. 30.

APPELLATE CIVIL.

6 A. 73 = 3 A.W.N. (1883) 221 = 8 Ind. Jur. 320.

6 A. 73=3 A.W.N. (1883) 221=8 Ind. Jur. 320.

[73] APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Oldfield.

CHUNI KUAR (*Plaintiff*) *v.* UDAI RAM (*Defendant*).* [30th August, 1883.]

Bond—Allegation of payment—Allegation of loss of document—Burden of proof.

The plaintiff in a suit on a bond for money accounted for not producing it by alleging that the defendant had stolen it. The defendant admitted the execution of the bond, but alleged that he had paid it. *Held* that the defendant was bound to begin and prove payment either by the production of the bond or other evidence or by both.

[D., 11 A.L.J. 734=20 Ind. Cas. 955; 11 A.L.J. 255=16 Ind. Cas. 878; R., 14 M.L.T. 117=25 M.L.J. 329=20 Ind. Cas. 792.]

THE plaintiff in this suit claimed the amount of a bond for money. He accounted for the non-production of the bond by alleging that it had been lost. The defendant alleged that he had paid the amount of the bond, and it had been returned to him, and was in the possession of his mukhtar's widow, who refused to give it up, having colluded with the plaintiff. The first Court (Munsif) framed as an issue for trial the following issue, *viz.*:—"Has the bond been lost as alleged by the plaintiff, or has it been returned by the plaintiff to the defendant on payment of the money by the defendant as alleged by him: who is now in possession of the bond, and how has he come in possession of it?" Upon this issue the Court observed as follows:—"The plaintiff has produced witnesses to prove the loss of the bond, but their statements are vague, insufficient and unsatisfactory. Still, as the defendant, who alleged that he, having paid the amount of the bond, had taken back the document, has failed to prove his allegation, there arises a presumption that the plaintiff's statement is correct. The defendant's objection amounts to an admission of the execution of the bond and denial of liability for its amount. After this allegation of the defendant, and want of proof of such allegation, I did not consider it necessary for the plaintiff to adduce further proof of the loss of the bond." The first Court accordingly gave the plaintiff a decree. On appeal by the defendant the lower appellate Court (District Judge) held that until the plaintiff proved the loss of the bond, and that it had not been returned to the defendant, the defendant was not bound to prove payment, and that the plaintiff had failed to prove the loss of the bond; and it therefore dismissed the suit. The plaintiff [74] appealed to the High Conrt, contending that as the execution of the bond was admitted, the burden of proving payment and the return of the bond lay on the defendant.

Pandit *Nand Lal*, for the appellant.

Pandit *Ajudhia Nath*, for the respondent.

The Court (STRAIGHT, Offg. C.J., and OLDFIELD, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—The plaintiff came into Court, accounting for his non-production of the bond by an allegation that the defendant or persons on his behalf had surreptitiously carried away the instrument

* Second Appeal No. 666 of 1883, from a decree of E. B. Thornhill, Esq., Judge of Aligarh, dated the 27th February, 1883, reversing a decree of Maulvi Mubarak-ullah Khan, Munsif of Aligarh, dated the 17th December, 1881.

from his premises. No doubt this assertion was intended to anticipate the possible production of the bond by the defendant, and the presumption of payment that might otherwise be drawn from its being in the possession of the obligor or some person on his behalf. The defendant having pleaded payment, admitted the bond and its execution, and it was for him to begin. It was only in the event of his producing the bond that the allegations of the plaintiff, as to how it was lost, became material. The Munsif therefore was in error in allowing the plaintiff to commence, though he eventually set the matter right by holding the defendant bound to prove his plea of payment. The Judge misappreciated the true effect of the plaintiff's statement as to the mode in which the bond had got out of his hands, which was to rebut the presumption that might be drawn in case the defendant produced it, or proved it to be in the hands of his agent. The plaintiff's case did not necessarily fall through, because he failed to establish an allegation, which would only become material in a certain event dependent on the defendant, who, having admitted the bond, but asserted payment, was bound to prove it either by evidence to the fact, or the production of the bond, or both. The case must be remanded to the Judge, for him to record a finding as to whether the plea of payment is established, which he will return into this Court within ten days for objections.

Cause remanded.

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6 A. 75=3 A.W.N. (1883) 212.

[75] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

UMA SHANKAR AND ANOTHER (*Defendant*) v. KALKA PRASAD AND ANOTHER (*Plaintiffs*).* [23rd August, 1883.]

Suit for possession of immoveable property—Suit for cancellation of instrument—Act XV of 1877 (*Limitation Act*), *sch. ii, Nos.* 91, 95, 138.

The purchasers of property sold in execution of a decree, having been resisted in obtaining possession of the property by a person claiming under a mortgage from the judgment-debtor, sued for possession by avoidance of the mortgage, alleging that the same was collusive and fraudulent. The plaintiffs did not ask for the cancellation or setting aside of the instrument of mortgage. *Held*, that the law of limitation governing the suit was not art. 91 or 95 of the Limitation Act, but art. 138.

Hazari Lal v. *Jadaun Singh* (1); *Ramausar Pandey* v. *Raghubar Jati* (2); *Sobha Pandey* v. *Sahodhra Bibi* (3); and *Raj Bahadur Singh* v. *Achambit Lal* (4), referred to.

[F., 6 A. 260 (262); 22 A. 90 (93); 16 B. 1 (9); R., 19 C. 629 (633); 34 C. 241 (247)=5 C.L.J. 385; 1 O.C. 178 (181).]

THE plaintiffs in this suit represented the purchaser of a house sold in execution of a decree against one Ishri Narain. The defendants opposed their obtaining possession, setting up a mortgage in their favour of a portion of the house by Ishri Narain. The plaintiffs thereupon brought this suit, claiming the following reliefs: "Proprietary possession over the entire house, by establishment of Ishri Narain's ownership

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* Second Appeal No. 594 of 1883, from a decree of H. A. Harrison, Esq., Judge of Farakhabad, dated the 14th February, 1883, affirming a decree of Pandit Jagat Narain, Subordinate Judge of Farakhabad, dated the 30th September, 1882.

(1) 5 A. 76. (2) 5 A. 490. (3) 5 A. 322. (4) 6 I.A. 110.

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6 A. 75 =
3 A.W.N.
(1883) 212.

thereto and by removal of the defendants' opposition based on the collusive mortgage, and in the event of the said mortgage-deed being of such nature that it cannot be declared to be inoperative, possession should be awarded on the unmortgaged portion of the said house in virtue of the auction-purchase right: in respect of the mortgaged portion a decree should be given to the plaintiffs declaring their title to redeem the same in future from mortgage." They also asked that a door should be closed, two platforms built by the defendants be removed, and possession be given to them of the land occupied by the platforms; also that they should be put in possession of land which the defendants had included in their own dwelling-house, and that a water-spout should be removed. There was also a claim for damages for materials appropriated. The defendants set up as a defence to the suit that it was [76] one to set aside the instrument of mortgage, to which No. 91, sch. ii of the Limitation Act, 1877, applied, and was therefore barred by limitation. The Court of first instance disallowed this defence, and gave the plaintiffs a decree for possession of the entire house, in avoidance of the mortgage set up, which it found to be fictitious and made with the object of defrauding the plaintiffs, and for the removal of the door and platforms, but dismissed the rest of the claim. On appeal by the defendants the lower appellate Court affirmed this decree. In second appeal the defendants again urged that the suit was governed by No. 91, sch. ii of the Limitation Act, and was therefore barred by limitation.

Mr. *Conlan* and Pandit *Ajudhya Nath*, for the appellants.

Pandit *Bishambhar Nath*, for the respondents.

The Court (OLDFIELD and TYRRELL, JJ.) delivered the following judgments :—

JUDGMENTS.

OLDFIELD, J.—(After stating the facts of the case, and the contention of the defendants in second appeal, continued) :—The plea, in my opinion, has no force. This is a suit to recover possession of immoveable property. It is not one to cancel or set aside the instrument under which defendants set up a mortgage. The question whether there is a mortgage in favour of defendants, which can effect the claim for possession, no doubt is raised, and called for decision, but that is a different question from one of cancellation of the instrument under which the mortgage is created. In *Hazari Lal* v. *Jadaun Singh* (1) it was held by Mr. Justice STRAIGHT that "art. 91 is intended to apply to suits of the kind mentioned in s. 39 of the Specific Relief Act, and to cases where a plaintiff seeks to have cancelled or set aside some instrument he has been induced by misrepresentation, concealment of facts, or other means of a like kind, to enter into, or where the cancelment or setting aside of an instrument is the only relief asked," and this was followed in *Ramausar Pandey* v. *Raghubar Jati* (2) and in *Sobha Pandey* v. *Sahodhra Bibi* (3), where it was held that art. 91 applied to suits of the nature of those in s. 39, Specific Relief Act, that is, to suits the object of which is to have the instrument adjudged void or [77] voidable, and an order made that it be delivered up and cancelled.

The plaint in the case before us contains no prayer for the cancellation or setting aside of the instrument, so as to make the suit of the nature of those to which art. 91 applies, as I understand that article.

(1) 5 A. 76. (2) 5 A. 490. (3) 5 A. 322.

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6 A. 75=
3 A W.N.
(1883) 212.

The avoidance of the mortgage does not necessarily involve the cancellation of the instrument. In any case the suit is one for possession of immoveable property, and is governed by the law of limitation applicable to such suits, which is not affected by the incidental question being raised whether the claim to possession can be defeated by the existence of a mortgage in favour of the defendants. This view of the law appears to be supported by the decision of the Privy Council in *Raj Bahadur Singh* v. *Achambit Lal* (1).

The 1st plea in appeal fails, and for similar reasons the 2nd plea, that art. 95, Limitation Act, bars the suit, also fails. The suit is not for relief on the ground of fraud, but for possession of property by right of auction-purchase, and the law of limitation applicable is art. 138; the period runs from the date of sale, and the suit is within time. It cannot be held that there is any possession on the part of the alleged mortgagee, prior to the sale, which can be held adverse so as to bar the suit. The finding is that there was no mortgage, the transaction being fictitious and colourable to defraud the plaintiffs who were creditors; in fact, the party really in possession was the judgment-debtor, whose interests the plaintiffs purchased. The plaintiffs' title rests on their auction-purchase. They no doubt bought whatever the judgment-debtor possessed, but they cannot be affected by a fraudulent transaction entered into by the judgment-debtor and a third party, which was merely colourable and made with a fraudulent object. I would dismiss the appeal with costs.

TYRRELL, J.—I am willing to concur in the above order.

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6 A. 78=3 A.W.N. (1883) 216.

[78] APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Oldfield.

MOTI LAL AND ANOTHER (*Plaintiffs*) *v.* MOTI LAL (*Defendant*).*
[27th August, 1883.]

Hundi—Notice of dishonour—Act XXVI of 1881 (*Negotiable Instruments Act*), ss. 93, 94, 98 (c).

In the absence of any local usage to the contrary it is just and equitable that the doctrine of notice of dishonour propounded in the Negotiable Instruments Act (XXVI of 1881) should be applied to a hundi in the vernacular, the "reasonable time" within which such notice is to be given being determined according to the circumstances of the case. *Held*, therefore, that where the holder of such a hundi, which had been dishonoured, sued the prior indorsers on it, without having given them such notice, and did not prove that they could not suffer damage for want of such notice, the suit must fail.

[F., 7 A.L.J. 815 (817)=6 Ind. Cas. 792; R., 20 B. 488 (490); 30 C. 977 (979); 26 M. 239 (241)=12 M.L.J. 267.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Mr. *Conlan* and Pandit *Ajudhia Nath*, for the appellants (plaintiffs).

The *Senior Government Pleader* (Lala *Juala Prasad*), for the respondent (defendant).

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* Second Appeal No. 1235 of 1882, from a decree of C.W.P. Watts, Esq., Judge of Agra, dated the 30th August, 1882, reversing a decree of Maulvi Muhammad Sultan Hasan, Subordinate Judge of Agra, dated the 21st August, 1881.

(1) 6 I.A. 110.

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AUG. 27.
APPELLATE CIVIL.
3 A. 78 = 3 A.W.N. (1883) 216.

The Court (STRAIGHT, Offg. C.J., and OLDFIELD, J.) delivered the following judgment :—

JUDGMENT.

STRAIGHT, Offg. C.J.—On the 28th April, 1880, the firm of Madho Ram and Uttam Chand drew a hundi for Rs. 2,500, payable 51 days after date, in favour of Moti Lal, the defendant, addressed to the firm of Chote Lal and Moti Lal. The defendant indorsed it to the firm of the other defendants, Lakhu Mal and Lakmin Chand of Faizabad, who in their turn indorsed it to the plaintiffs, who indorsed it to Shankar Lal. Shankar Lal indorsed it to another person, who presented it on the 9th June, the day before due date, to the drawees for acceptance, which was refused. Shankar Lal's indorsee then returned the hundi upon re-payment of the consideration given by him, and in the same manner Shankar Lal handed it over to the plaintiffs upon receipt of its amount, and they are the present holders. On the 24th June, the firm of Lakhu Mal and Lakmin Chand failed, and on the 21st December, 1880, the present suit was instituted against them and their indorsers, Chote Lal and Moti Lal. The latter alone defended the [79] suit. The Subordinate Judge decreed the claim, but his decision in appeal was reversed by the Judge. Both Courts agreed in finding that no notice of dishonour was ever given to the answering defendant; but while the Subordinate Judge thinks that no injury resulted to him thereby, the Judge is of opinion that he was prejudiced, for " if he had had notice at once, about the 11th or 12th June, that the hundi had been dishonoured, he might have put pressure on Lakhu Mal and Lakmin Chand, and have obtained some satisfaction from them." The first point we have to consider in appeal is, were the plaintiffs under a legal obligation to give notice of dishonour to the defendant Moti Lal ? If we are to be guided by English law, the question is beyond the region of argument, for not only is notice essential, " but it is now settled that the want of notice is a complete defence, and that evidence tending to show the defendant was not prejudiced by the neglect is inadmissible except in an action against the drawer, who had no effects in the hands of the drawee." In short, the holder of a dishonoured bill must, in an action against his indorser, and all other parties he seeks to make liable, as part of the proof of his case, established due notice to them of dishonour. If we looked to the " Negotiable Instruments Act " of 1881, which though not having force or effect in regard to an instrument of the kind sued upon may be usefully consulted, we find that the holder of a dishonoured promissory note, bill of exchange or cheque, " must give notice that the instrument has been so dishonoured to all other parties whom the holder seeks to make severally liable thereon," excepting always to the maker of promissory note or the drawee of a bill or cheque. The notice may be oral or written, and if the latter, may be sent by post, and it must either in express terms or by reasonable intendment, inform the person to whom it is addressed either at his place of business or residence, as the case may require, " within a reasonable time after dishonour," that the instrument has been dishonoured, and that he will be looked to by the holder to pay it. These provisions as to notice, however, are qualified by a declaration that it is not necessary, among other cases, " when the party charged could not suffer damage for want of notice." The " Negotiable Instruments Act " is in fact, in a general way, nothing more than a reproduction of the English law [80] on the subject, and if we were to apply the principles

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therein enunciated to the present case, it would come to this, that the plaintiffs, if they sought to make him liable, were bound to give notice of the dishonour of the hundi to the defendant, Moti Lal, at his place of business in Calcutta, within a reasonable time of their receiving notice to that effect from Shankar Lal, their indorsee; and it was upon them to show that the preceding notice from Shankar Lal's indorsee to him and from Shankar Lal to them, was also within a reasonable time, for "if there be any *laches* in the circulation of the notice back through the several parties, even though the neglect of one be compensated by the extraordinary diligence of another *laches* once committed discharge all the antecedent parties, and subsequent notices are invalid, for they are given by parties who are no longer liable on the bill" (*Byles on Bills of Exchange*, 13th Edn., p. 292). But more than this, if the principles of the "Negotiable Instruments Act" be applicable, it was in our opinion for the plaintiffs to establish, if no notice was given, that the defendant Moti Lal could not suffer damage for want of such notice. The grounds given by the Judge for holding that he was prejudiced are not sound. The reason for notice being necessary is, that the law presumes that "if the indorser has not had timely notice, the remedy against the parties liable to him is rendered more precarious" (Byles, 297). Notice to the defendant Moti Lal was not necessary to enable him to bring pressure to bear upon Laku Mal and Lakmin Chand, but in order that he might take measures to hold the drawer responsible. If then, as is found, no notice was given in fact, and the plaintiffs have failed to prove that the defendant Moti Lal could not suffer from the absence of such notice, they cannot succeed. Unless any local usage to the contrary is proved, the hundi before us being in the vernacular, we think that the doctrine of notice of dishonour, as propounded in the "Negotiable Instruments Act" may with propriety be applied, "the reasonable time" within which it is to be given being determined according to the circumstances of the case. For aught that appears to the contrary, the defendant Moti Lal was unaware, until suit was brought, that he was to be held liable nor was any mercantile usage of the kind referred to in the first plea ever set up by the plaintiffs in the lower Courts to meet the [81] defence of want of notice. It seems to us that the doctrine of notice is based upon a just and equitable principle, and that it may rightly and fairly be applied to hundi transactions. The defendant Moti Lal did not plead that the plaintiffs had been discharged from liability by the invalidity of the antecedent notice, and we do not think that question can be opened up now. But as we consider that the plaintiffs were bound to give notice of dishonour to the defendant, Moti Lal, within a reasonable time, unless they could show that he could not suffer for want of it, which they have not done, and as they gave him no notice at all, we are of opinion that the suit failed. We therefore dismiss this appeal with costs.

Appeal dismissed.

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AUG. 31.

APPELLATE CIVIL.

6 A. 81= 3 A.W.N. (1883) 222.

6 A. 81=3 A.W.N. (1883) 222.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

RIBBAN AND ANOTHER (*Plaintiffs*) *v.* PARTAB SINGH (*Defendant*).*
[31st August, 1883.]

"Landholder" and "tenant"—Suit by tenant against sub-tenant for ejectment—Act XII of 1881 *(N.-W.P. Rent Act), Ch. II (B), ss.* 93, 95, 148*—Jurisdiction of Civil Court.*

The plaintiffs, alleging that they were the occupancy-tenants of certain land, that they had sub-let its cultivation to the defendant, and that the defendant had denied their title and set up a claim to be the tenant-in-chief under the zamindar, sued in the Civil Court to establish the right they claimed to the land and for possession of the land. *Held*, that the cognizance of the suit in the Civil Court was not barred by s. 93 or 95 of the N.-W.P. Rent Act.

[R., 18 A. 270 (283) (F.B.); D., 8 A. 62 (63).]

THE plaintiffs in this suit claimed possession of certain land on the allegations that they were the occupancy-tenants of it; that they had sub-let it to the defendant on the understanding that he should pay the rent to the landholder, and them a sum of Rs. 5 annually; and that in June, 1881, the defendant refused to pay them such sum, and claimed to be tenant-in-chief of the land. The defendant set up as a defence to the suit that it should not have been instituted in the Civil Court, but in the Revenue. The Court of first instance disallowed this defence, and gave the plaintiff a decree for the land. On appeal by the defendant, the lower appellate Court held that the suit was not cognizable in the Civil Courts and dismissed it.

[82] In second appeal the plaintiffs contended that, inasmuch as the defendant had denied their title to the land and set up his own, the suit was cognizable in the Civil Courts.

Pandit *Sundar Lal*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

The Court (STRAIGHT, Offg. C. J., and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—The lower appellate Court was wrong in holding that this suit is exclusively cognizable by the Revenue Court. The plaintiffs' case was that they being occupancy-tenants of the land in dispute had sub-let its cultivation to the defendant, who after 1286 fasli denied their title and set up a claim to be tenant-in-chief under the zamindar. This suit is therefore to assert the plaintiffs' title and get the land from the defendant, who now holds it in trespass of the plaintiffs' rights. It is obvious that no suit under s. 93 of Act XII of 1881 would cover such a case as this.

It is equally clear that the provisions of Chap. II (B) of that Act do not apply to a tenant of the *status* and in the present position of the defendant. And if we are to regard the plaintiffs as "landholders" and the defendant as "tenant" in the sense of s. 148 of the Rent Act, the question being whether the plaintiffs, as they allege, or the zamindars

* Second Appeal No. 753 of 1883, from a decree of D. M. Gardner, Esq., Judge of Benares, dated the 10th March, 1883, reversing a decree of Shah Ahmad-ullah, Munsif of Benares, dated the 19th January, 1883.

according to the defendant, have received and enjoyed the defendant's rent, any decision the Revenue Court might make on the matter at issue "would not affect the right of either party entitled to the rent of the land to establish his title by suit in the Civil Court." Again, the relief sought by the plaintiffs could not be achieved by any application that they might make under s. 95 of the Rent Act, the defendant not being in the category contemplated in (*d*) or (*f*) of that section. The rules of ss. 93 and 95 therefore do not apply to this suit; and the Civil Court had no jurisdiction to try the case. Our ruling in F. A. from Order No. 147 of 1881 (1), decided the 20th March, 1882, is in point. We allow this appeal, and remand the case for disposal by the lower appellate Court on the merits. The costs of this appeal will be costs in the cause.

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Cause remanded.

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6 A. 83 = 3 A.W.N. (1883) 224.

[83] CRIMINAL REVISIONAL.

Before Mr. Justice Oldfield.

EMPRESS *v.* ANNU KHAN. [11th September, 1883.]

Criminal Procedure Code, ss. 32 (*a*), 262—*Act XLV of* 1860 (*Penal Code*), s. 73—*Summary trial—Solitary confinement.*

It is not illegal to impose solitary confinement as part of the sentence in a case tried summarily.

THIS was a case reported to the High Court for orders by Mr. H. P. Mulock, Sessions Judge of Farukhabad. It appeared that Annu Khan, who had been summarily tried for an offence, had been sentenced to solitary confinement. The Sessions Judge was of opinion that a sentence of solitary confinement could not legally be inflicted in a case tried summarily under the Code of Criminal Procedure. He observed as follows:—"It has been urged that under the latter clause of s. 262 of the Code the punishment that can be awarded in summary trials is limited to three months' imprisonment." Now, if this is read with s. 32 (*a*), it will be found that the words 'including such solitary confinement as is authorized by law' are not found in s. 262. The General Clauses Act defines 'imprisonment' as imprisonment of either description as defined in the Penal Code. I would hold, therefore, that under the terms of the latter part of s. 262 of the Code the omission of the words 'including such solitary confinement as is authorized by law,' would imply that the intention of the Legislature was that solitary confinement should not be inflicted in summary trials."

JUDGMENT.

OLDFIELD, J.—There is nothing in the terms of s. 262, Criminal Procedure Code, to make it illegal to impose solitary confinement as part of the sentence in summary trials. The effect of s. 262 is only to limit the imprisonment to a term of three months; it does not interfere with a Court's powers under s. 73, Penal Code, to order solitary imprisonment, or with the similar powers given by s. 32 (*a*) of the Criminal Procedure Code.

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(1) Not reported.

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[84] PRIVY COUNCIL.

PRESENT :

Lord Blackburn, Sir B. Peacock, Sir R. P. Collier, Sir R. Couch and Sir A. Hobhouse.

[*On appeal from the High Court, North-Western Provinces.*]

MILLER, OFFICIAL ASSIGNEE, HIGH COURT, CALCUTTA (*Plaintiff*) *v.* SHEO PRASAD (*Defendant*).

[12th, 22nd and 23rd February and 15th March, 1883.]

Stat. 11 *and* 12 *Vic.*, *Cap.* 21, *s.* 24—*Insolvency—Voluntary transfer by insolvent.*

A firm, trading in Calcutta, having been there adjudicated insolvent, the transfer of a debt, transferred by one of its branches located in Lucknow, was held upon the evidence to have been a voluntary assignment, void under s. 24 of the Statute 11 and 12 Vic, Cap. 21, as against the Official Assignee.

A draft, dated of the day on which, at night, the insolvent firm stopped payment in Calcutta, adjudication having followed on the second day after, purported to have been drawn by a debtor owing money to the Lucknow branch under its assignment in favour of the defendant to the amount of such debt. The latter received the money. *Held*, that under all the circumstances it was not necessary to decide whether the transfer was made on the date which the draft purported to bear, the conclusion, upon all the facts, being that the debt had been transferred "voluntarily" within the meaning of s. 24.

[R., 10 O.C. 305 (308) (F.B.).]

APPEAL from a decree of the High Court (17th November, 1879) (1), reversing a decree of the Subordinate Judge of Cawnpore (25th September, 1878).

The suit out of which this appeal arose was brought by the plaintiff as the Official Assignee of the estate of a firm trading in Calcutta and having branches at Cawnpore and at Lucknow. This firm stopped payment in Calcutta on the night of the 20th December, 1875, and was adjudicated insolvent on the 22nd *idem*, when the order vesting its estate in the plaintiff was made.

The defendant, a banker at Cawnpore, had a *kothi* at Lucknow also, managed by one Paras Ram, through whom he had received from the Lucknow branch of the firm above mentioned (which was styled Chote Lal Sita Ram, and was managed by one of the partners named Baij Nath), the assignment of a debt due to it from Ram Prasad, also of Lucknow, amounting to Rs. 9,436. This sum the defendant had realized.

The plaintiff's case was that this transfer was invalid under s. 24 of the Statute 11 and 12 Vic., Cap. 21, as against him having [85] been made "voluntarily" within the period within which a voluntary assignment by an insolvent was by that section rendered void. He claimed Rs. 9,436, with interest; in all Rs. 11,701.

The defence was that the transfer had been made by Baij Nath on behalf of the Lucknow branch, in the due course of business, and upon the urgent request of Paras Ram, having been effected by a "rukka," or draft, on Kanhaia Lal, a banker of Lucknow. At the hearing this rukka was produced.

Rukka written by Ram Prasad on 20th December, 1875.

My friend Lala Kanhaia Lal,—

Rupees 10,352 were due to Lala Baij Nath, Khazanchi, by me under a rukka, dated 17th May, 1875, bearing my signature. Now I draw this rukka in your favour, to the effect that under his assignment I am causing Rs. 9,452 to be paid to Lala Paras

(1) See report of this case on appeal to the High Court, 2 A. 474.

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Ram on account of his debt. Take a receipt from Lala Paras Ram according to this rukka, and enter the amount in my account. I will give you credit for this item against my item of deposit, at the time of adjustment of account. It is necessary that you should attend to this matter.

RAM PRASAD.

Received the amount of this rukka.

PARAS RAM.

In regard to whether and to what amount Sheo Prasad was indebted to Chote Lal Sita Ram, the following related to the question. It was stated that in the course of previous dealings between the two parties Baij Nath, as manager of Chote Lal Sita Ram, had drawn two hundis, one dated 15th November, 1875, and the other 18th idem, each for Rs. 2,500, and payable 61 days after date, on the Cawnpore branch of the same firm, styled Bansidhar Ghasi Ram in favour of the defendant's manager, Paras Ram. Also, that on the 2nd December, 1875, Baij Nath had drawn a hundi for Rs. 2,500, payable 51 days after the date, on the Calcutta firm styled Nanu Mal which hundi was also held by the defendant. It was not expected that these hundis would be paid, and to their amount, *viz.*, Rs. 7,500, was added a book-debt of Rs. 1,000, money said have been lent by Sheo Prasad to Baij Nath as manager of Chote Lal Sita Ram, on 3rd Badi Pus, 1932 Sambat, corresponding to 15th December, 1875. Also a balance of Rs. 427 was said to be due from Chote Lal Sita Ram, to the firm of Paras Ram Beni Madho, of Cawnpore, which Paras Ram was to pay them. Lastly, Rs. 525 were, it was stated, to be retained by Kanhaia Lal out of the amount of the [86] rukka, that sum being due to him at that time from Chote Lal Sita Ram. According to the decision of Babu Ram Kali Choudhri, the Subordinate Judge of Cawnpore, the transfer of the Rs. 9,436 was not in fact made on the 20th December, 1875, as alleged. His judgment referred to the account-books as follows :—

According to the defendant the sum of Rs. 9,152 of the *rukka* in question consists of Rs. 7,500 that was due to him by the firm of Chote Lal and Sita Ram on three *hundis*, dated 15th and 18th November, and 2nd December, 1875; Rs. 1,000 that was due to him by that firm on another account; Rs. 525 that was due to Kanhaia Lal by the same firm (which sum the defendant on taking the *rukka* engaged to pay Kanhaia Lal); and Rs. 427 that was due by the same firm to that of Paras Ram and Beni Madho (which the defendant also engaged to pay to the latter firm). It is alleged on the part of the defendant, as recorded in the proceeding of this Court, dated 11th September, 1878, that one or two days before the date of the aforesaid *rukka*, *i.e.*, on 18th or 19th December, 1875, the accounts between the firm of Chote Lal and Sita Ram and the firm of the defendant were closed by a balance being struck (*lekha deorha hogaya* is the expression used) by Paras Ram and Baij Nath. It appears that the sequence to this alleged striking of the balance was that on the 20th of December, 1875, according to the defendant's statement, Baij Nath, who managed the affairs of the firm of Chote Lal and Sita Ram, assigned the debt that was due to this firm by Ram Prasad to the defendant, and caused Ram Prasad to draw the said *rukka* in his (defendant's) favour, upon Kanhaia Lal with the view of discharging the balance, Rs. 8,500, that was found out due to defendant by adjustment of accounts on the 18th or 19th December, 1875, and also of paying a balance of Rs. 525 that was due to Kanhaia Lal, and of Rs. 427 that was due to the firm of Paras Ram and Beni Madho. Naturally, it is expected that this balancing and closing of accounts between the firm of Chote Lal and Sita Ram and that of the defendant should have been entered in the account-books of the defendant's firm at Lucknow, on the 18th or 19th of December, 1875, or at the most on the 20th of December, 1875 (Pus Badi 8th, 1932 Sambat), when the balance of the debt was also discharged by Baij Nath by means of his getting Ram Prasad to draw the said *rukka* in favour of the defendant, and when on the same date, the 20th of December, 1875, as is admitted on the part of the defendant, Kanhaia Lal also accepted the *rukka*. But this was not done. It appears from the defendant's statement, as recorded in a proceeding of this Court, dated the 16th April, 1878, that it was on the 31st of March, 1876 (Chait Sudi 6th; 1933 Sambat), that the sum of Rs. 9,452 of the *rukka* in question was credited to

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the account of the firm of Chote Lal and Sita Ram in the account-books of the defendant's firm; and on the same date also the said sum of Rs. 525 due to Kanhaia Lal was entered in them; and the said sum of Rs. 427 due to the firm of Paras Ram and Bani Madho was entered on a later date, the 25th August, 1876 (Bhadon Sudi 6th, 1933 Sambat). In explanation of this post-dating of entries connected with the sum of the said *rukka* it is stated by the defendant that the practice is that items received in cash are entered in books on the dates of their realization, and that the said items of Rs. 9,452, Rs. 525 and Rs 427 were not entered in his books on Pus Badi 8th, 1932 Sambat (20th December, 1875), because they were transferred [87] debts. But it is opposed to rules of business as well as to commonsense that when an account is finally balanced and closed by the assignment of so large a debt as Rs. 9,452, such an important event should not be recorded in account-books on the date of its occurrence." The practice pleaded by the defendant has no evidence in support of it; it is rather disproved by his own conduct, for he says that the entry of Rs. 9,452 of the *rukka* was made on 31st March, 1876, but he does not state that on that date the whole of the said sum was realized in cash. On the other hand, it appears from his statement that the sum in question was entered in his books in the account of Kanhaia Lal, whose accounts have not yet been settled. Then again the defendant states the sum of Rs. 9,452 of the *rukka* to have been entered in the account-books of Kanhaia Lal on Pus Badi 8th, 1932 Sambat, *i.e.*, 20th December, 1875, the date of the *rukka* and placed on the credit side of his (defendant's) account therein. In support of this fact the defendant made his witness, Bhondu Mal, produce two account-books of Kanhaia Lal, deceased, one of them being *rozanama-bahi* (day-book) and other *khata-bah* (ledger). But these books are quite unworthy of any credit. The item of Rs. 9,452 is credited to the defendant on Pus Badi 8th, 1932 Sambat, in leaf 127 of the *rozanama-bahi*, and the preceding leaves from 117 to 126 (both inclusive) are not to be found in the book. The displacement of these ten leaves is a circumstance of strong suspicion.

The Subordinate Judge, having found that the transfer was made after the vesting of the insolvent's estate in the Official Assignee, decreed in favour of the plaintiff.

On appeal to the High Court (STUART, C.J., and PEARSON, J.) this was reversed. The Chief Justice was of opinion that the 20th December, 1875, was the true date of the rukka, and that pressure had been put upon Baij Nath. In this decree PEARSON, J., concurred, holding that the single point for decision was whether the assignment had been made before, or after, the vesting order.

On this appeal

Mr. *Graham*, Q. C., and Mr. *Woodroffe*, appeared for the appellant.

Mr. *Leith*, Q. C., and Mr. *Doyne*, for the respondent.

For the appellant it was argued that even if the rukka was made, as alleged, on the 20th December, 1875, still the transfer was a "voluntary" one, and void under s. 24 of the Statute 11 and 12 Vic., c. 21. The transfer plainly appeared to be voluntary when the absence of any actually existing debt, then due from Chote Lal Sita Ram to Sheo Prasad, was considered. To put Sheo Prasad in funds either to take up or eventually to meet hundis due at a future date differed from the payment of a pressing liability. [88] The other items contributing to make up the alleged debt due to Sheo Prasad were not debts due to him from Chote Lal Sita Ram except the sum of Rs. 1,000 as to which the evidence was unsatisfactory. Mixed up together as were the matter of the hundis, the borrowing of the Rs. 1,000 currency note, and the defendant's undertaking to see that two other parties received what was due to them, the consideration for the transfer of Rs. 9,436 could not be said to have been clearly established. As to there having been pressure put upon Baij Nath by Paras Ram, it was difficult to see how, in regard to the nature of the alleged liabilities, Paras Ram could be in a position to press them.

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Without explanation far more complete than that which had been given, the transaction must be treated as a voluntary transfer.

For the respondent, reliance was placed on the evidence showing that the rukka was made on the 20th December, 1875. Paras Ram knew that the hundis would not be paid at their due date, and therefore to treat them practically as if they had been already returned unpaid, or dishonoured was not contrary to the due course of business under such circumstances.

It was a reasonable act so to do; and no collusion or fraud had been established. The transaction had actually preceded the insolvency in point of time; and this, coupled with its *bona fide* character, was sufficient to protect it.

In the arguments on both sides reference was made to the following cases, decided upon the former law of Bankruptcy in England under the Statute 6, Geo. IV, c. 6, s. 13—*Strachan* v. *Barton* (1), *Mogg* v. *Baker* (2), *Morgan* v. *Brundrett* (3), *Cook* v. *Rogers* (4). Counsel for the appellant were not called on to reply.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR RICHARD COUCH.—This is an appeal in a suit brought in the Court of the Subordinate Judge of Cawnpore by Mr. A. B. Miller, the Official Assignee of the High Court at Calcutta, as the assignee of the state and effects of Lala Baij Nath deceased, Bansidhar and Ghasi Ram, insolvents. Baij Nath and Bansidhar [89] were brothers, and Ghasi Ram, is the son of a deceased brother, Sita Ram, and they carried on business in partnership at Calcutta, Lucknow, and Cawnpore, as bankers and piece-goods merchants. The firm at Calcutta was Nanu Mal; at Cawnpore, Bansidhar Ghasi Ram, and at Lucknow the banking business was carried on under the style of Chote Lal Sita Ram, and the piece-goods business of Bansidhar Ghasi Ram. The business at Calcutta was managed by Bansidhar, that at Lucknow by Baij Nath, and that at Cawnpore by one Sheo Dial as *munid* (agent). The Calcutta firm stopped payment at midnight on the 20th of December, 1875, and were adjudicated insolvents on the petition of two of their Calcutta creditors, on the 22nd of December. The defendant carried on business at Lucknow under the style of Sheo Prasad, Khazanchi. His business was managed by his brother-in-law, Paras Ram, who was himself a partner in a firm at Cawnpore, styled Paras Ram Beni Madho.

The Official Assignee in his suit alleged that one Munshi Ram Prasad, a resident of Lucknow, owed Rs. 9,436 to the banking firm of Chote Lal Sita Ram at Lucknow, and that Baij Nath who died in 1876, colluded with the defendant Sheo Prasad, and fraudulently transferred this debt to him, and in the account-book wrongly entered the date 21st December, 1875, and that the defendant had recovered the debt from Ram Prasad, and the Official Assignee demanded the amount of it with interest.

The defendant to his written statement said that there were dealings between his firm and the firm of Chote Lal Sita Ram at Lucknow; and with reference to the money dealings from the 13th July to the 14th December, 1875, Rs. 9,452 were found due by Baij Nath, and on the

(1) 25 L.J. Exch. N.S. 182.
(2) 4 Mee. and Wels. 348.
(3) 5 Barn. and Ad. 289.
(4) 7 Bingham 438.

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20th of December, 1875, Ram Prasad drew, under the assignment of Baij Nath, a rukka for Rs. 9,452 through Paras Ram, on account of the money due to the defendant upon one Kanhaia Lal, deceased, a banker resident at Lucknow; that Kanhaia Lal, according to the rukka, dated 20th December, 1875, made entries in his own firm, according to banking usage, against the defendant's name, in respect of the item of Rs. 9,452, and the said item is shown in Kanhaia Lal's account-books to the defendant's credit.

[90] On the 16th of April, 1878, the Subordinate Judge recorded as the issues in the case:—

1. When did the transfer of the principal sum in suit take place? Is the transfer unlawful, and was it fraudulently made or not?

2. Is the plaintiff entitled to interest?

On the 11th September, 1878, before he proceeded to take evidence, he questioned the pleaders of both parties, and recorded that the plaintiff's pleader stated that the plaintiff claimed to have the transfer declared invalid, on the grounds—

1st. That it was really made after the 22nd of December, 1875, and was made fraudulently.

2ndly. Even granting that the transfer took place before the 22nd December it was voluntarily made and was invalid under s. 24 of the Indian Insolvency Act.

The Subordinate Judge does not appear to have made any alterations in the issues which he had recorded, but their Lordships think this was not necessary, and that the question whether the transfer was voluntary and fraudulent and void as against the assignee was sufficiently raised.

The Subordinate Judge made a decree for the plaintiff for Rs. 9,436-12-0 and Rs. 2,264-13-0, interest thereon, for reasons which will be afterwards mentioned, and this was reversed by the High Court, which dismissed the suit with costs.

Their Lordships have come to the conclusion that the transfer was voluntary, within the meaning of s. 24 of the Indian Insolvency Act 11 & 12 Vic., c. 21. That section is:—

"And be it enacted that if any insolvent who shall file his petition for his discharge under this Act, or who shall be adjudged to have committed an act of insolvency, shall voluntarily convey, assign, transfer, charge, deliver, or make over, any estate, real or personal, security for money, bond bill, note, money property, goods or effects whatsoever to any creditor, or to any other person in trust for or to, or for the use, benefit, and advantage of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, if made when in insolvent circumstances, and within two months before the date of the petition of such insolvent, or of the petition on which an adjudication [91] of insolvency may have proceeded, as the case may be, or if made with the view or intention, by the party so conveying, assigning, transferring, charging, delivering, or making over, or petitioning the said Court for his discharge from custody under this Act, or of committing an act of insolvency, shall be deemed and is hereby declared to be fraudulent and void as against the assignees of such insolvent."

The plaintiff having proved, by a deposition taken at Calcutta, that the order of adjudication was made on the 22nd December, examined as a witness Sheo Dial, who was the agent of the insolvent firm at Cawnpore, and became the servant of the official assignee. He said the account-books of the firm of Chote Lal Sita Ram at Lucknow were stolen on the 11th of March, 1878, and in December, 1877, he examined the account of the defendant in those books. He produced a memorandum

from which he stated that on the 21st of December, 1875, Rs. 9,636-12-0 were entered on the credit side, and Rs. 9,436-12-0 on the debit side, in the cash book of Chote Lal Sita Ram, after adjustment, and by both these items the account of Sheo Prasad was closed in this way, that there was a balance of Rs. 200 due by Sheo Prasad; that the firm at Cawnpore was under his management, and at 4 A.M. on the 21st of December he learnt from Beni Madho (not the brother of Paras Ram), that the firm of Baij Nath had failed. The items entered in the account-books were in Baij Nath's handwriting.

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The principal witness for the defendant was Paras Ram, who said:—

"I was manager (*muthamim*) of the firm of Lala Sheo Prasad, situate at Lucknow, and used to do all the work of the firm of Lala Sheo Prasad. Rs. 8,500 were due by the firm of Baij Nath, styled the firm of Chote Lal and Sita Ram, up to the 20th of December, 1875, in this way, that there were three hundis drawn by Baij Nath, aggregating to Rs. 7,500, and a currency note for Rs. 1,000 was lent to Baij Nath; that up to the 20th December, 1875, the term of none of the three hundis had expired. Before the 20th of December, 1875, I had pressed the demand for Rs. 8,500 on Baij Nath, and the reason for my making the demand before the expiry of the term of the hundis was that Baij Nath, having drawn a hundi for Rs. 5,000, had gone to the Bank of Bengal for borrowing money, and the Agent to the Bank of Bengal at Lucknow [92] refused to give money, saying that he had been prohibited to receive his (Baij Nath's) hundis by the Calcutta Bank, and consequently he would not take his hundi. This happened two or three days previous to the 20th of December, 1875; consequently I made the demand on Baij Nath on 20th December, 1875, and he then caused Rs. 8,500 to be paid by Munshi Ram Prasad. I had told Baij Nath to give me Rs. 8,500 in cash. Baij Nath then said, 'I have no money in cash; money is due to me from Munshi Ram Prasad. Accompany me, and I will make him pay money to you.' I immediately proceeded with Baij Nath to Munshi Ram Prasad's house, and Baij Nath said to Munshi Ram Prasad, 'Lala Sheo Prasad is pressing his demand hard on me: give whatever money is due to me by you.' Munshi Ram Prasad then, having adjusted the account, struck a balance of Rs. 9,452 against himself, and he drew a rukka on Kanhaia Lal, banker, resident of Lucknow, to the effect, 'Pay Rs. 9,452 to Lala Paras Ram,' and Kanhaia Lal, on seeing the rukka, debited Rs. 9,452 to Munshi Ram Prasad in his account-books, and credited the same to my account. Some of those persons who have monetary dealings with the firm of Lala Sheo Prasad at Lucknow sometimes make debit and credit entries in my name in their account-books, but the monetary dealings are carried on for the firm of Lala Sheo Prasad. Baij Nath caused Rs 9,452 to be paid to me by Munshi Ram Prasad, for this reason, that Rs. 8,500 were paid in the account of Lal Sheo Prasad, and Rs. 525 were given, it being due to Kanhaia Lal, on whom the rukka was drawn, and Rs. 427, due to the firm of Paras Ram and Beni Madho in Cawnpore, was caused to be paid. At the time when Munshi Ram Prasad wrote the rukka on Kanhaia Lal for Rs. 9,452, Lachman Prasad, Daroga Maulvi Faqir-ulla, Lala Baij Nath and I were present, and Munshi Ram Prasad, having written the rukka, had given it to me before Baij Nath, and took back a rukka of his from Baij Nath. I sent the rukka written by Munshi Ram Prasad to Kanhaia Lal through Becha peon, employed in the Bank, and Kanhaia Lal, on seeing the same, accepted it. At the time when the sum of Rs. 427 was caused by Baij Nath to be paid to the firm of Paras Ram Beni Madho, the whole amount due to Paras Ram Beni Madho had not been paid in full. The debit and credit entries in the books of the firm of Lala Sheo Prasad were made on the 31st March, 1876, in respect of Rs. 9,452. The debit and credit entries regarding the rukka of the 20th December, 1875, were delayed and made on the 31st March, 1876, because when the accounts of Kanhaia Lal were compared, then this item was debited and credited; this item was not an [93] item of cash, and consequently it was not debited and credited immediately."

The Judge, on the 26th of August, 1878, ordered a commission to be issued to three experts to examine the defendant's account-books, and on the 11th of September, 1878, they reported as follows:—

"The item of Rs. 9,452, entered in *rokar-bahi* (cash book), page 218, as credited to Chote Lal Sita Ram, on account of assignment made against Munshi Ram Prasad, has been credited on 6th Sudi Chait, Sambat 1933, corresponding to 31st March, 1876, and in its detail the following words are written, '8th Badi Pus, debited to Kanhaia

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Lal, caused to be paid by Munshi Ram Prasad.' The items comprising this item appear to be entered on the debit side as follows :—

	RS.	A.	P.
"Page 181, 3rd Badi Pus, Sambat 1932, corresponding to 15th December, 1875, one note, No. 88969 L. 53, through Umrao Ali ...	1,000	0	0
"Page 26 of the naql (bahi). 2nd Badi Pus, Sambat 1932, one hundi drawn by Chote Lal Sita Ram, at Cawnpore, upon Bansidhar Ghasi Ram, payable 61 days after 2nd Badi Mangsar, credited to Surat Changa Mal, and money paid on 13th Badi Pus ...	2,500	0	0
"Page 218 of *rokar-bahi*, 6th Sudi Chait, Sambat 1933, corresponding to 31st March, 1876,--			
"One hundi drawn on Calcutta by Chote Lal Sita Ram upon Nanu Mal, in my (*i.e.*, Sheo Prasad's) favour, payable 51 days after 5th Sudi Mangsar, credited to Ajudhia Prasad ...	2,500	0	0
"One hundi drawn at Cawnpore by Chote Lal Sita Ram, upon Banshidhar Ghasi Ram, in favour of Paras Ram, payable 61 days after 5th Badi Mangsar, credited to Gur Prasad Shukul.	2,500	0	0
"On Pus Badi 8th, Sambat 1932, credited to Kanhaia Lal ...	525	0	0
	5,525	0	0
"Page 264 of *rokar-bahi*. 6th Sudi Bhadon, Sambat 1933, corresponding to 25th August, 1870, credited to Lala Paras Ram, and debited to Chote Lal Sita Ram ...	427	0	0

"All these items amount to Rs. 9,452, mentioned above."

[94] Except the entry in the cash book, the only evidence of the loan of Rs. 1,000 is the vague statement of Paras Ram that a currency note for Rs. 1,000 was lent to Baij Nath, but their Lordships will take it as a fact that this sum was lent on the 15th of December. The next three sums of Rs. 2,500 each are the amounts of three hundis drawn by one of the insolvents' firms upon another of them. These hundis were drawn in favour of Paras Ram, as the defendant's agent, and had been discounted by him, and were on the 20th of December in the hands of third persons. They were subsequently taken up by the defendant, or debited to him by the holders. There was thus a contingent liability on the part of the defendant on these hundis, and on the 21st of December the parties must have had full knowledge that they would be dishonoured. Their Lordships are not prepared to say that the transfer, so far as it provided the defendant with funds to meet the hundis, would as a matter of law be voluntary within the meaning of the Insolvent Act, but the transaction was out of the ordinary course of business, and there was no satisfactory explanation of the delay in making the entry of it in the defendant's books.

Looking at this part of the transaction alone, there is strong *prima facie* ground for thinking that it was done with the view of preferring the defendant. But the hundis are mixed up with the other items, and the whole formed one transaction. The next item is the Rs. 525, said to be credited to Kanhaia Lal on the Hindu date corresponding to the 20th of December. But it is taken from page 218 of the cash book, and was not entered in it till the 31st of March, 1876. As to this sum there is only Paras Ram's statement that it was due, and the evidence of Bhondu Mal, who said, "Baij Nath Lal had given permission to Kanhaia Lal to make a deduction of Rs. 525 from the amount of the rukka. This permission was received two days before the execution of the rukka, and for two days I had been demanding money from Baij Nath." The remaining item of Rs. 427 was not credited to Paras Ram and debited to the insolvents' firm until the 25th of August, 1876, and is clearly a voluntary payment.

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Turning now to the books of Kanhaia Lal, their Lordships find fresh cause for suspicion. They were produced by Bhondu Mal, [95] his grandson, he having died on the 30th of November, 1876. As to these books, the report of the experts, to whom they were referred for examination, is as follows:—

"In obedience to your order, we have inspected and examined the said account-books, and it appeared to us that the accounts of Paras Ram are entered at leaf 56 of these account-books. In it, on the credit side, an item of Rs. 9,452 is entered, with reference to the day-book, leaf 127, in this way—'Credited to Paras Ram on Pus Badi 8th Sambat 1932, Anglice 20th December, 1875, (and) debited to Munshi Ram Prasad.' In the same day-book, at leaf 127, Rs. 9,452 are debited to Munshi Ram Prasad, and in its detail the following words occur:—'Pus Badi 8th Sambat 1932, Anglice 20th December, 1875, credited to Paras Ram the amount of a rukka.' In this day-book the first three leaves have not been paged, and then the 4th leaf has been paged, and the account commences to be written on the back of the leaf marked 4, and the pages have been regularly numbered up to leaf 116. The next leaf should have been numbered 117, but in this day-book leaf 127 is in place of 117; from leaf 117 up to 126, ten leaves are wanting in the account-book. In this day-book, at leaf 127, an item of Rs. 13-2-3 is debited to Kanhaia Lal, and in the account of Kanhaia Lal the said item of Rs. 13-2-3, which is entered on the debit side, has been posted from the day-book, and leaf 117 is mentioned. The cash balance, which has been struck in the day-book, is in regular order."

This view was adopted by the Subordinate Judge, and it is unnecessary to state what he said.

Another suspicious fact is, that the rukka, which was drawn by Ram Prasad, says, "Rs. 10,352 were due to Lala Baij Nath, Khazanchi, by me under a rukka, dated 17th May, 1875, bearing my signature. Now I draw this rukka in your favour, to the effect that, under his assignment, I am causing Rs. 9,432 to be paid to Lala Paras Ram, on account of his debt," and there is no evidence that any part of the Rs. 10,352 had been paid by Ram Prasad. For aught that appears, the balance of Rs. 900 may have been given up to Ram Prasad.

These are the material facts in the case, and upon consideration of all the circumstances, their Lordships have come to the conclusion that the transfer was voluntary within the meaning of the Insolvent Act, and fraudulent and void as against the assignee.

[96] It is therefore unnecessary to decide whether the transfer was made on the 20th of December. The Subordinate Judge put the burden of proof of this upon the defendant, and found that it was not; and inferring from this and the entries in the defendant's books, and the abstraction of the leaves from Kanhaia Lal's book, that it was made after the 22nd December, he made a decree for the plaintiff. Their Lordships are not prepared to say that he was right as to the burden of proof, or whether his conclusion as to the time of the transfer was a right or a wrong one; but they consider that justice to him requires them to say that, so far from thinking, as the Chief Justice in his judgment on the appeal says, that "the Subordinate Judge does not appear to have understood the law on the subject, but has occupied himself with irrelevant and trivial considerations and details quite immaterial to the case," they are of opinion that he had before him a case upon which he might come to the conclusion to which he came. Their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, and to affirm the decree of the Subordinate Judge, with costs. The respondents will pay the costs of this appeal.

Solicitors for the appellants: Messrs. *Watkins* and *Lattey*.

Solicitors for the respondent: Messrs. *W.* and *A. Ranken Ford*.

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CRIMINAL REVISIONAL.

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CRIMINAL REVISIONAL.

Before Mr. Justice Tyrrell.

IN THE MATTER OF THE COMPLAINT OF ISHRI *v.* BAKHSHI AND OTHERS [20th September, 1883.]

Criminal Procedure Code, s. 250—Case instituted "upon complaint"—Frivolous or vexatious complaint—Compensation.

A case instituted by the police, on a complaint to them, is not instituted "upon complaint" in the sense of s. 250 of the Criminal Procedure Code, and therefore in such a case an order awarding compensation made under that section is illegal.

[F., 7 M. 563.]

THIS was a case reported to the High Court for orders, under s. 432 of the Criminal Procedure Code, by Mr. F. N. Wright, Magistrate of the Meerut District. It appeared that one Ishri had preferred a complaint to the police that five men had forcibly prevented him from driving to the pound certain cattle which had [97] been trespassing on his land, thereby committing an offence punishable under s. 24 of Act I of 1871. The police made an inquiry and sent up the five persons accused by Ishri for trial. The Subordinate Magistrate before whom the case came for hearing dismissed the complaint as being false and vexatious, and ordered Ishri, under s. 250 of the Criminal Procedure Code, to pay a sum of Rs. 10 to each of the five accused as compensation. The Magistrate of the District being of opinion that the case had not been instituted "upon complaint," within the meaning of s. 250, and that therefore the Subordinate Magistrate had no power to award compensation, reported the case to the High Court for orders.

JUDGMENT.

TYRRELL, J.—This case was not instituted "upon complaint," in the sense of s. 250 of the Criminal Procedure Code. The order made under that section by the Magistrate was therefore illegal. It is set aside, and the money, if paid, will be refunded.

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6 A. 97=3 A.W.N. (1883) 224.

CRIMINAL REVISIONAL.

Before Mr. Justice Tyrrell.

EMPRESS *v.* DWARKA PRASAD. [25th September, 1883.]

Furnishing false information—Cheating—Act XLV of 1860 *(Penal Code)*, ss. 177, 182, 415.

A person attempted to obtain his recruitment in the police of a district by giving certain information which he knew to be false to the District Superintendent of Police. *Held* that such person had not thereby committed an offence punishable under s. 177 or s. 188 of the Indian Penal Code, or the offence of attempting to "cheat" within the meaning of s. 415 of that Code.

[R., 15 A. 210 (215); 13 B. 506 (512); 1 P.R. 1907 (Cr.)=32 P.L.R. 1907.]

THIS was an application to the High Court for revision of the order of Mr. H. P. Mulock, Sessions Judge of Farukhabad, dismissing the

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appeal of the applicant, Dwarka Prasad, who had been sentenced to three months' rigorous imprisonment by Mr. J. Denman, Assistant Magistrate of the first class, under ss. 177 and 182 of the Indian Penal Code. It appeared that Dwarka Prasad had applied to the Farukhabad District Superintendent of Police to be enlisted in the Police of the district, and knowing that there was a rule which prohibited the enlistment of residents of a district into the Police of that district, had falsely stated to the Superintendent that he was not a resident of the Farukhabad District. The Magistrate on these facts convicted Dwarka Prasad of offences punishable under ss. 177 and 182 of the Indian Penal Code, [98] on appeal by Dwarka Prasad the Sessions Judge was of opinion that, although the acts of the appellant did not constitute either of those offences, they did constitute the offence of attempting to cheat, and dismissed the appeal.

The applicant was not represented.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENT.

TYRRELL, J.—The Sessions Judge is doubtless right in holding that the petitioner, who made a prevaricatory statement in respect to his place of residence, in order to facilitate his recruitment in the Farukhabad police force, has not committed the offence contemplated by ss. 177 or 182 of the Indian Penal Code. But the Judge is no less wrong than the Magistrate in finding that the acts alleged against the convict constitute the offence of cheating as defined in s. 415 of the Indian Penal Code. The element of "fraud or dishonesty" is absent from these circumstances; and there is no attempt to show that the convict's acts "caused or was likely to cause damage or harm in body, mind, or reputation" to the person whom he is supposed to have misinformed as to his ordinary place of residence. The finding and sentence are cancelled.

Conviction quashed.

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CRIMINAL REVISIONAL.

Before Mr. Justice Tyrrell.

EMPRESS *v.* NAROTAM DAS. [2nd October, 1883.]

Sanction to prosecution—Nature of sanction—Preliminary inquiry—Criminal Procedure Code, ss. 195, 215, 476—*Illegal commitment—Want of evidence.*

The Court of an Assistant Collector is not subordinate to that of the Magistrate of the District, within the meaning of s. 195 of the Criminal Procedure Code.

Sanction to a prosecution granted under s. 195 should specify the Court or other place in which, and the occasion on which, the offence was committed, and such sanction should not be granted without a preliminary inquiry, where such inquiry is "necessary," within the meaning of s. 476 of the Code.

Where sanction to the prosecution of a person for the offence of using certain evidence known to be false was granted by a Court to which the Court in which such evidence was used was not subordinate, and such sanction did not specify the place in which, and the occasion on which, such offence was committed, and the Court granting the sanction did not make any preliminary inquiry, although such an inquiry was "necessary" in the sense of s. 476 of the Criminal Procedure [99] Code; *held* that the indispensable preliminary conditions of s. 195 of the Code being wanting to the prosecution, the committing Magistrate was incompetent to entertain the case, and the commitment was illegal, and should be quashed.

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Held also that the fact that there was not any evidence to connect such person with the use of such false evidence, was a defect in law sufficient to justify the quashing of the commitment.

[R., Rat. Un. Cr. C. 423 (424); Not F, 27 M.L.J. 593 = 25 Ind. Cas. 993 = 15 Cr. L.J. 665.]

THIS was an application to the High Court to quash a commitment to the Court of Session made by Munshi Behari Lal, exercising the powers of a Magistrate of the first class in Azamgarh District. It appeared that in the year 1879, one Bisheshar Prasad, whose name was recorded in the revenue registers as the proprietor of a six annas share in a village in the Azamgarh District, called Shahbazpur, died. His heirs, among whom were Narotam Das, the applicant in this case, made a joint application to the Assistant Collector having jurisdiction in the matter, to have the name of Bisheshar Prasad expunged, and the names of his heirs entered in its stead, and to have the name of Narotam Das entered as lambardar. In April, 1880, the Assistant Collector made an order granting this application. On the 27th February, 1882, an application was made in the name of Narotam Das to have the crops of one Phiran, a tenant of the zamindars of Shahbazpur, distrained for arrears of rent for 1289 Fasli. Phiran made an application contesting the legality of the distraint, on the ground, among others, that rent at an enhanced rate had been wrongfully claimed. In answer to this application a written statement was filed in the name of Narotam Das, in which it was alleged that Gulzar, the son of Phiran, had on the 2nd May, 1877, executed a kabuliat agreeing to pay an enhanced rent for his father's holding. On the 6th May, 1882, to support this allegation, a kabuliat to that effect was filed in the name of Narotam Das, which purported to have been executed by Gulzar on the 2nd May, 1877. Gulzar, who was prosecuting the application to contest the legality of the distraint on his father's behalf, denied that he had executed the kabuliat. The Assistant Collector trying the case decided that the kabuliat was not binding on Phiran, as he had not executed it and it was not shown that he had accepted it, observing at the same time that Gulzar's allegation that he had not executed the kabuliat was not to be favoured. On the 22nd March, 1883, Gulzar made an application to the Magistrate of the Azamgarh Dis-[100]trict, in which he alleged that on the date on which the kabuliat was executed he was in jail, and it was a forgery, and praying for sanction to prosecute any one he might think proper in respect of the kabuliat. The Magistrate of the district, by an order dated 5th April, 1883, granted the application. The order was in the following terms:—'Having been brought forward to-day along with the record, it appears that the matter is a suspicious one; hence it is proper that permission to bring a charge be given." On the 9th May, 1883, in pursuance of this sanction, Gulzar preferred a complaint in which he prayed that Narotam Das, the writer of the kabuliat, and the attesting witnesses, might be punished for forgery, and using a forged document as genuine knowing it to be forged. The case was inquired into by Munshi Behari Lal, Magistrate of the first class, who eventually, by an order dated the 21st June, 1883, committed Narotam Das for trial before the Court of Session on a charge of using evidence known to be false, an offence punishable under s. 196 of the Indian Penal Code; the writer of the kabuliat on a charge of fabricating false evidence, an offence punishable under s. 193; and the attesting witnesses on a similar charge.

Narotam Das applied to the High Court to quash the commitment as illegal. **1883 OCT. 2.**

Messrs. *Colvin, Conlan, Hill* and *Spankie*, Munshi *Ram Prasad*, and Pundit *Sundar Lal*, for the applicant. **CRIMINAL REVISIONAL.**

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

6 A. 98=3 A.W.N. (1883) 225.

JUDGMENT.

TYRRELL, J.—The commitment of Narotam Das is bad from every point of view, but its legal defects only may be considered at present.

The committing Magistrate had no jurisdiction to take cognizance of the case, for the provisions of s. 195 (*b*) of Act X of 1882, restraining all Courts from taking cognizance of an alleged offence punishable under s. 196 of the Indian Penal Code, except with lawful sanction previously obtained, have been wholly neglected. The Court of the Assistant Collector was the Court to which application should have been made, in the first instance, for sanction for this prosecution on the charge of an offence said to have been therein committed (s. 195). But no application was **[101]** made to this Court; nor was an application made to some other Court to which that Court was subordinate. The application was made to the Magistrate of the district, to whom the Assistant Collector is in no way subordinate in the sense of s. 195. Again, the sanction given by the Magistrate failed to specify the Court or other place in which, and the occasion on which, the offence was committed. Now, this is not a mere technical omission, but a defect of grave import, which must prejudice the person concerned in his defence and otherwise; and lastly, no preliminary inquiry was made by the Magistrate, though this is a case in which inquiry was obviously "necessary" in the sense of s. 476 of Act X of 1882. The indispensable preliminary conditions of s. 195 are thus wanting to this prosecution, and the committing Magistrate was therefore incompetent to entertain the case.

It may be added that the utter absence of evidence to convict Narotam Das with any knowledge of the suspicious kabuliat made in 1877, when he had no connection with the estate of Shahbazpur, or with the act of its use in 1882, when he was nominally only connected with the village, being a permanently absentee lambardar, would point to a defect in point of law sufficient to justify me in quashing the commitment, as I hereby do under s. 215 of Act X of 1882.

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CRIMINAL REVISIONAL.

Before Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF PARSOTAM LAL *v.* BIJAI AND OTHERS. [23rd October, 1883.]

Sanction to prosecution—Nature of sanction—False evidence—Criminal Procedure Code, s. 195—Preliminary inquiry.

In a suit on a bond, instituted in the Court of a Munsif, the question whether the defendant had executed the bond or not was referred to arbitration. The arbitrator decided that the defendant had not executed the bond, and that it was a forgery. The Munsif dismissed the suit in accordance with the award. The defendant then applied to the Munsif for sanction to prosecute the plaintiff

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without specifying in his application the offences in respect of which he desired to prosecute. The Munsif granted sanction, merely observing that there were sufficient grounds for sanctioning the prosecution, without giving any reasons or specifying the offence or offences in respect of which sanction was granted. *Held* that the terms in which the Munsif had given his sanction to a prosecution were not sufficiently explicit, and that he should have mentioned the section or sections of the Penal Code, under which he authorized criminal proceedings to be taken, as also in a general way the offence or offences to be charged, the date of commission, and the place where committed. [102] Further, that as the Munsif himself had not determined the question of forgery in the suit, he should have made some inquiry to satisfy himself that there were materials to justify a prosecution.

[R., 35 P.R. 1889 (Cr.).]

THIS was an application to the High Court to set aside the sanction to a prosecution granted by the Munsif of Muttra. It appeared that the applicant, Parsotam Lal, brought a suit against certain persons in the Court of the Munsif of Muttra, upon a bond, the execution of which they denied. By consent of parties the question as to the execution of this bond was referred to arbitration. In his award the arbitrator found that the defendants had not executed the bond, and that the bond was forged. Acting upon this award the Munsif dismissed the suit. The defendants then applied to the Munsif for sanction to prosecute the plaintiff, without specifying in their petition the offences in respect of which they desired to prosecute. The Munsif granted the application for sanction to prosecute, merely observing that there were sufficient grounds for sanctioning the prosecution of the plaintiff, but not giving reasons for arriving at such a conclusion, or specifying the offence or offences in respect of which sanction was granted. Parsotam Lal applied to the District Judge of Agra to have the order of the Munsif set aside, but this application was refused.

Parsotam Lal thereupon made the present application to the High Court to set aside the Munsif's order, it being contended on his behalf that the order was bad in law, in the first place, because the offence or offences were not specified in respect of which sanction was granted, and, in the second place, because before making such order the Munsif was bound to have himself made some preliminary inquiry, the more so in this case, as he himself had not decided that the bond in question was forged.

Mr. *Spankie*, for the applicant.

Pandit *Nand Lal*, for the opposite parties.

JUDGMENT.

STRAIGHT, J.—The terms in which the Munsif has given his sanction to a prosecution of the applicant were not sufficiently explicit, and he should have mentioned the section or sections of the Penal Code under which he authorized criminal proceedings to be taken, as also in a general way the offence or offences to be charged, the date of commission, and the place where committed. [103] Moreover, as the Munsif himself had not determined the question of forgery in the civil suit, he should have made some inquiry to satisfy himself that there were materials to justify a prosecution, and should have placed upon record his reasons for holding that criminal proceedings ought to be sanctioned. I quash the order of the 28th July last, but I direct that the record be returned to the Munsif, in order that he may restore the respondent's application to his file; and, after issuing notice to Parsotam Lal to show cause, he will

deal with and dispose of it in advertence to the remarks made above. I think it well to add that judicial officers, in granting sanctions under s. 195 of the Criminal Procedure Code, should be clear and precise upon the matters I have indicated, in order that the Magistrates, who have to entertain the prosecutions, may accurately know the exact offence or offences in respect of which proceedings have been authorized.

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6 A. 103=3 A.W.N. (1883) 227.

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

EMPRESS v. CHAIT RAM. [27th October, 1883.]

Criminal Procedure Code, s. 477—False evidence—" Judicial proceeding "—Act XLV of 1860 *(Penal Code)*, *ss.* 191, 193.

A man died leaving some money due to him in the hands of the Telegraph authorities. *P* wrote a letter to those authorities claiming the money, as the sole heir of the deceased. This letter was sent to the District Judge for verification and orders. *P* supported his claim before the Judge by the evidence on oath of *C*. *C's* evidence being, in the opinion of the District Judge, false, the District Judge, in his capacity as Sessions Judge, tried him for giving false evidence and convicted him of that offence. *Held* that as the reference to the District Judge by the Telegraph authorities of *P's* letter for verification, and the subsequent action in regard thereto, did not constitute a "judicial proceeding," and as the District Judge had not any authority to administer an oath to *C*, the conviction was illegal.

Held also, that the District Judge had no jurisdiction, under s. 477 of the Criminal Procedure Code, to try *C*.

[F., 10 S.L.R. 64 ; R., 14 A. 354 (355).]

THIS was an appeal from a judgment of conviction of Mr. H. P. Mulock, Sessions Judge of Farukhabad, dated the 4th October, 1883. It appeared that one Bhagwan Din, an employee in the Telegraph Department at Amballa, died, leaving some money due **[104]** to him in the hands of the Telegraph authorities. One Pitam wrote a letter to the deceased's superior officer, in which he claimed to be the sole heir of the deceased. This letter was sent to the District Judge of Farukhabad, Mr. H. P. Mulock, for verification and orders. Pitam produced two witnesses before the District Judge to support his statement, one of them being Chait Ram, the appellant. Chait Ram deposed on oath that Pitam was the paternal uncle of the deceased, and that the deceased had left no widow or child. It having been proved that Pitam was not the paternal uncle of the deceased, but his second cousin, and that the deceased had left a widow surviving him, the District Judge made an order directing that Chait Ram should be bound over to take his trial before him for giving false evidence. The District Judge, in his capacity as Sessions Judge, subsequently tried Chait Ram for giving false evidence, and convicted him. In defence of Chait Ram it was objected that under s. 477 of the Criminal Procedure Code the offence had not been committed before the District Judge acting as a Court of Session, and that he, therefore, so acting, had no jurisdiction. The District Judge held that he had jurisdiction under that section.

On appeal it was contended, amongst other things, for the appellant, that the provisions of s. 477 of the Criminal Procedure Code did not

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APPELLATE CRIMINAL.

Mr. *Dillon*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENT.

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STRAIGHT, J.—The reference to the Judge by the Telegraph authorities of Pitam's letter for verification, and the subsequent action in regard thereto, did not constitute a judicial proceeding, nor was there any authority for administering an oath to the appellant. The Judge's order cannot for a moment be sustained on this ground; but I may add that his view of s. 477 of the Criminal Procedure Code is equally erroneous. The appeal is decreed, and the appeal and conviction are reversed.

Appeal allowed.

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6 A. 105=3 A.W.N. (1883) 227.

[105] CRIMINAL REVISIONAL.

Before Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF HAR DIAL v. DURGA PRASAD AND ANOTHER. [27th October, 1883.]

Sanction to prosecution—False evidence—Nature of sanction—Criminal Procedure Code, s. 195.

A sanction to prosecution for giving false evidence, granted under s. 195 of the Criminal Procedure Code, should specify the place where, and the time when, the alleged false evidence was given, and in substance the assignments of perjury, as also the sections of the Penal Code under which proceedings are authorized.

[**F.**, Rat. Un. Cr. C. 693; **R.**, 19 B. 362 (363).]

THIS was an application for revision of an order made by the District Judge of Meerut, Mr. H. A. Harrison, revoking the sanction to a prosecution granted by the Munsif, under s. 195 of the Criminal Procedure Code. It appeared that the applicant, Har Dial, brought a suit in the Munsif's Court against two persons named Durga Prasad and Indar Bhan, in the course of which those persons and two witnesses for them, named Kewal Ram and Ram Das, gave evidence. After the decision of the suit, Har Dial applied to the Munsif, under s. 195 of the Criminal Procedure Code, for sanction to prosecute the defendants and the two witnesses, before named, for offences mentioned in that section, alleged to have been committed in or in relation to the suit, and among them for the offence of giving false evidence in the suit. The Munsif granted this application, his order granting the same being as follows:—"Having been brought forward to-day, before the pleaders for both parties, the record of the original suit was perused: the perusal of this record discloses a sufficient reason for my giving the required sanction to the plaintiff; ordered that the application be allowed, and the plaintiff be permitted to take criminal proceedings against the persons named in the application." One of the defendants, Durga Prasad, applied to the District Judge to revoke the sanction thus granted. The District Judge revoked the sanction, being of opinion that the order granting it was bad, as the particular words which were said to constitute the false evidence

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were not set out in the order, and because there were not sufficient grounds for sanctioning the prosecution of the defendants and their witnesses. Har Dial applied for revision of the District Judge's order.

Mr. *Simeon*, for the applicant.

[106] Mr. *Colvin*, for Durga Prasad and Indar Bhan.

JUDGMENT.

STRAIGHT, J.—I agree with the Sessions Judge that the sanction is not sufficiently explicit; and, as I have remarked in former cases, it is incumbent upon the Courts authorizing prosecutions under s. 195 of the Criminal Procedure Code, to clearly and in terms state the sections of the Penal Code under which proceedings are to be instituted. With the other part of the Judge's order I am not altogether in accordance, and I am not prepared to say that the Munsif unwisely or erroneously exercised the discretion vested in him by law in granting sanction to a prosecution. (After stating his reasons for disagreeing with that part of the order, the learned Judge continued):—As I think the Munsif's order of sanction was faulty in its want of proper details, the order of the Judge, so far as it sets it aside upon this ground, was justified; but in other respects it was not warranted, and cannot be sustained. The best course for me to pursue, therefore, will be to reverse both the orders of the Judge and the Munsif, which will have the effect of leaving the applicant Har Dial at liberty to apply to the Munsif for a fresh sanction, should he be so advised. In the event of its being granted, the Munsif will be careful to specify in distinct terms the place where, and the time when, the alleged false evidence was given, and in substance the assignments of perjury, as also the sections of the Penal Code under which proceedings are authorized.

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6 A. 106 = 3 A.W.N. (1883) 229.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

BHAGWATI PRASAD GIR (*Plaintiff*) v. BINDESHRI GIR AND OTHERS (*Defendants*).* [19th November, 1883.]

Suit to enforce the right of pre-emption—Misjoinder—Civil Procedure Code, s. 45.

Two co-sharers of a village, holding separate shares, sold their share separately to the same person, upon which a third co-sharer of the village sued them and the vendor jointly, to enforce his right of pre-emption in respect of the sales. *Held* that the frame of the suit was bad by reason of misjoinder of defendants and causes of action, and the suit had been properly dismissed on that ground.

[R., 32 A. 14 (17); 34 B. 358 (367); 9 C.P.L.R. 125 (128); 3 K.L R. 161.]

[107] THE plaintiff in this suit, a minor represented by his mother, was a co-sharer in a certain village. On the 18th June, 1881, Jadubans, another co sharer, sold his share, three annas, to Mangri, the principal defendant in this suit, for Rs. 1,200. On the same day, Bindeshri, another co-sharer, sold his share, five annas, to Mangri for Rs. 2,000. The present suit was thereupon instituted by the plaintiff, in which he sought to

* Second Appeal No. 581 of 1883. from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 8th February, 1883, affirming a decree of Rai Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 27th July, 1882.

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enforce his right of pre-emption in respect of these sales, joining as defendants the vendors of the shares and the purchaser. Balgobind, another co-sharer, claiming to have a better right than the plaintiff, was subsequently made a defendant to the suit under s. 32 of the Civil Procedure Code. The defendant purchaser, Mangri, set up as a defence to the suit that it was bad for misjoinder of defendants and causes of action. The Court of first instance (Subordinate Judge) allowed this defence and dismissed the suit. On appeal by the plaintiff the lower appellate Court (District Judge) affirmed the decree of the first Court.

In second appeal by the plaintiff it was contended on his behalf that there was no misjoinder in the case.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Pandit *Ajudhia Nath*, for the appellant.

Munshi *Hanuman Prasad*, Pandit *Bishambhar Nath*, and Munshi *Kashi Prasad*, for the respondents.

The Court (STRAIGHT and OLDFIELD, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—In the suit to which this appeal relates, the plaintiff-appellant sought, by establishing his right of pre-emption, to avoid two separate sales, of a three and five annas share, respectively, made by the defendants Jadubans and Bindeshri to the defendant Mangri. The latter objected from the outset that the suit was bad for misjoinder of defendants and causes of action.

Both the lower Courts concurred in holding that the contention was a sound one, and upon this basis have dismissed the suit. We think they were right in doing so.

The sales constituted two distinct causes of action, each of itself giving the plaintiff a complete right to come into Court and [108] assert his pre-emptive claim. The circumstance that the vendee was the same person in both instances does not affect the matter, nor create such a privity among the three defendants interchangeably in respect of the two contracts as would give them a community of interest in the issues to be determined in regard to each sale. This, as has been pointed out in the Full Bench ruling of this Court, in *Narsingh Das* v. *Mangal Dubey* (1), is the test of the applicability of s. 45 of the Civil Procedure Code; in other words joint interest in the main questions raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants.

It was observed on the part of the plaintiff-appellant that the objection of misjoinder was not taken by the vendor-defendants but only by the vendee who, as the single purchaser of the two shares in derogation of the plaintiff's right of pre-emption, could not avail himself of such a plea.

We do not agree in this view. If our interpretation of the law is correct, the suit was open to the objection, and the vendee-defendant was as much entitled to avail himself of it as any other party.

The only other point to be determined is as to whether the Subordinate Judge was right in dismissing the suit, or whether he should not rather have rejected the plaint, or returned it for amendment. Apart from any question that would otherwise have to be determined in reference to s. 53 of the Code, we think it enough to say that, from the shape in which

(1) 5 A. 163.

the plaintiff moulded his plaint and presented his case therein, the first Court had no alternative open to it but to proceed to trial of the matters of fact, upon the preliminary determination of which the point raised as to misjoinder turned. In our opinion the appeal fails and must be dismissed.

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Appeal dismissed.

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6 A. 109 = 3 A.W.N. (1883) 230.

[109] CIVIL REVISIONAL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

AWADH KUARI (*Decree-holder*) *v.* RAKTU TIWARI AND ANOTHER (*Judgment-debtors*).* [20th November, 1883.]

Execution of decree—Objection to attachment—Civil Procedure Code, ss. 281, 282, 283 *—Appeal.*

The heirs of the deceased obligor of a bond were sued thereon on the ground that they were in possession of the property of the deceased, and a decree was made in this suit for the recovery of the amount claimed "from the property of the deceased." In execution of this decree, the plaintiff caused certain property to be attached as belonging to the deceased. The defendants objected to the attachment, on the ground that the property belonged to them. The Court executing the decree, proceeded to investigate this objection, and finding that the property did not belong to the defendants, but to the deceased, disallowed it. *Held*, that the proceedings upon such objection were taken under s. 281 of the Civil Procedure Code, and the order disallowing it was therefore not appealable.

[Overruled, 12 A. 313 (323) (F.B.); N.F., 16 C. 1 (7); R., 8 A. 626 (633) = A.W.N. (1886) 128; 9 A. 605 (607); Cons., 15 C. 437 (445).]

THIS was an application for revision under s. 622 of the Civil Procedure Code. The applicant, Awadh Kuari, sued Raktu Tiwari and certain other persons, "as the heirs and in possession of the property of Ram Kali deceased," on a bond executed by Ram Kali in her favour. She obtained a decree for the recovery of the amount claimed "from the property of Ram Kali." In execution of this decree the plaintiff caused certain land in the possession of the defendants to be attached as the property of Ram Kali. The defendants objected to the attachment of this land, on the ground that it belonged to them and did not form any part of Ram Kali's estate. The Court executing this decree (Munsif), proceeded to investigate the objection, and, holding that it was proved that the land formed part of Ram Kali's estate, disallowed it. The defendants appealed to the District Judge, who held that the land was not part of such estate, and allowed the objection.

The plaintiff applied to the High Court to revise the District Judge's order, contending that the first Court's order was not appealable, being one made under s. 281 of the Civil Procedure Code. Reference was made to *Abdul Rahaman* v. *Muhammad Yar* (1).

[110] Mr. *Spankie*, for the plaintiff.

Munshi *Sukh Ram* and Babu *Ram Das Chakarbati*, for the defendants.

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* Application No. 194 of 1883, for revision under s. 622 of the Civil Procedure Code of an order of J. W. Power, Esq., Judge of Ghazipur, dated the 15th March, 1883, reversing an order of Munshi Kulwant Prasad, Munsif of Ballia, dated the 26th August, 1882.

(1) 4 A. 190.

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6 A. 109= 3 A.W.N. (1883) 230.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment :—

JUDGMENT.

STRAIGHT, J.—It is objected on the part of the petitioner that the Judge had no jurisdiction to entertain an appeal from the order of the first Court. We concur in this view, and are of opinion that the proceedings upon the objections filed by the respondents before the Munsif, were taken under s. 281 of the Civil Procedure Code, and that his order was final. The application must therefore be granted with costs, and the order of the Judge being reversed, that of the Munsif must be restored.

Application allowed.

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APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

ANTU AND OTHERS (*Defendants*) *v.* GHULAM MUHAMMAD KHAN AND ANOTHER (*Plaintiffs*).* [23rd November, 1883.]

Landholder and tenant—Suit for declaration of proprietary right to land—Suit for a declaration that tenant is a tenant-at-will and liable to have his rent enhanced at will—Jurisdiction of Civil Court—Act XII of 1881 (*N.-W.P. Rent Act*), *ss.* 10, 95 (*a*) *and* (*l*).

A suit for a declaration that the plaintiffs are the proprietors of a village and the defendants are tenants thereof, at the will of the plaintiffs, and liable to have the rent enhanced at the will of the plaintiffs, is, as regards the claim for a declaration of right, cognizable in the Civil Courts, but not as regards the other claims, such claims raising questions under ss. 10 and 95 (*a*) and (*l*) N.-W.P. Rent Act, 1881, exclusively cognizable in the Revenue Court.

[R., 15 A. 387 (389) (F.B).]

THE plaintiffs in this suit, the representatives in title of one Ghulam Husain Khan, deceased, were the proprietors of the entire twenty biswas of a village named Majri, of which Ghulam Husain Khan had, on the 5th April, 1861, granted a lease to persons called Bhana, Antu and Mathuri, for a term of sixteen years. The plaintiffs alleged that, according to the terms of this lease, it was optional with the lessor, on the expiration of the term of sixteen years, to determine the tenancy at will, or enhance the rent; [111] that on the 1st January 1880 (the lease having expired on the 20th April, 1877), the plaintiff informed the defendants, one of the original lessees and the representatives of the original lessees, that the tenancy had determined, whereupon the defendants claimed to have a right of occupancy in the village. On these allegations the plaintiffs brought this suit in the Court of the Subordinate Judge of Saharanpur against the defendants, claiming a declaration of their proprietary right to the village, and that they were entitled to terminate the tenancy of the defendants or to enhance the rent at will.

The defendants set up as a defence that they had not denied the plaintiffs' proprietary right, and therefore the latter were not entitled to a declaration of the same, and that they had acquired a right of occupancy

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* First Appeal No. 11 of 1882, from a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Saharanpur, dated the 4th January, 1882.

in the village. The Court of first instance held that, although the defendants had not denied the proprietary title of the plaintiffs, yet as the tenancy of the defendants under the lease had terminated, the plaintiffs were entitled to such a declaration, and gave them a decree in these terms : "That a declaration be given to the plaintiffs in this way, *viz.*, that the effect of the lease be considered to have terminated, and that the plaintiffs, owners of the village, be competent to act as zamindars as against the defendants, tenants, in the same manner as other owners are legally empowered to do as against their tenants: this decision will entitle the plaintiffs to seek relief according to the Revenue Law in a competent Court, in regard to the assessment and enhancement of rent, the determination of the nature of the holding and the right of the tenants : but on the ground of the former contract they will not be bound to realize any fixed amount of rent."

The defendants appealed to the High Court, contending that the object to the suit being to establish that the tenancy of the defendants under the lease had terminated, or, in other words, to determine the *status* of the defendants as tenants, the suit was not cognizable in the Civil Courts ; and that the mere declaration sought by the plaintiffs should not have been granted, as they were able to seek further relief.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Babu *Jogindro Nath Chaudhri*, for the appellants.

[112] Shah *Asad Ali*, for the respondents.

The Court (STUART, C.J., and OLDFIELD, J.) delivered the following judgment :—

JUDGMENT.

OLDFIELD, J.—The plaintiffs seek in this suit for a declaration that they are proprietors of the estate, and the defendants are their tenants, holding under a terminable lease, under which the plaintiffs are entitled to eject them, by annulment of the lease or to enhance their rents at will. The defendants, on the other hand, claim occupancy-rights, and not to be liable to have their rents enhanced except under the provisions of ss. 16 and 17, Rent Act.

The Court of first instance decreed the claim. It is contended in appeal that the suit is not cognizable by the Civil Court, and that there is no sufficient ground for giving a declaratory decree.

We are of opinion that, so far as this is a suit to have the plaintiffs' proprietary right in the land declared, it is a suit cognizable by the Civil Court ; but a Civil Court has no jurisdiction, with reference to s. 95, Rent Act, to determine the rest of the claim ; for that raises the questions of the nature and class of a tenant's tenure under s. 10 of the Act, and the liability of the defendants to have their rents enhanced, which are questions coming under (*a*) and (*l*), s. 95, and exclusively within the cognizance of the Revenue Court.

The decrees should be confined to a declaration of the plaintiffs' proprietary right ; but as that was never really impugned, the plaintiffs should pay all the costs of both Courts.

Appeal allowed.

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APPELLATE CIVIL.

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APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

RAMCHAND AND ANOTHER (*Defendants*) *v.* FATEH SINGH AND OTHERS (*Plaintiffs.*)* [23rd November, 1883.]

Sale in execution of decree of share of mahal—Arrears of Government revenue—Payment of arrears out of surplus sale-proceeds—Liability of purchaser to reimburse judgment-debtor—Act XIX of 1873 (*N.-W.P. Land Revenue Act*), s. 146—*Act X of* 1877, s. 316.

A share of mahal, arrears of Government revenue being due in respect of the whole mahal, was sold in execution of a decree. The existence of the arrears [113] was notified at the time of sale. The title of the purchaser to the share vested from the date of the sale, Act X of 1877, s. 316, being in force at that date. The Collector attached and realized the amount of the arrears out of the surplus sale-proceeds. *Held*, that inasmuch as at the date of the realization of the arrears out of the surplus sale-proceeds, the purchaser was the proprietor of the share, and it and he were responsible under s. 146 of Act XIX of 1873 (N.-W. P. Land Revenue Act) for the arrears, the payment of the arrears out of the surplus sale-proceeds must be regarded as a payment made *in invitum* by the judgment-debtor for the purchaser, and the judgment-debtor was entitled to be reimbursed by the purchaser.

THE plaintiffs in this suit owned a ten biswas share (one-half) of a certain mahal. On the 20th November, 1878, this share was sold for Rs. 7,275 in execution of a decree. Arrears of Government revenue, amounting to Rs. 1,274-8-6, were due in respect of the mahal at the time of the sale, and this was notified at that time. The share was purchased by the defendants. On the 17th December, 1878, the Collector attached the amount of such arrears out of the surplus sale-proceeds and subsequently realized such amount. The plaintiffs in this suit claimed the whole amount of the arrears from the defendants. The lower Courts held that the plaintiffs were entitled to recover one-half of such amount.

On second appeal by the defendants it was contended on their behalf that the plaintiffs had no cause of action, the defendants not being liable, because the revenue authorities had deducted the arrears from the surplus sale-proceeds; and that such arrears being due in respect of a period during which the plaintiffs were in possession, they had been properly deducted, and the plaintiffs were not entitled to recover from the defendants.

Mr. *Conlan* and Munshi *Hanuman Prasad*, for the appellants.

Babu *Sital Prasad*, for the respondents.

JUDGMENT.

STUART, C.J., and STRAIGHT, J.—Under Act X of 1877, s. 316, the Code of Procedure to be looked to in the present case, the title of the defendants-appellants, upon the confirmation of the sale of the 20th of November, 1878, dated from the sale. On the 17th of December, 1878, therefore, when the Collector attached the Rs. 1,274-8-6 of the surplus sale-proceeds belonging to the plaintiffs-respondents, the defendants-appellants were the proprietors of half the mahal, and such half of the mahal and [114] they as the proprietors thereof, were responsible under

* Second Appeal No. 865 of 1882, from a decree of C. W. P. Watts, Esq., District Judge of Agra, dated the 11th May, 1882, affirming a decree of Maulvi Muhammad Sultan Hasan, Subordinate Judge of Agra, dated the 4th August, 1880.

s. 146 of Act XIX of 1873 to Government for the proportionate amount of revenue due in respect of the ten biswas bought by them. Beyond them, and the mahal itself, the Collector was not bound to look for payment of the arrears due, and the half of it they had purchased stood charged therewith. Under these circumstances the Rs. 1,274-8-6, which the Collector realized from the surplus sale-proceeds belonging to the plaintiffs-respondents, must be regarded as a payment made *in invitum* by them for the defendants-appellants, who had bought the property with the notification that arrears were due from it, and so no doubt purchased it at a reduced figure, and have enjoyed the benefit of the payment. Looking to all the facts, we think the plaintiffs-respondents were entitled to demand a reimbursement, and that the present suit to obtain it has been rightly brought. We dismiss the appeal with costs.

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Appeal dismissed.

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6 A. 114=3 A.W.N. (1883) 240.

CRIMINAL REVISIONAL.

Before Mr. Justice Oldfield.

IN THE MATTER OF THE PETITION OF GAURI SAHAI.
[23rd November, 1883.]

Sanction to prosecution—False charge—Criminal Procedure Code, s. 195—*Act XLV of* 1860 (*Penal Code*), s. 211—*Preliminary inquiry.*

A prosecution of a charge under s. 211 of the Penal Code should not be granted under s. 195 of the Criminal Procedure Code as a matter of course, but only when the complainant can satisfy the Court that the interests of justice require a prosecution, and there is strong *prima facie* case against the accused. *Held*, therefore, where *S*, who had been tried before the Court of Session for an offence, and acquitted, applied to the Court, in respect of the criminal proceedings which had been instituted against him, for sanction to prosecute *G* for abetment of an offence under s. 211 of the Penal Code, and the Sessions Judge granted the sanction, and there was nothing on the record of the criminal case or of the Judge's proceedings to show on what grounds *G* was accused of abetting a false charge, or on what grounds the Judge gave the sanction; that before the Judge gave the sanction, he should have satisfied himself by examination of *S* or other inquiry, whether *S* had sufficient grounds, in fact, for accusing *G*, and whether there were *prima facie* grounds for suspecting *G* of abetting a false charge, and permitting a prosecution.

[F., L.B.R. (1893—1900) 542; R., 5 C.P.L.R 78 (79); 35 P.R. 1889 (Cr.).]

THIS was an application to revise an order made by Mr. C. W. P. Watts, Sessions Judge of Saharanpur, under s. 195 of the Criminal [115] Procedure Code, granting sanction to the prosecution of one Gauri Sahai. It appeared that one Sohan Lal was tried before the Sessions Judge on a charge of rape and acquitted, without being called upon to enter on his defence. He then applied to the Sessions Judge for sanction to prosecute the woman who had charged him. In this petition Sohan Lal alleged that the false charge had been preferred at the instigation of Gauri Sahai, and he accordingly prayed for sanction to prosecute him also for abetment of an offence under s. 211 of the Penal Code. The Sessions Judge granted sanction. Gauri Sahai applied to the High Court to set aside the Sessions Judge's order as regards him, on the ground—(1) that there was no evidence to support the allegation of Sohan Lal, that he (applicant) was in any way concerned with the charge preferred

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against Sohan Lal; and (2) that the order had been made without the applicant having been heard in his defence, and without any inquiry.

Mr. *Colvin* and Shah *Asad Ali*, for the appellant.

JUDGMENT.

OLDFIELD, J.—There is nothing whatever on the record of the case of *Queen* v. *Sohan Lal* or of the proceedings before the Judge to show on what grounds Sohan Lal accuses Gauri Sahai of abetting a false charge of rape against him, or on what grounds the Judge has given sanction to prosecute Gauri Sahai under s. 195, Criminal Procedure Code. Before the Judge gave sanction to prosecuting Gauri Sahai, he should have satisfied himself, by examination of Sohan Lal or by other inquiry, whether the latter had, in fact, sufficient grounds for accusing Gauri Sahai, and whether there were good *prima facie* grounds for suspecting Gauri Sahai of abetting a false charge and for permitting a prosecution.

A prosecution of a charge under s. 211, Indian Penal Code, should not be sanctioned under s. 195, Criminal Procedure Code, as a matter of course, but only when the complainant can satisfy the Court that the interests of justice require a prosecution, and there is a strong *prima facie* case against the accused. The order of the Judge is set aside, and he is directed to dispose of the application with reference to the above remarks.

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6 A. 116 (F B.)=3 A.W.N. (1883) 243.

[116] FULL BENCH.

Before Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

RAMPHAL RAI AND ANOTHER (*Plaintiffs*) *v.* TULAKUARI AND OTHERS (*Defendants*).* [26th November, 1883.]

Hindu Law—Hindu widow—Alienation made with consent of next reversioner—Remoter reversioners.

A gift by a Hindu widow, who has succeeded to the separate estate of her deceased husband, of such estate, is not valid and does not create a title which cannot be impeached by the remoter reversioner, because it has been made with the consent of the next reversioner. *Raj Bullabh Sen* v. *Oomesh Chunder Roos* (1) and *Noferdoss Roy* v. *Modhu Soondari Burmonia* (2), dissented from.

Raj Lukhee Dabea v. *Gokool Chunder Chowdhry* (3) and *the Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (4), referred to.

Sia Dasi v. *Gur Sahai* (5) and F. A. No. 116 of 1882 (6), distinguished.

[Overruled, 30 A. 1 (20) (P.C.)=5 A.L.J. 1=9 Bom. L.R. 1348=6 C.L.J. 766=12 C.W.N. 74=11 O.C. 78=17 M.L.J 605=3 M.L.T. 1; **F.,** 6 A. 288 (289); 14 A. 377 (379); 32 A. 176 (177)=7 A.L.J. 121 (122)=5 Ind. Cas. 270; **R.,** 22 A. 33 (45) (F.B.); 29 A. 71 (75)=3 A.L.J. 755=A.W.N. (1906) 272; 25 B. 129 (140); 31 M. 366 (379)=18 M.L.J. 309=3 M.L.T. 355; 28 Ind. Cas. 496 (497); 10 S.L.R. 49; **D.,** 9 A. 441 (444); 10 A. 407 (409).**]**

THE plaintiffs in this suit claimed to have a gift by the defendant Janki Kuari, a Hindu widow, of her deceased husband's separate landed

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* Second Appeal No. 329 of 1883, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 5th February, 1883, reversing a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 4th July, 1882.

(1) 5 C. 44. (2) 5 C. 732. (3) 13 M.I.A. 209.
(4) 8 M.I.A. 529. (5) 3 A. 302. (6) Not reported.

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FULL BENCH.

6 A. 116 (F.B.) = 3 A.W.N. (1883) 243.

estate set aside as contrary to Hindu Law. It appeared that Janki Kuari had made the gift in favour of her husband's sisters, the defendants Tula Kuari and Surtaji Kuari, with the consent of the next reversioners to the estate, namely, the defendant Jadi Kuari, mother of Janki Kuari's deceased husband, and Gaya Rai, the uncle of the deceased. The donees (defendants) set up as a defence to the suit that the gift having been made with the consent of the next reversioners, the plaintiffs, who were more remote reversioners, were not in a position to impugn it. The Court of first instance disallowed this defence, and gave the plaintiffs a decree setting aside the gift. On appeal by the plaintiffs, the lower appellate Court (District Judge) *held* that a Hindu widow was competent to alienate the separate estate of her deceased husband with the consent of the next reversioner, and such an alienation was not impeachable by a remoter reversioner, and dismissed the suit.

[117] In second appeal the plaintiffs again contended that the gift was not valid as regards them, and they were entitled to impeach it. The Divisional Bench (STRAIGHT and BRODHURST, JJ.), before which the appeal came for hearing referred the question whether the gift was impeachable by the plaintiffs to the Full Bench; the order of reference being as follows :—

STRAIGHT, J.—We refer to the Full Bench the following question:—"Is a gift by the childless widow of a separated Hindu made with the consent of the immediate next reversioner valid against all the other reversionary heirs of her deceased husband? As favouring an affirmative answer, we refer to *Raj Bullubh Sen* v. *Oomesh Chunder Rooz* (1); *Noferdoss Roy* v. *Modhu Soondari Burmonia* (2); and contra *Varjan Rangji* v. *Ghelji Gokaldas* (3); see also *Rao Kurun Singh* v. *Fyz Ali Khan* (4); *Sia Dasi* v. *Gur Sahai* (5); *Raghu Nath* v. *Thakuri* (6); Mayne's Hindu Law, p. 558; and White and Tudor's Leading Cases in Equity, 4th ed., vol. I, p. 757; and *Birch-Wolfe* v. *Birch* (7).

The *Senior Government Pleader* (Lala *Juala Prasad*) and Lala *Lalta Prasad*, for the appellants.

Munshi *Sukh Ram* and Maulvi *Mehdi Hasan*, for the respondents.

The following judgment was delivered by the Full Bench :—

JUDGMENT.

STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ.—We think that the question put to us by this reference should be answered in the negative. In *Raj Lukhee Dabea* v. *Gookool Chunder Chowdhry* (8), which was a case relating to a sale by two Hindu widows of a portion of their husband's property for the alleged purpose of satisfying his debts, it is observed :—"Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, **[118]** there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu Law" (p. 228). So again in *The Collector of Masulipatam* v. *Cavaly Vencata*

(1) 5 C. 44.
(2) 5 C.732.
(3) 5 B. 563.
(4) 14 M.I.A. 187 = 2 Suth. P. C. C. 474.
(5) 3 A. 362.
(6) 4 A. 16.
(7) L.R. 9 Eq. 683.
(8) 13 M.I.A. 209.

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Narrainapah (1) it is remarked;—"For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her, which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred." It seems to us that the plain principle deducible from these rulings of the Privy Council is, that in order to validate an alienation by a Hindu widow of her deceased husband's estate for purposes other than those sanctioned by the Hindu Law, it must have the consent of all those among his kindred who can reasonably be regarded as having an interest in questioning the transaction. Whether this is or is not the precisely correct construction to place upon those decisions we find it impossible to reconcile the remarks of their Lordships with the two Calcutta cases quoted in the referring order, and to be found on pages 44 and 732 of Vol. V of the authorized Calcutta Reports. In the first of these it was laid down in plain terms that "a grant by a Hindu widow with the sanction and concurrence of the next reversioner is valid, and creates a title which cannot be impeached on the death of the widow by the person who, but for such grant, would be entitled as heir of her husband." In the second, it was decided that "the surrender of her estate by a Hindu widow or mother to persons who at that time are unquestionably the heirs under Hindu Law of the person from whom she inherited it vests in those persons the inheritance they would take if she at that time were to die." It seems to us that these two decisions are directly in conflict with the principle enunciated by the Privy Council, and that they proceed upon a mistaken view of the relative positions of the widow and the reversionary heirs, and the nature of their several rights. As to the widow, although it is not techni-[119]cally correct to call her the life-tenant of her deceased husband's estate, it would be equally erroneous to say that she is proprietor of it. But though no legal definition is to be found exactly to describe the nature of her estate, its incidents and characteristics are well understood. She is only so far the owner, that if money has to be raised by sale or mortgage to provide her with the means to discharge duties and obligations imposed on her by the Hindu Law in respect of her deceased husband, or for the imperative necessities of her own maintenance, she can "*per se*" convey a good title to an alienee. But she has no disposing power over it in any other sense; and though she takes by inheritance, her right is of so peculiar and exceptional a kind that the ordinary course of succession may be said to be suspended during her life. It would therefore seem that beyond certain defined uses for which she may aliene, she possesses nothing higher or better than a life-interest in the usufruct, which interest it is competent for her to deal with in any way she may think proper for her own objects and purpose. It is not under these circumstances altogether easy to understand how, strictly speaking, the widow can be said to represent the whole estate. No doubt in some cases her husband's heirs would be bound by her acts, but equally as to others they would not be bound, as they would be, did she acquire the rights of a full owner. Apart from her capacity under the Hindu Law in certain contingencies to transfer the *corpus* of her husband's estate, the only personal alienable interest

(1) 8 M.I.A. 529.

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with which she is competent to deal is what we have indicated above, and whether she elects to convey it to the nearest reversioner or to a stranger, is a matter of indifference. All we say is that, as at present advised, her own interest and nothing more passes by the transaction to the assignee, whoever he may be, and we fail to see how the circumstance that the nearest reversioner is that person, or that he consents to the assignment, alters the case. For it is difficult to understand how any distinction can be drawn between the rights of the nearer and more remote reversioners. They alike have interests in expectancy, contingent on the death of the widow, the value of which as marketable commodities, if marketable at all, must turn upon their relative propinquity as heirs to the deceased husband, and other considerations into which we need not enter, but their [120] legal worth is identical. The immediate presumptive reversioner, alike with the other reversioners, has no vested interest in the succession, which, under the Hindu Law, being diverted during the widow's life from its ordinary channels, only opens up upon her death. It is true that the presumptive reversioner has the preference in coming into Court to maintain an action to impeach an act done by the widow inconsistent with the nature of her estate, but "if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue" (L.R., 8 I.A., 23). It need scarcely be pointed out that this rule has been laid down for convenience sake, as it would be absurd to grant the discretionary relief provided for in the Specific Relief Act to a person whose likelihood of succeeding to the inheritance is in the ordinary course of events in the highest degree improbable. Moreover, it may be noticed in the above passage, which is from a Privy Council judgment, that the case is contemplated of a next reversioner concurring in "an act alleged to be wrongful," and this suggests the inference that his concurrence has not the conclusive effect attached to it by the Calcutta Court in the two cases to which we have referred.

It appears to us, therefore, that the rights of all the reversioners are upon the same legal footing "*inter se*," and that an alienation made to, or with the consent of, the next reversioner, for other than legitimate purposes, is none the less an alienation that may be questioned by another reversioner, who has the preferable right to do so upon the principle laid down in the ruling of the Privy Council just quoted from. We know of nothing in the Hindu Law to sanction the view, that a person possessed of limited rights, such as those as a Hindu widow, can, by uniting with one of many others having identical interests in expectancy on the happening of a certain event, anticipate that event and convert such individual expectancy into an immediate absolute estate of full proprietorship. If this were permissible it would virtually confer upon a Hindu widow the right of directing the succession to her husband's property in her lifetime, when in law it only opens upon her death. We therefore do not think that the hard-and-fast rule laid down in the two Calcutta cases is correct, or that [121] the consent of a next reversioner to an alienation or gift by the widow of a sonless Hindu is necessarily binding upon all the other reversionary heirs, and cannot be questioned by them. For if according to the Privy Council rulings, to which we referred at the opening of our remarks, his consent alone is ineffectual to validate a transfer to a stranger, it seems reasonably to follow that it is equally insufficient to create an unimpeachable title in himself when he is the

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transferee, or perhaps to speak more accurately, the surrenderee. We think that the spirit of the Hindu Law is to keep the right of succession to the deceased husband's estate open until the widow's death, free of any control by her, except in such cases as she has a power to adopt, and that no reversioner possesses such a present vested interest as enables him to combine with her in defeating his co-reversioners. In other words his right and theirs have one common basis, that of survivorship to the widow, and it is incapable of anticipation. Such being our views, we hold, as we indicated at the outset, that the question referred to us must be answered in the negative. We may add that the case of *Sia Dasi* v. *Gur Sahai* (1) referred to by the Judge in no way conflicts with the opinion we have expressed. There the decision of this Court proceeded on the ground of estoppel by conduct, and in F.A. No. 116 of 1882, decided 4th July, 1883 (2), the judgment rests upon the same principle.

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6 A. 121=3 A.W.N. (1883) 241.

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

EMPRESS *v.* RAM PARTAB. [5th December, 1883.]

Offence made up of several offences—Rioting—Grievous hurt—Criminal Procedure Code, s. 235—*Act VIII of* 1882, *s.* 4—*Act XLV of* 1860 (*Penal Code*), *ss.* 146, 147, 149, 325.

A member of an unlawful assembly, some members of which have caused grievous hurt, cannot lawfully be punished for the offence of rioting as well as for the offence of causing grievous hurt.

[**Diss.**, 7 A. 29 (30); 9 A. 645 (647); **Appr.**, 16 C. 442 (446) (F.B.); **Rel.**, 14 A.L.J. 738=35 Ind. Cas. 978; **R.**, 10 A. 58 (67); 17 B. 260 (270) (F.B.); 19 C. 105 (111); Rat. Un. Cr. C. 493 (494); **D.**, 7 A. 757 (758).]

THE appellant, Ram Partab, a trooper in the Viceroy's Bodyguard, was committed to take his trial before Mr. C. W. P. Watts, Sessions Judge of Saharanpur, on a charge of rioting, in the course [122] of which grievous hurt was caused to Mannu and others, and thereby committing "an offence punishable under ss. 147 and 325 of the Indian Penal Code." It was not proved at the trial of Ram Partab that he had caused grievous hurt to any person in the course of the riot, but it was proved that grievous hurt was caused to Mannu and others in the course of the same by persons engaged in the riot. The Sessions Judge found him guilty of rioting and sentenced him to rigorous imprisonment for one year for that offence; and also of causing grievous hurt, and sentenced him to rigorous imprisonment for two years for that offence, such latter term to commence on the expiration of the former.

Mr. *Hill*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENT.

STRAIGHT, J.—(After coming to the conclusion that the appeal must be dismissed on the merits, continued) :—But it is incumbent upon me now to consider the further question of whether, under the double convictions of the appellant under ss. 147 and 325 of the Penal Code, the

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(1) 3 A. 362. (2) Not reported.

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separate sentences of one year and 2 years' rigorous imprisonment, respectively, were legally passed. I concede at once that by the first clause of s. 235 of the Criminal Procedure Code, it was competent for the Judge to try him in a single trial for the offences of riot and causing grievous hurt. Indeed, in cases of the description of that before me it is convenient so to vary the charges, for it often happens, in the course of criminal trials, that the evidence turns out inadequate to sustain the most serious or more serious counts, but discloses sufficient to allow of a conviction of a minor offence; and if the accused's plea to the count charging this had been taken at the outset of the proceedings, the trouble of alteration or amendment of the charge at a later stage is avoided. Upon examining the terms of s. 235 already referred to above, it will be noticed that the proviso which was attached to the corresponding s. 454 of the old Code has disappeared, while it is declared that "nothing in this section shall affect the Indian Penal Code, s. 71." This last-mentioned section is now re-enacted and amplified by s. 4 of Act VIII of 1882, which runs as follows:—"When anything which is an offence is made up of [123] parts, any of which is in itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided. When anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined and punished, or where several acts of which one, or more than one, would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences." Such being the law governing the subject, can it be said to cover the case before me, in which the appellant has been convicted of, and separately sentenced for the offences of riot and causing grievous hurt? It may be taken that there is no evidence to show that he individually inflicted grievous hurt upon any person, and it is only by praying in aid the provisions of s. 149 of the Penal Code that he can be held responsible for the injuries inflicted on the parties assaulted by the other members of the unlawful assembly with which he was associated. Section 149 declares in substance that every member of an unlawful assembly is responsible for an offence committed by another member, or the other members, in prosecution of the common object of such assembly, or one which he must have known was reasonably likely to be committed in the prosecution of such common object. In other words, this provision, so to speak, takes him out of the region of abetment, and makes him responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. Thus, if five men go out armed with heavy *lathis* to attack another party of men, and one of them alone inflicts grievous hurt, all the five may be convicted under s. 325 of the Penal Code, if the grievous hurt was caused in prosecution of the common object of the combination between them, or was an incident each and all of them must, as reasonable men, have known was likely to occur in the prosecution of such common object. So, in the present case, grievous hurt undoubtedly was caused by some of the rioters with whom the appellant was associated, and it was perfectly competent for the Judge upon the facts to hold that it was brought about in prosecution of the common object of the rioters; or, at any rate, that the appellant must have known that [124] it was likely to occur in the prosecution of such object. In this view of the matter the Judge was right in convicting under s. 325

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of the Penal Code. But it must be kept in mind that one essential ingredient towards warranting that conviction in point of law was the participation of the appellant in an unlawful assembly, for, by that circumstance, and that alone, was he statutably responsible for the individual acts of the other members. Now, I presume, it never could be seriously contended that a Court might sentence a convicted person to separate punishments upon the same facts, for the offence of being a member of an unlawful assembly and for riot, for a necessary component part of riot is an unlawful assembly, and it is only when force or violence are superadded that the offence of rioting is complete. In short, riot is no more than an aggravated form of unlawful assembly. So when the parties go further and inflict hurt, or grievous hurt, or death, though they are still guilty of riot, because they constitute an unlawful assembly, and have used force and violence, their responsibility under ss. 323, 325, 304 or 302 of the Penal Code for each other's acts is created by the given facts of an unlawful assembly. It seems to me that the plain meaning of the law as provided in s. 4 of Act VIII of 1882 is, that if in the course of a transaction a person commits different offences, inextricably mixed up with one another, and all graduating towards, essential to, and culminating in a single distinct offence, he is not to be punished separately upon conviction for such single and distinct offence, and for any or each of such other offences as well, For example, a man holds up his fist to another in a threatening manner, then he strikes him a slight blow with a stick, and ends by stabbing him with a knife. Technically, he has committed an assault, has caused hurt, and has caused grievous hurt; but no one would seriously contend that he should be punished separately for each of these offence. So, in the present case, the appellant was a member of an unlawful assembly, he participated in a riot, and in the course of such riot grievous hurt was caused by persons other than himself, for which he was responsible in law as if his own hand had inflicted it, by reason of his being a member of an unlawful assembly of which they also were members. It was permissible to try and convict him for riot, and for causing hurt or grievous hurt as the case might be, in respect of each person assaulted, subject, of course, [125] to the limitations of s. 234 of the Criminal Procedure Code as to the number of charges joined; but while he might be punished for the riot, or upon each of the charges of grievous hurt separately, I do not think that different sentences can be passed for the riot and in respect of one or each of such other charges as well. In my opinion, the riot is a part of those other offences, the force or violence incident to their commission converting what would otherwise have been a mere unlawful assembly into a riot In this view of the matter, I hold that the sentence passed upon the appellant under s. 147 should be quashed, and, as I think the two years' rigorous imprisonment imposed under s. 325 of the Penal Code meets the requirements of justice, I consider it unnecessary to make any further orders.

6 A. 125=2 A.W.N. (1882) 60.

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CIVIL REVISIONAL.

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Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

BALMAKUND (*Plaintiff*) *v.* SHEO JATAN LAL AND OTHERS (*Defendants*).* [15th March, 1882.]

Decree, refusal to amend—High Court's powers of revision—Civil Procedure Code, ss. 206, 622—Laches.

Where a Court improperly refused to amend a decree, which was at variance with the judgment, *held* that in so acting the Court had acted in the exercise of its jurisdiction illegally and with material irregularity, within the meaning of s. 622 of the Civil Procedure Code, and its order was consequently subject to revision under that section.

On the question whether the High Court should refrain from exercising its powers under s. 622 by reason of the long time which had elapsed from the date of the decree, *held* that the petitioner was not fairly chargeable with laches.

[F., 11 O.C. 208 (211).]

THIS was an application to the High Court for revision of an order of the Subordinate Judge of Benares, refusing to amend under s. 206, Act X of 1877, a decree made by that Court. It appeared that the applicant, Balmakund, the plaintiff in a suit for possession of certain land, instituted in the Court of the Subordinate Judge of Benares, obtained a decree against the defendants on the 21st September, 1878, in accordance with an arbitration award. The defendants appealed to the High Court on the 21st [126] November, 1878, objecting to the validity of the award. On the 16th August, 1880, the High Court disallowed their objections and dismissed the appeal. On the 22nd November, 1880, the plaintiff applied to the Subordinate Judge for amendment of the decree he had obtained on the allegation that, although he had claimed mesne profits accruing from and after the date of the decree and such mesne profits with interest had been awarded by the judgment, yet by some inadvertence no mention of them had been made in the decree. The Subordinate Judge refused to amend the decree on the ground that the judgment was not in accordance with the award, in so far as it awarded mesne profits of which no mention had been made by the arbitrators, and also that as the decree had been confirmed by the High Court, he had no power to amend it. The plaintiff, on the 26th July, 1881, made the present application to the High Court for revision of this order. It was contended on behalf of the defendants, *inter alia*, that the application was not entitled to favourable consideration, in consequence of the time that had elapsed since the date of the decree.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the plaintiff.

Lala *Lalta Prasad* and Munshi *Kashi Prasad*, for the defendants.

The Court (STUART, C.J., and STRAIGHT, J.) delivered the following judgment:—

JUDGMENT.

STUART, C.J.—The matter complained of in this application is the refusal by the Subordinate Judge of Benares to amend a decree for possession of land from which by mistake an order for mesne profits had

* Application No. 111 of 1881, for revision under s. 622 of the Civil Procedure Code of an order of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated the 9th July, 1881.

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been omitted. It was suggested at the hearing that the application, as one under s. 622, was not entitled to favourable consideration in consequence of the time that had elapsed since the decree had been made. But regard being had to the several dates of the procedure in execution, it will be seen that the plaintiff is not fairly chargeable with any laches. The original decree was made on the 21st September, 1878, and it was appealed to this Court, the date of the presentation of such appeal being the 21st November, 1878, exactly two months after the date of the decree itself. The appeal was a first appeal, and according to the [127] course of this Court in such cases, it appears to have come on for hearing on the 8th December, 1879. The question in that appeal related only to the validity of the arbitration award that had been made, and whether the order on such award could be appealed to this Court, and no question being raised, nor was it necessary then that any question should be raised, respecting the mesne profits.

We were of opinion that such appeal was excluded by s. 522 of the Code of Civil Procedure, and our order to that effect is dated the 16th August, 1880. But before making that order various delays took place in consequence of the illness of the pleader for the respondent, and attempts by the parties to compromise the case, and it was not till the 10th August, 1880, that we were informed that any arrangement by compromise was hopeless, and the case therefore then stood for judgment, such judgment as I have already stated having been given a few days after, *viz.*, on the 16th August, 1880.

On the 22nd of the following month of November, 1880, the plaintiff applied to the Subordinate Judge for amendment of the decree.

This Subordinate Judge was not the same officer who had made the decree itself, but one who was new to the case. He appears to have taken time to consider what he would do with this application, for it was not till the 9th July, 1881, that he disposed of it by an order refusing it, an order which I cannot otherwise characterise than as idle and irrelevant, and, I might add, ignorant, for it had been made in ignorance of the procedure which had resulted in his predecessor's decree and of the legal effect of that procedure.

The Subordinate Judge appears to have thought that the claim to mesne profits had been included in the case submitted to the arbitrators, and that it was in consequence of their not having been given by the award that these profits had been omitted from the decree. He ought to have known better. The plaintiff's suit against Bindeshri Prasad and Muta Prasad as defendants was instituted on the 25th April, 1878, and the record shows that no less than twelve very precise issues were settled for determination, and [128] written statements were filed by the defendants in the following months of May and June, and in July the parties agreed to submit their differences to arbitration, and two arbitrators, pleaders by profession, were appointed, and to them the case was made over by the Subordinate Judge, by his order dated the 13th July, 1878. This order states that "the case" is made over to the arbitrators and they are "directed to decide the case and submit their decision within one week from the date of the receipt of this order."

What took place before the arbitrators appears clearly enough from the award dated 11th September, 1878. This award is very formal and elaborate, reciting the pleadings and the issues, all of which the arbitrators took cognizance of, and they thereupon gave their award, or judgment as they call it, on all the points embraced in the issues, thus

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determining everything that had been litigated between the parties. The case then went back with the arbitrators' award to the Subordinate Judge, who found there was no defect in the award, and he made the decree to which I have already referred in conformity with it, adding however the further and consequential order that the plaintiff be declared entitled to mesne profits with interest up to the date of delivery of possession. Mesne profits, or in the vernacular "*wasilat*," constitute what may be called a consequential right, and in the present case they are expressly reserved to the plaintiff by the Subordinate Judge's order of the 21st September, 1878. It is thereby ordered that a decree for possession of the property therein mentioned be given in favour of the plaintiff, and that his claim in other respects be dismissed, and then after disposing of the question of costs, the decretal order proceeds and ends as follows :—" And that the said plaintiff be declared entitled to obtain *wasilat* with the usual interest up to the date of the delivery of possession." The Subordinate Judge thus gave full and complete effect to the arbitration award, and as a consequence decreed him mesne profits.

Now from the dates and particulars I have given of the proceedings in the case from beginning to end, it is apparent that the plaintiff neither did, nor omitted to do, anything in consequence of which he might justly be considered to have forfeited these profits, and he might undoubtedly recover them in a separate [129] suit. But I am also of opinion that he is entitled to them by an order under s. 622 of the Code of Procedure. That section provides that " the High Court may call for the record of any case in which no appeal lies to the High Court." The order complained of in the application before us is clearly a case of that kind, and then the section proceeds:—" if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, and may pass such order in the case as the High Court thinks fit." Now there can be no doubt that the Subordinate Judge, who so completely failed in his duty in refusing to give effect to his predecessor's decretal order, acted in the exercise of his jurisdiction illegally and with irregularity, and we now, in revision of his order under this section, set the same aside, and direct him to amend the decree so as to make it embrace and give recovery for the mesne profits in conformity with his predecessor's judgment and decretal order. As to costs, seeing that the plaintiff-applicant has been kept out of the mesne profits since September, 1878, he is clearly entitled to costs, including the costs of the application to amend the decree and the costs of this Court.

Application allowed.

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6 A. 129 = 3 A.W.N. (1883) 257.

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Before Mr. Justice Straight.

EMPRESS *v.* ASHRAF ALI. [13th December, 1883.]

Escape from confinement negligently suffered by public servant—Escape from confinement intentionally suffered by public servant—Act XLV of 1860 *(Penal Code)*, ss. 222, 223—*Criminal Procedure Code*, s. 167.

While a case was being investigated by *A*, a police officer, under the provisions of Chapter XIV of the Criminal Procedure Code, *T* presented a petition to the

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Magistrate having jurisdiction to try the case, in which he accused *W* of being concerned in the commission of the offence, and prayed that he might be arrested and sent to the police officer investigating the case. *W* was accordingly arrested and brought before the Magistrate, who having examined *T* on oath and taken *W's* statement, made an order on the petition to the following effect:—" As no police report has been made in this matter and the petitioner only has presented this petition, ordered that these papers of *W* be sent to the District Superintendent of Police and if a report of this matter be made, the case may be sent up according to rule with the papers." In accordance with this order *W* was taken to the Dis-[130]trict Superintendent of Police, and was sent by that officer to *A*. *Held* that the Magistrate's order might be taken to have been passed under s. 167 of the Code and therefore *W* was lawfully committed to the custody of the Police, and *A* was bound to detain him in such custody until released therefrom by due course of law; and that consequently *A*, having negligently suffered *W* to escape had been properly convicted under s. 223 of the Penal Code.

THIS was an application for revision of an order of Mr. J. R. Holt, Assistant Magistrate of the first class, dated the 21st September, 1883, and of the appellate order of Mr. H. D. Willock, Sessions Judge of Azamgarh, dated the 29th September, 1883, affirming the Assistant Magistrate's order. It appeared that, on the 19th June, 1883, at a village near Azamgarh, called Amloh, in the police circle of Muhammadabad, certain persons caused the death of a man, named Khoda Buksh, by beating him with lathis. On the same day one Talab-ub-haq presented a petition at Azamgarh to the Magistrate of the pargana in which Amloh was situated, in which he stated that he had been informed that one Wajid Husain was one of the persons who had beaten Khoda Buksh, and that Wajid Husain had come to Azamgarh, and was at the Magistrate's Court-house, and he prayed that Wajid Husain might be arrested and sent to the Muhammadabad Police. Upon the petition being presented, Wajid Husain was arrested and brought before the Magistrate, who took the statement of Talab-ul-haq on oath, and the statement of Wajid Husain, and made the following order on the petition:—" As no police report has come in this matter, and the petitioner only has presented this petition, ordered that these papers of Wajid Husain be sent to the District Superintendent of Police, and if a report of this matter be made, the case may be sent up (*chalaned*) according to rule with the papers: the petition presented by Talab-ul-haq and the blood stained *dopatta* may be sent." In accordance with this order Wajid Husain was taken to the District Superintendent of Police with the *dopatta* which he had been wearing when arrested, and which was apparently stained with blood, and was sent by that officer in charge of two constables to the sub-inspector of Muhammadabad thana, that is to say Ashraf Ali, the applicant in this case. Wajid Husain arrived at Amloh on the 20th June, where Ashraf Ali, who had arrived there on the 19th, was making an inquiry into the circumstances relating to Khoda Buksh's death. Wajid Husain [131] was made over to Ashraf Ali. On the 23rd June the police inquiry was closed, and Ashraf Ali left the village, taking, it was alleged by the witnesses for the prosecution, Wajid Husain with him. The latter was subsequently arrested in the Ghazipur District. In his defence, Ashraf Ali stated that inquiry was jointly conducted by him and the inspector of police, and that the latter had released Wajid Husain on the 23rd June, there being nothing to justify his retention in custody. On these facts the Assistant Magistrate convicted Ashraf Ali of negligently suffering Wajid Husain to escape from lawful custody, under s. 223 of the Indian Penal Code, and sentenced him to simple imprisonment for six weeks and a fine of Rs. 30, or in default of payment to a further

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term of simple imprisonment for two weeks. On appeal, the Sessions Judge affirmed the conviction and sentence.

Mr. *W. M. Colvin* and *G. T. Spankie*, for the applicant.

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

It was contended for the applicant that it was not shown that he was under any legal obligation to keep Wajid Husain in confinement. The order of the Magistrate of the pargana was not one by virtue of which the applicant was bound to keep Wajid Husain in confinement, or the latter was lawfully committed to custody. The detention by the police of Wajid Husain in the absence of an order under s. 167 of the Criminal Procedure Code, or some other lawful order, for more than twenty-four hours, was illegal—s. 61 of the Code. There is no evidence that the applicant had grounds for believing that the accusation against Wajid Husain was well founded, and he was properly released,—ss. 167 and 169 of the Code.

For the Crown it was contended that the order of the Magistrate of the pargana must be taken to have been an order of remand under s. 344 of the Code, by virtue of which the applicant was bound to keep Wajid Husain in confinement, and the latter was in lawful custody when made over to the applicant. The release of Wajid Husain without security being taken from him as required by s. 169 amounts to negligently suffering him to escape from confinement, in which he should have been kept unless such security was given.

JUDGMENT.

[132] STRAIGHT, J.—I am of opinion that this conviction must be sustained. Although the Magistrate's order is not so explicit in its terms as it should have been, and does not disclose, as clearly as it might, the reasons for authorizing the detention of Wajid Husain in custody, I think it may be held to have been passed under s. 167 of the Criminal Procedure Code. It seems to me, therefore, that Wajid Husain was lawfully committed to the custody of the police, and that the applicant, as a police-officer, was bound to detain him in such custody until released therefrom by due course of law. That he negligently suffered Wajid Husain to escape from his custody under s. 223 of the Penal Code—if he did not intentionally suffer such escape under s. 222, which latter provision is perhaps more strictly applicable to the facts—is abundantly clear from the evidence on the record, which is amply sufficient to sustain the conviction. This application must be refused. But as there is no proof of the applicant's having acted as he did from any corrupt motive and his conduct may therefore be regarded as a mere piece of negligence, I think a fine is an adequate punishment for the offence, more particularly as his conviction will, no doubt, entail the loss of his appointment. I accordingly quash the sentence passed by the Magistrate, and do order that Ashraf Ali do pay a fine of Rs. 100, or in default be imprisoned simply for two calendar months. If the Rs. 30 fine inflicted by the Magistrate has been paid, it will be credited towards the satisfaction of the Rs. 100.

Application refused.

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Before Mr. Justice Straight.

EMPRESS *v.* BABUA. [14th December, 1883.]

Security for good behaviour—Information showing that a breach of the peace is imminent —Order to furnish security for good behaviour for three years—Arrest of accused—Inquiry as to truth of information—Proof of information—Statements of persons not called as witnesses—Criminal Procedure Code, ss. 112, 114, 117, 118.

Conversations out of Court with persons however respectable, are not legal or proper material upon which Magistrates should adopt proceedings under s. 107 or s. 110 of the Criminal Procedure Code.

The information to be required by a Magistrate, before issuing an order under s. 112, may to some extent be of a hearsay and general description; but [133] when the party to whom the order is directed appears in Court in obedience thereto, the enquiry must be conducted on the lines laid down in s. 117. It is not because a man has a bad character, that he is therefore necessarily liable to be called upon for sureties of the peace or for good behaviour. There must be satisfactory evidence in the one case that he has done something, or taken some step that indicates an intention to break the peace or that is likely to occasion a breach of the peace; and, in the other, that he is within the category of persons mentioned in s. 110, the determination of which question must always be guided by the considerations pointed out in *Empress* v. *Nawab* (1).

A Magistrate is not competent, upon information that suggests the likelihood of a breach of the peace, to resort to s. 110 of the Criminal Procedure Code, and it is altogether *ultra vires* for him to demand security for three years in such a case.

In ordering the arrest of a person under s. 114 of the Criminal Procedure Code, the Magistrate must act on recorded information; it is not enough for him to express a belief that such a course is necessary. Not only must be have "reason to fear the commission of a breach of the peace," but "that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person."

[R., 12 A.L.J. 365 = 15 Cr. L.J. 288 = 23 Ind. Cas. 496 = 36 A. 262.]

THIS was an application for revision of an order of Mr. G. S. D. Dale, Magistrate of the Mirzapur District, dated the 3rd August, 1883, and of the order of Mr. W. Barry, Sessions Judge of Mirzapur, dated the 15th September, 1883, affirming the Magistrate's order. It appeared that on the 26th July, 1883, the Magistrate made an order, in which, stating that he had received information that Babua, the applicant in this case, and certain other persons were likely to commit a breach of the peace, by beating the Kotwal of Mirzapur city with shoes, he called upon those persons to give security for their good behaviour for three years, in their own recognizances for Rs. 1,000, and two sureties for Rs. 500 each, and ordered Babua to be arrested. Upon the inquiry, it being proved in the Magistrate's opinion that it was necessary, for maintaining good behaviour, that Babua should be ordered to give the security specified, the Magistrate made an order accordingly. The terms of the Magistrate's order were as follows:—

"From information I have received of late, it would appear that the *badmashes* of Mirzapur have risen to such a pitch of audacity, that respectable citizens have been afraid to move out of their houses lest they should be subjected to insult and injury at the hands of some of the city ruffians. The prime mover and pro-[134]tector of these bad characters was reported to be the accused Babua, a man of some wealth, who keeps an iron-monger's shop. Report has it that under

(1) 2 A. 835.

Babua's protection are certain '*chelas*' or disciples, who are entrusted with any dirty work that has to be done, and who are supported by Babua's influence when they are in danger of being brought under the law's grasp. That this report is well-founded, and not the mere result of individual spite, I firmly believe. Not one, but nearly every respectable city resident, who has spoken to me on the subject, has condemned this Babua as by repute the biggest black character in the city, and to such an extent has his influence made itself felt for evil, that one and all my informants refuse to come forward in open Court and give evidence against the accused for fear of the consequences. As one native gentleman expressed himself: 'If,' said he, 'you insist upon my coming into Court, I must leave Mirzapur, as I should not dare remain there any longer.' It may readily be understood therefore, as matters stand, how difficult a thing it is to obtain any evidence at all. In fact, the evidence on which the Court has to rely is certainly not as strong as it ought to be. In a question, however, of proceedings which have for their object the prevention of crime and preservation of the public security rather than the punishment of any particular offence, I think, as Magistrate in charge of the peace of a large city, I am justified in acting to a great extent upon information which has reached me from trustworthy sources as to the reputed character and habits of the accused, and such information, I unhesitatingly state, justifies me in demanding security for Babua's good behaviour.

"Such evidence as there is on record for the prosecution would, if it could be implicitly believed, amply warrant the requisition of a security bond from Babua, and to a great extent I do credit a considerable portion of the evidence, in so far as it shows the Babua is a man who has certainly earned a reputation for being a dangerous character, and one whom, in the interests of the public weal, it is desirable to call upon to give sureties for his subsequent good behaviour.

"Babua has only shown cause why he should not be called upon to execute a bond for good behaviour, by asserting that he is not a bad character, and is simply brought up before me through [135] the designs of the police. None of the witnesses produced by Babua are men of such status and repute as to be able to convince me of Babua's right to rank himself with the peace-loving and law-abiding community of Mirzapur city. Most of them vaguely shirk the question of character. The most respectable, as far as repute and standing goes, Sheonarain Das, Marwari, is conspicuous by his absence; the presumption being that he, too, like other respectable men, prefers to stay away: none of them support the allegation that the prosecution is the result of police persecution.

"Under these circumstances, I think it expedient to call upon Babua to execute a bond according to the terms of my order—*viz.*, himself in the sum of Rs. 1,000, with two respectable sureties (men approved of by the Court) in the sum of Rs. 500 each, to be of good behaviour for the term of three years. Until this security is given the accused Babua will be detained in prison, pending the orders of the Court of Session, to whom these proceedings must be submitted."

The proceedings having been laid before the Court of Session, the Sessions Judge affirmed the Magistrate's order, observing as follows:—

"On reading over the record and hearing Babua's pleader, Babu Lal Mohan, I consider there is sufficient evidence on the record to establish

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that Babua is a notorious *badmash*, an extortioner, a concoctor of false cases as a means of extorting money and altogether a terror to the town of Mirzapur.

"I have heard of the *badmashes* of Mirzapur (who, indeed, are notorious), and I have taken the opportunity of consulting a few of the residents of Mirzapur about this Babua, and the account they give of him is very black indeed.

"The proposed order of the Magistrate for a recognizance of Rs. 1,000, and two sureties of Rs. 500 each for Babua's good behaviour for three years, is sanctioned."

The Magistrate, upon his order being affirmed, directed that the imprisonment of Babua, upon failure to give the security required, should be rigorous.

[136] Babua applied to the High Court to revise the orders of the lower Courts.

Mr. *W. M. Colvin* and Mr. *G. T. Spankie*, for the applicant.

For the applicant it was contended that the order requiring the applicant to furnish security was not based on evidence taken by the Magistrate, but on information privately received by him, and was therefore illegal; and that it was further illegal, as it did not appear from the evidence recorded by the Magistrate that the applicant was one of the class of persons mentioned in s. 110 of the Criminal Procedure Code.

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

JUDGMENT.

STRAIGHT, J.—I regret to have to say that the procedure of the Magistrate in this case has been both unusual and irregular. Conversations out of Court with persons, however respectable, are not legal or proper material upon which to adopt proceedings under s. 107 or s. 110 of the Criminal Procedure Code; and while in every way anxious to support the Magistrates in preserving peace and good behaviour in the cities under their charge, it is impossible that this Court can for a moment allow the idea to get current that this is the kind of information required by law to justify issue of the process mentioned in Chap. VIII of the Code. Nor can it permit the Judge's extraordinary remark to the effect that he had "taken the opportunity of consulting a few of the residents of Mirzapur about this Babua, and the account they give of him is very black indeed," to pass without pointing out in very distinct terms that his action in talking out of Court about a case that was before him judicially was most improper, and must not be repeated. It seems to be thought that the procedure to be followed for taking sureties of the peace or for good behaviour may be of the loosest kind, and it is time this idea was corrected. No doubt the information to be required by a Magistrate before issuing an order under s. 112 may to some extent be of a hearsay and general description; but when the party to whom the order is directed appears in Court in obedience to such order, the inquiry must be conducted on the lines laid down in s. 117. It is not because a man has a bad character that he is therefore necessarily liable to be called upon for sureties of the peace or for good behaviour. There must be [137] satisfactory evidence in the one case that he has done something, or taken some step that indicates an intention to break the peace, or that is likely to occasion a breach of the peace; and, in the other, that he is within the category of persons mentioned in s. 110, the determination of which question must always be guided by the considerations pointed out

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in *Empress* v. *Nawab* (1). I am well aware that in Mirzapur, particularly, the task of the Magistrate in preserving order is an extremely difficult and anxious one; but neither he nor the Judge nor this Court is empowered by law to put a man in prison simply because he has an evil reputation. If respectable persons, who can prove facts which would constitute the credible information legally necessary to justify issue of process and requirement of security, have not the courage to come forward and assist the Magistrate in the prevention of breaches of the peace or of crimes by giving evidence in Court, it is unfortunate, to say the least of it, but the Magistrate is not therefore entitled to act upon inadequate proof obtained *aliunde*, which he himself describes "as not so strong as it ought to be." If in the interest of public order or security to property the attendance in Court of such persons was necessary, the Magistrate had the power, if he chose to exercise it, of compelling their appearance. But apart from these matters, other serious irregularities are to be found in the proceedings. Upon the face of the order of the 26th July, drawn up, I presume, under s. 112 of the Criminal Procedure Code, the only information set forth refers to an apprehended breach of the peace. S. 110, upon which the Magistrate professed to issue it, was therefore inapplicable, and he should have taken action upon such information, if he took it at all, in advertence to s. 107, by the provisions of which he was incompetent to require security for a longer period than one year. He had no authority whatever under the law, upon information that suggested the likelihood of an assault being committed and the public peace endangered, to resort to s. 110, and it was altogether *ultra vires* for him to demand security for three years in such a case. Moreover, beyond the Magistrate's own bare assertion of its necessity, I find nothing in the record to warrant the adoption of the extreme measure of arresting Babua under s. 114. **[138]** No adequate information is disclosed upon the face of the order showing that the alleged apprehended breach of the peace—namely, the alleged intended assault upon the City Kotwal—could not be prevented otherwise than by the arrest of Babua. This the law requires the Magistrate to record, and it is not enough for him merely to express a belief that such a course is necessary. Not only must he have "reason to fear the commission of a breach of the peace," but "that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person."

I have been constrained to point out these numerous irregularities in the Magistrate's procedure for his and others' guidance in future. From the very frank and candid terms in which he has couched his final order in the matter, I am satisfied he acted with the most perfect *bona fides*, and from a sincere desire to protect the interests of the large community under his charge. I have then to consider whether, despite the irregularity of the original order of the 26th July, the applicant was unfairly prejudiced in the subsequent inquiry. It is impossible not to feel in face of the Magistrate's own statement, as to the evidence not being "so strong as it ought to be," coupled with his admissions of conversations out of Court with persons who were not called as witnesses and whom Babua had no opportunity of cross-examining, that the facts necessarily presented themselves to his mind with an amount of colouring which, however wishful he may have been to be perfectly fair and impartial, could not but have an unduly prejudicial influence on his decision. I regret to be constrained to

(1) 2 A. 835.

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do so; but I have no alternative but to quash the orders of the Magistrate and Judge requiring Babua to find security; and I accordingly direct that they be set aside, and his bail and recognizances be discharged. I think it right to add, that it will be open to the Magistrate to adopt any fresh proceedings that may appear to him proper, though, under all the circumstances, it is desirable they should be initiated and carried out by some other competent officer in strict compliance with the directions of the Criminal Procedure Code.

Application allowed.

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6 A. 139=3 A.W.N. (1883) 263=8 Ind. Jur. 386.

[139] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Brodhurst.

SKINNER (*Plaintiff*) *v.* JAGER (*Defendant*).* [19th December, 1883.]

Bailment—Work done—Contract—Quantum meruit—Bailee's lien—Act IX of 1872 (*Contract Act*), s. 70.

S delivered *J* an organ to repair, *J* promising to repair it for Rs. 100. *J* subsequently refused to repair it for that sum, and claimed to be entitled to retain the organ until he received certain remuneration for the work done. *Held*, that as where there is an express contract, it must be performed in its entirety or nothing can be claimed under it, and there is only room for a *quantum meruit* claim where no express contract has been made, *J* was not entitled to retain the organ until he was paid.

THE plaintiff in this suit sued for an organ, which had been delivered to the defendant for repairs, and which the latter refused to return until a sum of Rs. 65-8-0 had been paid to him. It appeared that the defendant had come to the plaintiff's house, in order to examine the instrument with a view of estimating the value of the repairs which would be necessary. After an examination of the instrument he agreed with the plaintiff to repair it for Rs. 100. The defendant was thereupon allowed to remove the organ to his own house. Subsequently the defendant ascertained that a part of the machinery of the organ was so worn out that he was not able to repair it himself, and he therefore applied to the plaintiff for Rs. 25, the cost of having such repair effected elsewhere. The plaintiff refused to pay the money, on the ground that the defendant had agreed to repair the organ for Rs. 100. On the plaintiff demanding delivery of the organ the defendant refused to deliver it until he had been paid a sum of Rs. 65-8-0 made up as follows:—Rs. 50 for repairs to the organ; Rs. 10 for going to the plaintiff's house and taking the organ to pieces; and Rs. 5-8-0 for the hire of the coolies who removed the organ to the defendant's house. Thereupon the plaintiff brought the present suit. The Court of first instance (Subordinate Judge) decreed the plaintiff's claim, holding that as there had been a contract made for the repair of the organ for Rs. 100, the defendant had not the lien on the instrument which he claimed. The defendant appealed **[140]** to the District Judge, who, though concurring in the finding as to the existence of the contract to repair the organ for Rs. 100, yet held that the defendant had a lien on it in respect of the repairs done to it by him, and made a decree

* Second Appeal No. 674 of 1883, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 28th March, 1883, modifying a decree of R. Scott, Esq., Subordinate Judge of Dehra Dun, dated the 12th December, 1882.

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directing the defendant to deliver the organ to the plaintiff on payment by the latter of Rs. 40, the value of such repairs.

The plaintiff appealed to the High Court, and it was contended on his behalf that, having regard to the facts found in the case, the defendant had no right to retain the organ until he received the value of the service he had rendered in respect thereof.

Mr. *C. Dillon* and Mr. *J. E. Howard*, for the appellant.

Mr. *C. H. Hill*, for the respondent.

The Court (STUART, C.J. and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

STUART, C.J.—In this case various sections of the Indian Contract Act, the learning to be found in the books on the contract of bailment, of express contract, and of claims under a *quantum meruit*, and other legal doctrines were gone into at the hearing. But the case is a very simple one. The plaintiff was not himself examined as a witness, and this is to be regretted; but the evidence of the defendant was taken, and the material facts, as found by the Courts below, appear to be these:—Some time in October 1881 the defendant was called by the plaintiff to his house, where he was shown an organ which had got out of order. The defendant told the plaintiff that it wanted cleaning and repairs, and that the cost would be about Rs. 100 "if nothing else was the matter with it." The plaintiff agreed, and told the defendant to take the organ to pieces, and to take it to his own place, and the defendant did so. On further examination of the instrument the defendant found that there was more to be done in repairing it than he had expected, the catgut had been eaten by rats, and, as a consequence, the organ could not be wound up, and there was something wrong with one of the fly-wheels and he therefore considered that Rs. 100 would be an inadequate payment to him. The defendant also asked for a sum of money in advance, which the plaintiff refused. In the result the defendant claimed not under any contract but for work, &c., as follows—Rs. 65-8-0, which was [141] made up as follows, Rs. 50 for such work as he had done upon the organ, that is, in the language of the English law, for a *quantum meruit*; Rs. 10 for going to the plaintiff's house and breaking up the organ; and Rs. 5-8 for coolie hire.

These payments the plaintiff has steadily objected to, on the ground that there was a contract for all repairs whatever for Rs. 100, and in consequence the defendant has refused to deliver up the organ to the plaintiff till his claim for the Rs. 65-8-0 has been satisfied.

The material question is, whether there was an express contract on the part of the defendant to do all the necessary repairs on the organ for Rs. 100. Both the lower Courts are agreed in finding that there was such a contract, the Judge at the same time holding that, notwithstanding such contract, the defendant was entitled to special remuneration for such work and trouble as he had had with the organ; the Subordinate Judge, on the contrary, being of opinion that there was a complete contract to do all that was wanted on the organ for Rs. 100, and that there is no legal ground for any further claim; and I am entirely of the same opinion. The law on the subject is perfectly clear. Where there is an express contract it must be performed in its entirety, or nothing can be claimed under it, and there is only room for a *quantum meruit* claim where no such express contract has been made. The condition on the part of the defendant, "if nothing else is the matter with it," was an unreasonable, if not an

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absurd, stipulation, and it was probably an after-thought. In any case, it was highly unreasonable in the defendant to expect he was to receive Rs. 100 for merely cleaning the instrument and doing any trifling repairs. The sum was a substantial one, and I agree with the Subordinate Judge in thinking that it was intended to cover all that was necessary to be done. If the defendant was honestly of opinion that what was wanted for the thorough repair of the organ would cost more than Rs. 100, it was his duty at once to have told the plaintiff so, and at the same time to have returned to him the organ, leaving it to the plaintiff to allow him any remuneration or compensation which, under the circumstances, he might consider fair, and such compensation, indeed, the plaintiff's counsel stated, [142] at the hearing before us, he was willing to allow. Of course such compensation would include the charge for coolie hire, and probably a gold mohar would be sufficient in other respects. But in no case can the defendant retain the organ; any such claim for compensation as I have referred to is entirely in the discretion of the plaintiff, and the defendant cannot, for one moment in respect of it, be allowed a lien on the organ itself.

I would therefore allow the present appeal, set aside the order of the Judge, and restore that of the Subordinate Judge, with costs in all the Courts.

BRODHURST, J.—The lower Courts have concurred in finding that the defendant, who is a skilled musician, took the plaintiff's organ to pieces, and, after examining it, agreed with plaintiff to put it into thorough repair for a sum of Rs. 100, but, nevertheless, did not do the full repairs to the organ according to the agreement.

As observed by the learned Chief Justice, "where there is an express contract, it must be performed in its entirety, or nothing can be claimed under it;" and, under the circumstances of the case, I concur in decreeing the appeal, and in restoring the judgment of the Court of first instance, with costs in all the Courts.

Appeal allowed.

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6 A. 142 = 3 A.W.N. (1883) 264.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

PARSHADI LAL AND ANOTHER (*Creditors*) *v.* CHUNNI LAL (*Judgment-debtor*).* [21st December, 1883.]

Insolvent judgment-debtor—Application by creditor to prove claim—Act XV of 1877 *(Limitation Act), sch. ii, No.* 178—*Civil Procedure Code, ss.* 352, 353.

In July, 1878, a person was declared an insolvent under the provisions of Chap. XX of the Civil Procedure Code. Only one creditor then proved his debt, and no schedule was framed. This creditor having applied for the sale of property belonging to the insolvent, another creditor, in May, 1883, applied to prove his debt and to have his name inserted in the schedule which the Court then ordered to be framed.

Held that such application could not be treated as made under s. 353, as no schedule had been framed, but must be regarded as in the nature of a tender of proof of debt under s. 352; that it was governed by art. 178 of the Limitation Act, 1877; and that, the right to apply having accrued at the date of the declaration of insolvency, the application was beyond time.

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* First Appeal No. 119 of 1883, from an order of C.J. Daniell, Esq., District Judge of Moradabad, dated the 25th May, 1883.

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APPELLATE CIVIL.

6 A. 142 = 3 A.W.N. (1883) 264.

[143] ONE Chunni Lal, having been arrested in execution of a decree, applied on the 22nd April, 1878, under s. 344 of the Civil Procedure Code, to the District Court of Moradabad, to be declared an insolvent. The notice required by s. 347 was served on the creditors mentioned in the application. None of them appeared at the hearing of the application. On the 19th July, 1878, the District Court declared Chunni Lal to be an insolvent, but it did not appoint a receiver of his property, apparently because his assets amounted in value to Re. 1-15 only. For the same reason only one creditor, named Silchand, came forward to prove his debt. No schedule was framed as required by s. 352 of the Code. About three years later the insolvent inherited certain immoveable property, and thereupon the legal representatives of Silchand, who had in the meantime died, applied for the sale of such property. On the 7th May, 1883, notices were served on the other creditors, and thereupon Parshadi Lal and Ramchand, the assignees of the claim of Hira Lal, a creditor, mentioned in the application of Chunni Lal to be declared an insolvent, the assignment being dated the 10th April, 1878, applied to prove their claim. The District Court rejected the application as too late, refusing to enter the names of the applicants in the schedule, which it ordered to be framed.

The applicants appealed to the High Court, contending that they were entitled to prefer the application within ninety days from the date of the publication of the schedule, and as they had preferred it before the schedule was framed, it could not have been preferred beyond time.

Babu *Oprokash Chandar Mukarji*, for the appellants.

Lala *Ratan Chand*, for the respondent (judgment-debtor).

The Court (STRAIGHT and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—At the time the application was preferred to the Judge, which is the subject of this appeal, no schedule of creditors had been prepared in the manner directed by s. 352 of the Code. Such application, therefore, could not properly be regarded in the light of that of a creditor of an insolvent, not mentioned in the schedule of his creditors stuck up in the Court-house, applying under s. 353 for leave to prove his debt and for an order direct-[144]ing his name to be inserted therein. It is obvious that ss. 352 and 353 provide for two quite distinct proceedings,—the one prior, and the other subsequent, to the framing of the schedule; and it is to be noticed that separate appeals are given in cl. (17) of s. 588 in respect of the different orders that may be passed thereunder, while a special limitation of ninety days from "the date of the publication of the schedule" (art. 174 of Act XV of 1877) governs applications under s. 353. The application to which the appeal before us relates cannot, as we have already remarked, be treated as made under s. 353, for at the time it was presented no schedule had been framed; and we must look upon it as in the nature of a tender of proof of debt under s. 352. We then have to consider whether the Judge has rightly refused to admit the proof of the appellants on the ground that they are barred by limitation. It is to be observed that he does not mention any particular article of Act XV of 1877 as applicable, nor does he state where the limitation is to be found upon which he bases his decision. We think that when Chunni Lal was declared an insolvent on the 19th July, 1878, a right accrued to the appellants to apply for admission of the

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proof of the debt due to them. Although they received notice from the Court to come in, they failed to do so, and it is only now, when nearly five years have elapsed, that they seek to have their claim scheduled. In our opinion art. 178 of the Limitation Act may fairly be held to govern applications of the kind preferred by the appellants, and their right to apply having accrued at the date of the declaration of insolvency, they are now barred by time. In this view of the matter the Judge was right in his refusal, and this appeal must be dismissed with costs.

Appeal dismissed.

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6 A. 144=4 A.W.N. (1884) 1.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

SUNRAJ KUARI *v.* AMBIKA PRASAD SINGH.* [22nd December, 1883.]

Ex parte *judgment, application for an order to set aside—Civil Procedure Code, s.* 108—*Limitation—Act XV of* 1877 (*Limitation Act, sch. ii, No.* 164)—"*Execution of process for enforcing the judgment.*"

An *ex parte* order was made against *S*, to whom a certificate under Act XL of 1858 had been granted, revoking such certificate, and granting it to A, and [145] directing *S* to deliver the property of the minor to *A* and to render an account of all moneys received and disbursed within thirty days. In pursuance of this order a precept or injunction was served on *S*, informing her that the certificate granted to her had been revoked, and had been granted to *A*, and directing her to deliver the property of the minor to *A*, and to render him accounts of all moneys realized and expended within one month. *Held* that such precept or injunction was a "process for enforcing" such *ex parte* order, and that it was "executed" when it was served on *S*, within the meaning of art. 164 of the Limitation Act, 1877.

THIS was an appeal from an order of the District Judge of Gorakhpur, refusing to set aside a judgment *ex parte*. It appeared that the respondent, Ambika Prasad, had applied to the District Judge that the certificate of guardianship in respect of the person and property of a minor called Udibhan Singh, granted under Act XL of 1858 to the appellant, Sunraj Kuari, should be revoked, and a fresh certificate should be granted to him. On the 15th January, 1883, after issue of notice to Sunraj Kuari, who did not appear, the District Judge made an *ex parte* order under s. 21 of Act XL of 1858, directing—(i) that the certificate of guardianship granted to Sunraj Kuari, in respect of the person and estate of the minor, should be cancelled; (ii) that a fresh certificate should be granted to Ambika Prasad; (iii) that the property of the minor should be made over by Sunraj Kuari to Ambika Prasad within thirty days; and (iv) that an account of all moneys received and disbursed by Sunraj Kuari should be rendered within the same period. On the same day a notice was issued to Sunraj Kuari by the District Judge to the following effect:—"As under order made this day the certificate obtained by you on the 21st July 1874 has been revoked and granted to Babu Ambika Prasad Singh, you are therefore hereby directed to deliver all the property which is in your hands to Ambika Prasad within one month from the date hereof, and render accounts to him of all the moneys realized and expended." This notice was duly served on Sunraj Kuari

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* First Appeal No. 144 of 1883, from an order of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 5th September, 1883.

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on the 4th February, 1883. On the 9th February, 1883, Sunraj Kuari presented a petition to the District Judge in which she acknowledged the receipt of the notice of the 4th February, 1883, and alleged that she had received no intimation of the application for the cancelment of her certificate. This petition was filed with the record. On the 24th February the time allowed for compliance with the order of the 15th January having expired, Ambika Prasad applied to the District Judge to exercise his powers under [146] s. 22 of Act XL of 1858, and enforce the delivery of the minor's property and accounts. On the 9th April, 1883, the District Judge, under that section, fined Sunraj Kuari Rs. 10, and directed that if she did not within one week from that date comply with the order of the 15th January, 1883, he would be prepared to commit her to close custody. On the 11th April, 1883, Sunraj Kuari applied, under s. 108 of the Civil Procedure Code, for an order to set aside the *ex-parte* order of the 15th January, 1883, on the ground that she had not received notice of Ambika Prasad's application. The District Judge refused the application on the ground that it was made beyond the time allowed by art. 164 of Act XV of 1877, holding that such time began to run from the 4th February, 1883, when the notice set forth above was served on Sunraj Kuari, such notice being a "process for enforcing" the *ex-parte* order within the meaning of that article. Sunraj Kuari appealed to the High Court from this order.

Mr. *A. H. S. Reid*, for the appellant, contended that her application was within time. Until the property of the appellant has been attached, with a view to the realization of the fine imposed on her, or she has been committed to custody, under the provisions of s. 22 of Act XL of 1858, it cannot be said that any process for enforcing the *ex parte* order has been executed. He referred to *Poorno Chunder Coondoo* v. *Prosonno Coomar Sikdar* (1).

Mr. *G. T. Spankie* (with him Mr. *W. S. Howell*), for the respondent.—The notice of the 4th February was a summons or process, an initial process for enforcing the *ex-parte* order. It was executed when served on the appellant. Time began to run from that date. In the case cited for the appellant it is only held that mere notice of execution is not "sufficient" process for enforcing the decree, not that a notice is not a process for enforcing the decree. Having regard to the nature of the *ex-parte* order in this case, the notice of the 4th February was a process for enforcing it.

The Court (BRODHURST, J., and TYRRELL, J.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—The only question raised by this appeal is whether the application presented on the 11th April, 1883, by Sunraj Kuari [147] for an order to set aside a judgment *ex-parte* against her by the District Judge on the 15th January, 1883, was or was not within the period of limitation provided for such an application by art. 164, sch. ii, 3rd division of the Limitation Act. That period is thirty days, and it begins to run from "the date of executing any process for enforcing the judgment." We have therefore only to see on what date the execution of any process for enforcing the judgment took place. On the 15th January, 1883, a notice was issued to Sunraj Kuari by the District Court, to the effect that "as under order made this day the certificate obtained by you on the 21st July,

(1) 2 C. 123.

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1874, has been revoked and granted to Babu Ambika Prasad Singh, you are therefore hereby informed to deliver all the property which is in your hands to Ambika Prasad Singh within one month from the date hereof, and render accounts to him of all the moneys realized and expended." Formal proof of the service of this injunction on the Musammat under date the 1st and 4th February, 1883, is on the record, and she acknowledged receipt of the precept in her petition, dated and presented to the Judge on the 9th February, 1883. In this petition she endeavoured to show cause why the order of the 15th January aforesaid should not have effect in execution. We have no hesitation in ruling that the formal precept or injunction issued on the 15th January for carrying into operative effect the judgment or order previously made against the Musammat on that same day was a process for enforcing that judgment, and that it was executed when it was served on her according to law on the 4th February as above stated.

It is clear therefore that the limitation of art. 164 *supra* began to run from the 4th February, 1883, and had expired when Sunraj Kuari made her application to set aside the *ex-parte* judgment on the 11th April, 1883.

The Judge's finding that this application was barred is therefore right, and, affirming it, we dismiss this appeal with costs.

Appeal dismissed.

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6 A. 148=4 A.W.N. (1884) 6.

[148] ORIGINAL CIVIL.

Before Mr. Justice Straight.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* JAGAN PRASAD. [9th January, 1884.]

Cantonment—Grant of land by military authorities for building purposes—Resumption of land by Civil authorities—Assignment of profits of the land to Municipal Committee—Liability of grantee to pay ground-rent—Refusal of grantee to pay ground-rent to Municipality—Suit by the Secretary of State for India for declaration of title and assignment of rent—Cause of action—Jurisdiction of Civil Court—Right of grantee to compensation in case of ejectment.

Certain land situate within the limits of a cantonment was granted free of rent for building purposes by the military authorities. Under the Military Regulations relating to such grants such a grant could not be resumed by the Government without a month's notice and without the payment of the value of such buildings which might have been authorized to be erected. The land was subsequently resumed by the Civil authorities, and, the land being within municipal limits, the ground-rents on it were assigned to the Municipality. The Municipal Committee having demanded ground-rent in respect of the buildings erected on such land under such grant from the representative in title of the original grantee, and the latter having refused to pay the same or to vacate the land, the Secretary of State for India in Council sued him in the Civil Court for a declaration of the proprietary right to the land, for its assessment to ground-rent, and, in the event of the refusal of the defendant to pay such rent, when fixed, for his ejectment therefrom, and for mesne profits of the land for six years. The cause of action was stated in the plaint to be the refusal of the defendant to pay ground-rent or to accept a lease or to surrender the land after a notice to that effect had been issued to him by the Municipal Committee as the plaintiff's agents.

Held that the Municipal Committee were the plaintiff's duly authorized agents to lease and obtain rent for the land occupied by the defendant's buildings with their compounds; that such notice was properly issued in that

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character on behalf of the plaintiff; and that the defendant's subsequent refusal to pay rent, or to accept a lease or evacuate the premises amounted to a sufficient denial of the plaintiff's title to afford him a good cause of action—that, assuming that no agreement to pay rent existed, the plaintiff was entitled to demand and recover reasonable compensation for the use and occupation of the land by the defendant—that the suit was maintainable in the Civil Court, and it had power to grant the plaintiff the reliefs sought—that by the conditions of the grant by the military authorities the plaintiff was not disqualified from demanding ground-rent for the land before he had paid the defendant the value of the buildings, but that, looking to those conditions, it would not be fair or equitable to grant the plaintiff a decree, pure and simple, for the ejectment of the defendant, but he should be put under the condition that, if, in case of the defendant's refusal to pay the rent fixed, he desired to eject him, the value of the buildings as cantonment residence must first be determined, and when determined, must be tendered to the defendant, and if the latter refused to accept it, the plaintiff would then be entitled to eject him.

[F., 7 A.L.J. 1194 (1197) = 8 Ind. Cas. 1096 (1098); D., 30 B. 137 (146) = 7 Bom. L.R. 735.]

[149] THE facts of this suit are sufficiently stated for the purposes of this report in the judgment of the Court.

Mr. *T. Conlan* and Mr. *R. C. Saunders*, for plaintiff.

Mr. *C. H. Hill* and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the defendant.

JUDGMENT.

STRAIGHT, J.—In this suit the Secretary of State for India seeks for a declaration of his proprietary right to certain lands within the Municipality of Allahabad, now occupied by buildings belonging to the defendant, for their assessment to ground-rent from the 1st of July 1881, and thereafter at the yearly rental of Rs. 20 per acre, or in any other amount which to this Court may appear fair and equitable; and in the event of refusal by the defendant to pay such rent, when fixed, for possession of such lands by his ejectment therefrom. The plaintiff further sues for Rs. 1,552-2-0, mesne profits alleged to have accrued and to be owing from the defendant for the period intervening between the 1st of July 1875 and the 30th of June 1881. The following are, in substance, the allegations set forth in the plaint, upon which the plaintiff bases his claim. He says that in the year 1843, by an arrangement with the then zamindars, he acquired two plots of lands, for the purposes of this litigation respectively called *No. 4A.*, containing 2 acres 3 roods 23 poles, and *No. 5A*, 3 acres 6¼ poles, which were handed over to the military authorities for cantonment purposes, the buildings now standing thereon and belonging to the defendant being erected in that behalf. Subsequently, in the year 1857, owing to the participation of the proprietors thereof in the Mutiny, plots *4B.*, containing 2 acres 3 roods and 29 poles, and *5B.*, 4 acres and 11 poles, were confiscated by Government and added to plots *4A.*, and *5A.*, being alike with them subjected to cantonment regulations. All these plots were, the plaintiff alleges, resumed by the civil authorities on the 22nd of April, 1870, and cease from that date to be affected by the regulations applying to cantonments (1). The

(1) The material portion of those regulations was as follows :—

"No ground will be granted except on the following conditions, which are to be subscribed to by every grantee, as well as by those to whom his grant may subsequently be transferred :—(*a*) Government to retain the power of resumption, at any time, on giving one month's notice and paying the value of such buildings as may have been authorized to be erected, &c., &c.,"—*vide* Regulations and Orders for the Army of the Bengal Presidency, 1880, s. 17, paragraph 42.

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[150] plaintiff further states that on the 24th of January, 1871, one Quallett, the then owner of the buildings and compounds standing on and comprised in the plots mentioned above, was required by the Officiating Collector of Allahabad on behalf of the plaintiff to pay ground-rent in respect thereof at the rate of Rs. 20 per acre, the sum demanded being Rs. 191-3 0, which amount, however, was based upon a miscalculation of the areas of such plots, as being 9 acres 2 roods 9 poles 36 yards, instead of 12 acres 3 roods 29¼ poles, and payment thereof was made by Quallett on the 22nd February, 1871. That the said Quallett having, on the 1st of May, 1871, transferred his interest in the said buildings and plots to the defendant, the latter, on subsequent dates, namely, the 7th of June, 1871, 18th of April, 1872, 4th of May, 1873, and 12th of April, 1875, paid the said Rs. 191-3-0, but ceased to do so after such last-mentioned date, and now refuses to pay the same or any rent at all. The plaint further sets forth that on the 12th of April 1880 the plaintiff, through the President of the Municipality of Allahabad, caused notice to be served on the defendant, intimating that he would have to pay ground-rent from the 1st of July 1880 in respect of the plots in his possession which had then been measured and found to contain 12 acres 3 roods 29¼ poles, at the rate of Rs. 258-11-0 per annum, and that he was required to accept a lease at the above rental, or to resign his tenancy before the 30th of April then next ensuing. That the defendant, however, refused to pay the amount demanded, or to accept a lease, or to surrender the land, and hence the present suit, which was instituted on the 16th of March, 1882. It is needless for me to enter at length into the cause of the delay that ensued after the plaint was filed; it is enough to say that efforts were made to bring the matters in difference to arbitration, but these were unsuccessful; and on the 15th of February, 1883, the case having then been removed for trial into this Court, the statement of defence was filed. By this the defendant first takes objection to the frame of the suit, and impugns the plaint as disclosing no cause of action, because it does not allege that the defendant had ever denied the plaintiff's title to the land; because no agreement, express or implied, to pay Rs. 20 per acre for the period between the 1st July, 1875, and 30th of June, 1881, is asserted to have existed; [151] because this Court has no power to assess the defendant to rent in the manner prayed by the plaintiff; because the plaintiff cannot claim to have the defendant ejected for non-payment of rent, the rate of which had not been fixed at the time of suit brought; because the plaintiff never demanded ground-rent of the defendant, nor does he allege that he did; because the land in suit having been granted to the person who originally erected the buildings thereon, now belonging to the defendant, under cantonment regulations, the plaintiff cannot, according to such regulations, resume such land without first giving the defendant one month's notice of his intention to do so, and paying the value of the buildings erected thereon; because what took place between the Municipal Committee of Allahabad and Quallett and the defendant does not affect the question of the plaintiff's proprietary title, or the liability of the defendant to pay ground-rent to the plaintiff.

The defendant further pleads generally that of the 12 acres 3 roods 29¼ poles claimed by the plaintiff, 9 acres 3 roods and 36 yards were granted in 1844 by the military authorities for cantonment purposes to one E. A. Mumford, who erected thereon the two bungalows now in possession of the defendant, and that he (the defendant) is entitled to all the rights, conditions, and privileges which attached to the said

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E. A. Mumford—namely, one month's notice of the plaintiff's intention to resume and payment of the value of such buildings upon such resumption; that of the 9 acres 3 roods 29¼ poles last-mentioned only 5 acres 3 roods 29¼ poles were in fact acquired from the zamindars, while the remaining 3 acres 2 roods 20 poles and 26 yards were in 1843 made over to the plaintiff by the Jaipur State for military purposes, subject to the condition that when no longer required they should revert thereto, which condition having happened, they have ceased to continue in the hands of the plaintiff; that the said E. A. Mumford, after he had erected the bungalows aforesaid, added to the 9 acres 3 roods 9 poles 36 yards in his possession a further 3 acres 1 rood 19 poles and 14 yards by forcibly dispossessing the true owners therefrom, and litigation in respect thereof was going on between the said Mumford and the zamindars, at the time of the Mutiny, in the Court of the Munsif of Allahabad; that the records of such litigation were destroyed during that period, and that these [152] 3 acres 1 rood 19 poles and 14 yards were subsequently professedly confiscated by the plaintiff, but in all respects remained as a portion of the compounds of the said bungalows; that such confiscation was invalid; that in 1872 a portion of the 3 acres 1 rood 19 poles and 14 yards was exchanged for other lands, and such portion is no longer included in the said compounds; that the payment of Rs. 191-3-0 by Quallett, alleged in the plaint, was made under compulsion, and was, if an admission of liability at all, an admission of liability to the Allahabad Municipal Committee, and not to the plaintiff, and is in no way binding on the defendant; that the defendant's payments, set forth in the plaint, were made either under compulsion or protest; that they were made to the Municipal Committee, not to the plaintiff or any one on his behalf, and under a mistake as to the power of such Committee to demand them; and that they do not amount to an admission of any liability in the defendant to the plaintiff; that the notice of the 12th of April, 1880 was from the said Committee, and not from the plaintiff, or on his behalf; and that they had no authority to issue it on behalf of the plaintiff, nor can he ratify their action in doing so.

Upon the day appointed for the settlement of issues—namely, the 16th of March, 1883—I thought it convenient, by way of preliminary, to hear counsel on both sides as to the technical objections raised by the defendant's pleas to the matter of the plaint, and after doing so fixed the following issues for determination:—

1. Does the plaint, on the face of it, disclose any right in the plaintiff to institute a suit?

2. If the plaintiff has a right to sue, does the plaint disclose any contract, express or implied, between the defendant or his predecessors in title and the plaintiff to pay ground-rent for the land to which the suit has reference?

3. If no such contract is disclosed, has this Court power to assess the amount of ground-rent to be paid by the defendant to the plaintiff, and in default of payment thereof at the rate assessed, to order his ejectment from the land in suit?

[153] Subsequently at a further hearing on the 12th of July it appeared to me that the following additional issues arose, and they were fixed accordingly:—

4. Of the land now sought to be assessed with rent, what portion was originally granted to Mumford in 1844; and as to the rest, in what way has it been included in the two compounds as they now stand?

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5. Having regard to the terms of the Regulation under which the land or part of it was originally granted to Mumford by the cantonment authorities, did the condition as to notice and compensation, *ipso facto*, cease to have effect from the moment when it was surrendered to the civil authorities, or is the defendant entitled to the benefit of the terms and conditions on which the grant was made to Mumford?

6. Under what circumstances were the payments made to the Municipality by Dr. Quallett and the defendant, and do they now estop the latter from denying the plaintiff's title to rent?

Since the final hearing I have for formal purposes found it necessary to add the further issues:—

7. What amount is the plaintiff entitled to by way of rent for the period from the 1st of July, 1875, to the 30th of June, 1881?

8. If the defendant should be assessed to rent, what is a fair and reasonable rate at which to assess him?

With regard to the 1st issue, I am of opinion that the plaint does disclose a right in the plaintiff to institute a suit, and a cause of action to justify his coming into Court. The technical objections urged by the defendant to the maintenance of an action appear to me ill-founded, and to proceed upon a misapprehension of the relations that subsist between Government and Municipalities in respect of land of the kind to which the present litigation has reference. Assuming for the moment that the plaintiff's proprietary title to the ground occupied by the bungalows and compounds attached thereto, in the possession of the defendant, is established, it is necessary I should at once point out that though such land is nominally made over, or to use the more correct [154] term, intrusted to municipal bodies, no proprietary rights therein are parted with or transferred by Government, which simply places the usufruct thereof at the disposal of the local authorities as a source of income for local purposes. It is a standing rule that no sale by a Municipality of "*nazul*," as it is called, for building purposes is valid without the confirmation of Government; and if it is required by Government for any public object or for its own use, no compensation is paid or payable to Municipal Committees upon appropriation or resumption. In the present case, when the lands upon which the defendant's bungalows and compounds now stand were resumed in 1870, it was clearly within the competence of Government to hand the same over to the Municipality of Allahabad, and to permit it to realize and enjoy any profits that might be derived therefrom. For whatever the rights may be to which the defendant, as standing in the shoes of Mumford, is entitled—a question I will presently consider—the fact of the plaintiff's resumption of the actual land in suit, with the exception of a small portion since acquired by the defendant in exchange, upon its surrender by the cantonment authorities in 1870, is abundantly proved. The position of Government in regard to it since then has been neither better nor worse than that of any private individual, entitled to dispose of and deal with his own real estate according to his free will and pleasure, subject, of course, to any restrictions or obligations thereon properly created by himself or any other person on his behalf. By a Notification No. 5188-A, dated 13th December, 1870 (*North-Western Provinces Gazette*, page 675), the following "sources of income" were placed by Government at the disposal of the Municipal Committee of Allahabad:—

1.—"Site-tax and ground-rents on leased lands and grazing dues on unleased lands in the old and new cantonments."

The use of the expression "site-tax" is perhaps not altogether happy, for by Act VI of 1868, which then contained the law regulating Municipalities in these Provinces, Municipal Committees had no power in terms to impose "site-tax," the exact impost they were authorized to exact being "a tax on houses, buildings, and lands" (s. 11), and the latter Municipalities Act (XV of 1873), s. 16, contains a similar provision. If, however, "site-tax" did not [155] mean something more than, construed strictly, I should have to interpret it, the notification in question might just as well never have been published, for it professed to place a fund at the disposal of the Municipality which they had no power under the law to realize. If the exigencies of the case required it, I certainly should not hesitate to hold that the term "site-tax" was not used in a technical sense, and had a wider reference to moneys to be derived from "*nazul*" thereafter to be built upon. But there are further words in the notification which seem to me to obviate any difficulty or doubt that might arise in placing a construction on the expression "site-tax." "Ground-rents on leased lands" I read to mean ground-rents derivable from "*nazul*" already leased or thereafter to be leased. The term "ground-rents" appears to me to preclude the notion of rent derived from land let for mere agricultural purposes, and the only conclusion I can draw from the use of the words is, that Government intended to place all rents, already payable or thereafter to become payable for "*nazul*" leased or to be leased for erection of buildings or houses, at the enjoyment and disposal of the Allahabad Municipality. If this view is correct, then the land occupied by the bungalows with their compounds, now belonging to the defendant, was in terms covered by the language of the notification, and the Committee were empowered as agents of Government to charge ground-rent upon it if they thought proper to do so, and to take all necessary steps to impose and realize such ground-rent. I may as well add that even had there been no notification issued, there seems to me to be ample material upon the record to justify the inference that the land was placed by Government at the disposition of the Allahabad Municipality, with full authority to use it for its own profit and advantage. I confess I find it difficult to understand the precise position taken up by the defendant. He does not pretend to assert any proprietary title in himself, nor does he seriously contest that set up by the plaintiff: in short, his whole case is, as far as I can appreciate it, one of virtual confession of the plaintiff's rights and avoidance of his claim to rent or possession. Nowhere do I find in the pleadings, nor at any time during the trial did I hear from his learned counsel, any substantial or adequate reason why the defendant should be permitted to retain valuable land belonging to Government, upon [156] which ground-rent would ordinarily be payable, rent-free. I cannot accept the contention that, because Mumford built the bungalows under certain arrangements with the cantonment authorities, the Government is bound to allow him to sit as its tenant without payment of any rent at all. Some shadowy hints are thrown out in a letter of the defendant to the Collector of Allahabad, dated the 6th April, 1877 (page 17 of the paper-book), suggesting that the land "had been held by house proprietors on perpetual leases," but no attempt has been made to prove anything of this kind, and there is no evidence to justify such a conclusion. Indeed, it now seems to be conceded that Mumford was admitted to the land by the cantonment authorities. So far as they were concerned, they had no power to make a grant in perpetuity to Mumford or any other

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person; but even if they had such a power, no grant is proved. It may well be that, in consideration of his being allowed to occupy the land gratuitously, Mumford was quite willing to speculate in the building of the two houses on the chance of their remaining in cantonments for a lengthened period, during which he would be able to recoup his outlay and turn a good profit into the bargain out of the rent he might get. As a matter of fact, for six-and-twenty years as to some of the land, and for thirteen years as to the residue, neither he nor his successors in title paid a pice of ground-rent, while both he and they enjoyed, without interference, the entire income derived from letting the bungalows, though of course they were somewhat prescribed in their power of hiring out the houses by the rules and regulations relating to residential premises within cantonments. When, in 1870, the land ceased to be under the control of the military authorities and reverted to Government, those rules and regulations were no longer binding, and Mumford's representatives in interest were freed from the restrictions to which that interest was subject. Under such circumstances I can find nothing unreasonable or inequitable in Government expecting and demanding a reasonable sum from the defendant for the use and enjoyment of its land, nor do I appreciate the grievance on this account, of which so much was made by the learned counsel for the defendant. At first sight, I admit, it seems specious enough; but upon examination of its merits it has no recommendation. That [157] it would have come ill from the lips of Mumford to make any complaint of this kind can scarcely be denied, and the fact that the defendant purchased the bungalows in 1871 at a high price, and has since laid out considerable sums of money on their improvement, does not, to my mind, better his position. It is obvious he was well aware that they no longer stood within cantonments; that they had been resumed by the civil authorities, and, generally, of what their previous history was, and no misrepresentation or concealment of facts on the part of Quallett, in his bargain with the defendant, if any there was, which, I much doubt, can affect the legal liability of the latter to Government for reasonable rent. If he bought at too high a figure, that was his fault; and whatever his rights and remedies against Quallett might have been is a matter with which I am not called upon to concern myself in the present case. Particularising, therefore, the opinion I expressed at the commencement of these observations, I hold, for the reasons I have given as to the first issue, that the Municipal Committee of Allahabad were the plaintiff's duly authorized agents to lease and obtain rent for the land occupied by the defendant's bungalows with their compounds; that the notice of the 12th of April, 1880, was a notice formally and properly issued in that character on behalf of the plaintiff; and that the defendant's subsequent refusal to pay rent or accept a lease, or evacuate the premises, amounted to a sufficient denial of the plaintiff's title to afford him a good cause of action. In this view of the matter the first issue must be answered in favour of the plaintiff.

Many of the remarks made with regard to the preceding issue are pertinent to the second, and it would be useless to repeat them. I of course still assume the plaintiff's title to the land in suit to have been proved in what I am about to say upon the second point to be considered. I take to it to be admitted that the defendant has been in possession of the 12 acres, 3 roods, 29½ poles, with the exception of the small portion received by exchange in 1872, since July, 1875, without payment of any rent. For the five years prior to that, the plaintiff, I think very properly, does not claim the difference between the Rs. 191-3-0 paid by Quallett in

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1871 and by the defendant in 1871, 1872, 1873 and 1875, and the Rs. 258-11-0 now asserted to be the fair rental of the area of the land at Rs. 20 [158] per acre. My consideration of the case, therefore, is not encumbered by any question of this kind in respect of that period, and the point from which I have to start is the 1st of July, 1875. Granting that no agreement to pay rent, express or implied, is disclosed on the face of the plaint, and that none existed, I am nevertheless clearly of opinion that the plaintiff is entitled in law to demand and to recover reasonable compensation from the defendant for the use and occupation of his land from the 1st of July, 1875, to the 30th of June, 1881, or for six years in all, though what the amount should be will be disposed of in its proper place, when the seventh issue has to be determined. As the objection of the defendant, to which the second issue was directed, only has reference to that period, this is a sufficient finding for the purpose of disposing of it.

As to the third issue, I am unaware of the existence of any legal prohibition to the institution in a Civil Court of a suit like the present. Obviously, no Revenue Court could entertain it, for the exclusive jurisdiction given to tribunals of that kind does not extend to land occupied by, or appurtenant to, dwelling-houses, as is the case here. Why, then, should the plaintiff be debarred from resorting to the ordinary channels for relief? The land is his, at least for the moment I assume it to be; the defendant is in possession of it, and has been for upwards of eight years; after receipt of notice requiring him to adopt one of those alternatives, he has neither paid rent, nor accepted a lease, nor surrendered the premises, and now holds the plaintiff at arm's length, virtually, if not in distinct terms, asserting a right to hold rent free. If, under such circumstances, the Civil Court was not open to the plaintiff to vindicate his proprietary title and obtain redress, it would, indeed, be a scandal. I cannot for an instant recognise the contention to the contrary, for to do so would be, to my mind, wholly inconsistent with one of the first of legal principles, and highly mischievous to the public interest. I hold that the plaintiff is entitled to maintain the present form of suit, and that this Court has power to grant him the reliefs prayed,—namely, first, a declaration of his proprietary title; second, that the defendant must pay for the use and occupation of the plaintiff's land from July 1st, 1875, to June 30th, 1881; third, that the defendant is [159] bound to pay rent to the plaintiff from the 1st of July, 1881; fourth, that in the event of the defendant failing to pay such rent he be ejected from the land in suit. With regard to this last point, I will deal with it more at large when I come to discuss the fifth issue.

In dealing with the fourth issue it does not appear to me very material to consider whether the area of land acquired by Mumford from the Military authorities under cantonment regulations in 1844 was only 5 acres 3 roods 29¼ poles, as stated by the plaintiff, or 9 acres 2 roods 9 poles and 36 yards, as asserted by the defendant. This, at least, is certain, that in 1870, when the resumption took place, the bungalows and compounds, then owned by Quallett, occupied as they now do 12 acres 3 roods 28¾ poles, or thereabouts, as nearly as could be. I think it very probable that before the Mutiny Mumford did forcibly take possession of some land belonging to the zamindars of Fatehpur-Bichua and Bakhtiara, though how much it was there is no very clear or satisfactory evidence to show. At any rate, if the statements of the witness, Muhammad Husain, otherwise called Husain Baksh, are to be believed, and I see no reason why they should not, a suit was instituted against

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Mumford by the then proprietors of Bakhtiara to assert their title against him to recover rent. How far the litigation had proceeded, or what the questions actually involved in it were, does not appear, the records unfortunately having been burnt during the disturbances of 1857. This, however, is certain, and it is a matter of local history and notoriety, that after the Mutiny the rights of the zamindars of Fatehpur-Bichua and Bakhtiara were confiscated by Government on account of their participation in the rebellion.

From 1844 down to the present moment no person has made any proprietary claim to a single bigha of the 12 acres 3 roods 29¼ poles, the subject of the suit; nor have the old zamindars of Fatehpur-Bichua or Bakhtiara, or their heirs and successors, ever raised any question as to the legality of the confiscation. It comes to this, therefore, that for nearly 40 years as to some of the land and for upwards of 20 in regard to the residue, the plaintiff has held and exercised the rights of full proprietorship. The circumstance that the defendant exchanged some small portion of this [160] land in 1872, with the then Collector's sanction, for other land, which is now included in the compounds, does not appear to me to make any difference; for what he gave with one hand belonged to the plaintiff, and what he took back with the other was merely in substitution, and must be regarded as replacing it. The assumption, therefore, upon which I proceeded in dealing with the earlier issues may now be taken as an ascertained fact, for I find, in reference to the issue at present under consideration, that the rights of the plaintiff, as proprietor of the 12 acres 3 roods 29¼ poles, have been affirmatively established.

I have already stated in an earlier part of this judgment that Mumford must be taken to have derived his title to occupy the land from the Military authorities in 1844 and 1858, and as to this point there can be no serious controversy. Their power to make a grant of it could only be co-extensive with their own tenure of their property, and no assignment by them could subsist beyond the period it might remain subject to cantonment regulations. Mumford must have taken it with full notice of all the restrictions and obligations under which he was to hold, and the chance, as I have before remarked, of a time arriving when it might pass from the control of the Military authorities and stand upon the footing of ordinary land subject to a reasonable ground-rent. No doubt one of the conditions under which Mumford entered was that, if Government at any time desired to resume the land on which he was about to erect his bungalows, he was to be entitled to a month's notice and compensation for his buildings. I am willing to give the defendant the full benefit of the broadest construction to be placed on this condition, and I do not hesitate to hold that the plaintiff is bound by it. But I cannot go the length of interpreting it to mean that the plaintiff was thereby disqualified from demanding a ground-rent upon the land until he had paid the defendant the value of the bungalows. No claim is preferred in this suit to the bungalows, nor does the plaintiff assert any right in respect of them. All he asks is, that the land belonging to him on which they stand may, like other land of a similar description, be assessed to a reasonable ground-rent; and only in the event of refusal by the defendant to pay such rent, when fixed, does he seek to have him ejected. Looking to the peculiar circumstances under which [161] Mumford entered into occupation and built the bungalows, and to the terms of the regulations as to resumption by Government, I do not think

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it would be fair or equitable to grant the plaintiff a decree, pure and simple, for the ejectment of the defendant, as asked. It seems to me I ought to put the plaintiff under the condition that if he desires to employ the machinery of this Court in execution to oust the defendant from the land, the value of the bungalows as cantonment residences must first be determined; and when the amount of compensation to which the defendant is entitled has been ascertained, a tender of it must be made by the plaintiff. I shall therefore provide in the decree that if the parties are unable to agree as to the proper sum to be paid, they shall, within three months from the date of the decree, execute a formal submission to arbitration of the question in dispute, each of them naming an arbitrator, and the Registrar of this Court in the event of such arbitrators differing, to be the umpire. When the award has been made, and the amount payable by the plaintiff has been declared, he will make a formal tender of it to the defendant. Should the defendant refuse to accept it, the plaintiff will then be entitled to have him ejected from the land. The cost of the arbitration proceedings, if any become necessary, will be borne by the plaintiff and the defendant mutually; though I cannot help expressing a hope here that, after this judgment has been perused and considered, the parties will feel themselves in a position to approach one another and to arrive at an amicable arrangement of their differences.

With reference to the matters mentioned in the sixth issue I confess I do not attach much importance to the payments made to the Municipality by Quallett in 1871, and by the defendant on four subsequent occasions. It is enough to say that I am not prepared to hold them as operating to stop the defendant from denying the plaintiff's title to rent.

As to the seventh issue, I think that the Rs. 1,552-2-0 claimed in the plaint, in respect of the period from July 1st, 1875, to the 30th of June, 1881, is a reasonable sum for the use and occupation of the plaintiff's land by the defendant during that time: indeed, no exception to the amount is taken in the statement of defence.

[162] The same remarks apply to the eighth issue, and I have no hesitation in declaring the defendant to have been and to be the tenant of the plaintiff in respect of the 12 acres 3 roods 29¼ poles in suit at a yearly rental of Rs. 20 per acre from the 1st day of July, 1881.

Upon these findings my judgment must be in favour of the plaintiff with costs, and I accordingly direct that a decree be prepared, declaring—

(1) the plaintiff's proprietary title to the 12 acres 3 roods 29¼ poles mentioned in the plaint;

(2) that the defendant shall pay to the plaintiff Rs. 1,552-2-0 for the use and occupation of the 12 acres 3 roods 29¼ poles in suit for the period from the 1st of July, 1875, to the 30th of June, 1881;

(3) that the defendant has been and is the tenant of the plaintiff of the 12 acres 3 roods 29¼ poles from the 1st day of July, 1881, at a yearly rental of Rs. 20 per acre, or in all of Rs. 258-11-0;

(4) that the defendant shall pay to the plaintiff Rs. 517-6-0 for the two years from July 1st, 1881, to the 30th of June, 1883, already accrued and owing, and upon each successive first day of July in every year, so long as he may continue in the occupation of the land, subject always to the right of either

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party to determine the tenancy according to law, the sum of Rs. 258-11-0 for and on account of ground-rent for the plaintiff's land;

(5) that the plaintiff shall be entitled to require this Court on the execution side to eject the defendant from the plaintiff's land only after he has first, within three months from the date of the decree, required the defendant to submit the question of the value of the two bungalows as cantonment residences to arbitration, and the latter has refused to do so, or when the plaintiff and the defendant have within such period of three months executed a submission of such question to the arbitration of two persons; one to be named by the plaintiff and the other by the defendant, with a provision that, in the event of a difference between [163] them the Registrar of the Court shall be the umpire, and an award has been published, and the plaintiff, having tendered the amount declared to be due from him to the defendant as the value of the bungalows, the defendant has refused to accept the same. That a condition of the above-mentioned agreement to refer shall be that each party shall pay his own costs of the arbitration proceedings;

(6) that the defendant shall pay the costs of the suit.

Decree accordingly.

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6 A. 163 (F.B.) = 4 A.W.N. (1884) 15.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

IN THE MATTER OF THE PETITION OF SUKH NANDAN LAL.*
[17th January, 1884.]

Pleadership examination—Notification of a candidate having qualified—Cancellation of Notification on the ground of error—Appeal to Her Majesty in Council—Civil Procedure Code, Chap. XLV.

A candidate at an examination for pleadership, a mistake in the computation of his marks having been made, was erroneously declared qualified for admission as a vakil of the High Court by a Government notification. The mistake having been discovered such notification was, so far as he was concerned, cancelled. He then petitioned the High Court in the matter, and was informed by it that his name must be excluded from such notification as he had not qualified by obtaining the requisite number of marks. The candidate having applied for leave to appeal to Her Majesty in Council, *held* that Chap. XLV of the Civil Procedure Code had no application, and the matter was not one in which the High Court was concerned to grant or refuse leave to appeal to Her Majesty in Council.

THIS was an application, on behalf of a pleader of the upper subordinate grade, for leave to appeal to Her Majesty in Council from an order of the High Court. The petitioner had been, through a mistake made in the computation of his marks at the examination held for pleaders in January, 1883, erroneously declared qualified for admission as a vakil of the High Court in the notification published in the *North-Western Provinces Gazette*, No. 646, dated the 10th March, 1883, and in consequence

* Application for leave to appeal to Her Majesty in Council, No. 21 of 1883.

so much of that notification was cancelled by a subsequent notification No. 1060, dated the 11th April, 1883. He then presented a petition to the High [164] Court on the 11th August, 1883, and in reply was informed that owing to a miscalculation in the number of marks he had obtained, of which the Court had satisfied itself by personal inspection of the papers, his name must be excluded from the notification, as he had not qualified by obtaining the requisite number of marks. The present application was made with reference to the above orders, under Chapter XLV of the Civil Procedure Code.

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Mr. *R. C. Saunders*, for the petitioner.

The Full Bench made the following order :—

ORDER.

STUART, C.J., and OLDFIELD, BRODHURST, and TYRRELL, JJ.—We are clearly of opinion that Chapter XLV of the Civil Procedure Code has no application, and that this is not a matter in which this Court is concerned to give or refuse leave to appeal to Her Majesty in Council. Moreover, the petitioner has no reasonable ground of complaint; for when it was discovered that a notification had by mistake issued by which he had been erroneously declared qualified, it was essential that the error should be corrected and the notification cancelled. We therefore reject this application.

STRAIGHT, J.—As I am President of the Examination Board, whose action is questioned, I prefer not taking any part in this order.

Application refused.

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APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

DORI LAL (*Defendant*) v. UMED SINGH (*Plaintiff*).*
[26th November, 1883.]

Registration—Registered and unregistered documents—Priority of documents—Act VIII of 1871 (*Registration Act*), *s.* 50—*Act III of* 1877 (*Registration Act*), *s.* 50.

Held by STUART, C.J., that under the *Explanation* to s. 50 of the Registration Act, 1877, a sale-deed, the registration of which under the Registration Act, 1871, was compulsory, and which was duly registered thereunder, took effect, as regards the property comprised therein, against a deed of simple mortgage of a prior date, relating to the same property, the registration of which under the Registration Act, 1871, was optional and which was not registered thereunder. [165] *Ganga Ram* v. *Bansi* (1) and *Lachman Das* v. *Dip Chand* (2), observed on. *Sri Ram* v. *Bhagirath Lal* (3), dissented from.

Held by STRAIGHT, J., that the former document had no preference over the latter under s. 50 of the Registration Act, 1877.

Sri Ram v. *Bhagirath Lal* (3), followed.

THE plaintiff in this suit claimed to enforce a simple mortgage of certain immoveable property, dated the 28th August, 1874, the registration of which was optional under the Registration Act, 1881, the Registration Law in force at the time of the mortgage. The defendant

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* Second Appeal No. 33 of 1882, from a decree of C.J. Daniell, Esq., District Judge of Moradabad, dated the 1st November, 1881, reversing a decree of Munshi Banwari Lal, Munsif of Bilari, dated the 5th July, 1881.

(1) 2 A. 431. (2) 2 A. 851. (3) 4 A. 227.

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Dori Lal, who had purchased the property under an instrument bearing date the 31st December, 1875, which required to be registered under that Act and was registered thereunder, set up as a defence to the suit that under s. 50 of the Registration Act, 1877, the sale-deed took effect as regards the property in suit against the plaintiff's mortgage, as the sale-deed was registered while the mortgage-deed was unregistered. The Court of first instance (Munsif) allowed this contention, with reference to the case of *Lachman Das* v. *Dip Chand* (1), and dismissed the suit. On appeal by the plaintiff the lower appellate Court (District Judge) relying on *Bhola Nath* v. *Baldeo* (2), gave priority to the bond and decreed the plaintiff's claim.

The defendant appealed to the High Court, raising the same contention as he had raised in the lower Courts.

Munshi *Hanuman Prasad*, for the appellant.

The respondent did not appear.

The Court (STUART, C.J., and STRAIGHT, J.) delivered the following judgments :—

JUDGMENTS.

STUART, C.J.—The judgment of the Full Bench of the Court in *Sri Ram* v. *Bhagirath Lal* (3) has, I consider, no application to the facts and dates of such a plain case as this. To hold otherwise would, in my judgment, be absolutely to repeal s. 50 of the present Registration Act III of 1877 and the "Explanation," for such would necessarily be the effect of holding that "duly registered" in s. 50 means, in *all* cases, "registered according to this Act." Such a reading of the section goes simply to contradict and, indeed, to abolish the "Explanation" attached to the end of s. 50. To state **[166]** this is sufficient to show that the ruling of the Full Bench in the case referred to cannot be used as a precedent in such a case as that before us. Indeed, even in the case in which it was delivered, the reasoning of the Full Bench judgment, in my opinion, went much too far in the same direction of the repealing s. 50 and the "Explanation," much as it commended itself to my sympathy in the interest of justice in that particular case. Its reasoning, in fact, is to a great extent an argument with respect to the policy of the Act and not an exposition of an existing law to be judicially interpreted with reference to its actual terms.

In the French Civil Court there is a distinct provision that laws are not to have any retrospective operation. This appears to involve a recognition of a presumption in favour of the contrary view where that is expressed, and that it is necessary to provide against any such expressed law. In English Courts the rule of interpretation is different, the presumption against laws being retrospective having full effect, *where nothing to the contrary appears in the enactment.* It is therefore with us an accepted canon of construction of written laws that they are not to have—*i.e.*, that they are not to be presumed to intend—retrospective effect. That, however, is subject to the exception, "unless from the language a retrospective effect is clearly intended" (*per* STORY, J., in an American case referred to in *Maxwell on Statutes*, p. 191). And the competency of the Legislature "to pass retrospective laws if it think fit cannot be denied, and many times they have done so" (Dr. Lushington

(1) 2 A. 851. (2) 2 A. 198. (3) 4 A. 227.

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in *The Ironsides*, 31 L. J., Prob. M. & A. 131, in *Hardcastle on Statutes*, p. 195). Here the "Explanation" appended to s. 50 of the Registration Act is distinctly and intentionally retrospective, and it cannot be got rid of on any views of vested rights or otherwise, but must be applied and enforced, and the meaning of the "Explanation" is that registration under any of the Acts mentioned in it is to have precisely the same effect as to the priority of any registered instrument as registration under Act III of 1877. If my colleagues differ from me on this point, I would feel obliged by their saying to what possible cases the registration provided in the "Explanation" applies.

The true construction of s. 50 and the "Explanation" is to be found in the judgment of Spankie, J., and myself in *Ganga Ram* [167] v. *Bansi* (1), and this was adopted by a Full Bench consisting of PEARSON, SPANKIE, OLDFIELD, and STRAIGHT, JJ., and myself in *Lachman Das* v. *Dip Chand* (2). And this ruling has been followed by us in several cases and by the Calcutta Court in *Shib Chandra Chakravarty Johobux* (3), and also, I am informed, by the Chief Court of the Punjab.

In *Ganga Ram* v. *Bansi* (1) the two competing instruments were a bond dated the 20th August, 1878, and a deed of sale dated the 27th September, 1877. The registration law applicable to the bond was that provided by Act VIII of 1871, and under which registration was optional. The deed of sale was governed as to registration by s. 50, Act III of 1877, and the "Explanation" thereto, under which registration gives priority to all documents duly registered over all others unregistered. In giving judgment I said:—"The Munsif was clearly right in holding that the registered sale-deed, although subsequent in date, had preference over the unregistered bond, and the Subordinate Judge was clearly wrong in deciding to the contrary. In stating this conclusion it is at the same time difficult to resist a certain feeling of its injustice, for it seems unreasonable to allow a discretion, and at the same time to impose a penalty or disability on its exercise. This is plainly what has been brought about. The last Registration Act III of 1877, not less than its predecessor, allows a discretion as to the registering or not registering certain documents of which the bond in this case is one, and if such an instrument has been legally and validly prepared and executed, and is effectual for its purpose, it might be justly contended it should be so as from its date. Yet one can appreciate the policy and in a real sense, the convenience, of compelling, as far as may be, the registration of the contracts of the people of this country. The Subordinate Judge's remark that 'agreeably to the principal of the law, no law can have retrospective effect,' is generally correct, and a right once conferred by law cannot be taken away by implication; and if we had nothing but s. 50 itself, we might possibly have applied these principles of law of the present case, and have held that the sale-deed of 1877, although registered, had no priority over the mort-[168]gage of 1875. But the 'Explanation' appended to s. 50 removes all doubt, and may be said to have a repealing effect by expressly negativing the application of the principles of law referred to. On the other hand, Act III of 1877 does not affect, in the sense of invalidating, the class of instruments mentioned in s. 18. It simply says that such instruments, if registered, shall have preference over any other unregistered document relating to the same property, and such a law it was quite competent to the Legislature to pass." The next time the

(1) 2 A. 431. (2) 2 A. 851. (3) 7 C. 570.

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question occurred for decision was in the case of *Lachman Das* v. *Dip Chand* (1) before Oldfield, J., and myself. In that case there were two bonds, both executed before Act III of 1877 came into force, and neither of which was registered, but there was a third instrument, a deed of sale, dated the 13th July, 1878, and which was duly registered. Having regard to the fact that there had been in the meantime conflicting rulings, or apparently conflicting rulings, in the Calcutta Court and this Court, we referred to the Full Bench the following question :—" Whether the provisions of s. 50, Act III of 1877, apply to give effect to the defendants' registered deed against plaintiff's deeds so as to prevent the plaintiff enforcing his mortgage against the property bought by defendant ?" In the Calcutta case the principal question appears to have been, whether s. 6 of the General Clauses Act cured any defect arising from non-registration under the previous registration law. The other case in this Court is erroneously stated to be "unreported ;" but, strange to say, it is the very case I have referred to as having been decided by SPANKIE, J., and myself, and it will be found, as I have stated, on p. 431 of the same volume in which this case before OLDFIELD, J., and myself appears. The Full Bench which affirmed that ruling consisted of PEARSON, SPANKIE, OLDFIELD, and STRAIGHT, JJ., and myself, and in giving judgment, which we did severally, we unanimously affirmed the law laid down by SPANKIE, J., and myself. The same decision was afterwards arrived at by the Calcutta Court in *Shib Chandra Chakravarty* v. *Johobux* (2), the ruling by SPANKIE, J., and myself and by the Full Bench of this Court being expressly referred to in the judgment of the Calcutta Court, and approved.

[169] Now, in the face of all this authority I cannot think it was intended by my colleagues that the particular reasoning which found acceptance by them in the case of *Sri Ram* v. *Bhagirath Lal* (3) was meant to expound an absolute rule of law in all cases, and that it ought not to govern the present appeal I am very clear. It might indeed be well if, having regard to the authorities I have referred to, the true meaning and application of s. 50 and the " Explanation " should be reconsidered by us ; so that we may advisedly adopt a rule of legal interpretation for general application.

In the case before us s. 50 of the Act along with the " Explanation " is, it appears to me, too plain in its terms to leave any doubt as to its meaning and application, and as regards the facts and dates of this case, clearly gives priority to the registered sale-deed over the unregistered bond, although the latter is prior in date.

I would therefore allow the present appeal, reverse the judgment of the Judge, and restore the decree of the Munsif with costs in all the Courts.

STRAIGHT, J.—The bond of the plaintiff-respondent was dated the 28th August 1874, and was for Rs. 50. The sale-deed of the defendant-appellant was executed on the 31st December, 1875. Both these instruments were governed by the provisions of Act VIII of 1871, the bond being optionally and the sale-deed compulsorily registrable. The case is therefore directly governed by the ruling of the majority of the Full Bench of this Court in *Sri Ram* v. *Bhagirath Lal* (3), by which I considered myself bound. The question then before the Court was very fully and carefully considered, and the decision, the reasons for which were clearly explained, was not arrived at without a thorough appreciation of the

(1) 2 A. 851. (2) 7 C. 570. (3) 4 A. 227.

arguments to be urged on the other side. "Wherever it is possible to put upon an Act of Parliament a construction not retrospective, the Courts will always adopt that construction" (ERLE, C.J., *The Midland Railway Company* v. *Pye*, 13 C.B.N.S., 191) enunciates a principle we felt justified in acting upon in that case, and I see no ground for altering the opinion I then formed and expressed. In the suit to which the appeal before us relates, I hold [170] that the registered sale-deed of the defendant-appellant has no preference over the plaintiff-respondent's bond and that he was entitled to maintain his suit. I would therefore dismiss this appeal with costs.

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6 A. 170=4 A.W.N. (1884) 15.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

FAHIM-UN-NISSA AND ANOTHER (*Plaintiffs*) v. AJUDHIA PRASAD (*Defendant*).* [21st January, 1884.]

Act XII of 1881 (*N.-W. P. Rent Act*), *s.* 96-*A—Application of the provisions of the Civil Procedure Code to suits in the Revenue Court—Arbitration—Judgment in accordance with award—Appeal—Act XIX of* 1873 (*N.-W.P. Land-Revenue Act*), ss. 220—231.

The provisions of the Civil Procedure Code relating to awards are not applicable to suits under the N.-W.P. Rent Act, 1881, the matters in dispute in which have been referred to arbitration, as s. 96-A of that Act specially imports into it the procedure of the N.-W.P. Land-Revenue Act with regard to arbitration.

Where the Court trying a suit under the Rent Act, the matters in dispute in which have been referred to arbitration, has refused an application to set aside the award, and has decided the case in accordance with the award of the majority of the arbitrators, no appeal lies from its decision.

THIS was a suit for profits under the N.-W. P. Rent Act, 1881, instituted in the Court of an Assistant Collector. The parties to the suit agreed to refer the matters in dispute to arbitration, the opinion of the majority of the arbitrators to prevail. Three arbitrators were appointed, and after a delay which extended beyond the time fixed by the Court for delivery of the award, two arbitrators delivered an award. The plaintiff applied to have the award set aside on the ground of misconduct of the arbitrators, and that the award was void, having been delivered after the time fixed. The Assistant Collector refused this application, and decided the case in accordance with the award. The plaintiff appealed from this decree to the District Judge, who dismissed the appeal, observing as follows :—

"This Court is of opinion that no appeal lies; under s. 221, Act XIX of 1873, the Assistant Collector had power from time to time to extend the period within which the award could be made. [171] His accepting the award after the time fixed, was tantamount to an extension of period under s. 223, Act XIX of 1873. The Assistant Collector rejected the application to set the award aside, and he decided the case. Under s. 231 his decision is not open to appeal. Appeal is rejected."

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* Second Appeal No. 991 of 1883, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 19th April, 1883, affirming a decree of Maulvi Inayat Husain Khan, Deputy Collector of Bulandshahr, dated the 14th March, 1883.

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6 A. 170 = 4 A.W.N. (1884) 15.

The plaintiffs appealed to the High Court on the following grounds:—(i) That inasmuch as the legality of the award made by the arbitrators was questioned, an appeal lay to the Judge; and (ii) that the award was null and void, having been made after the period fixed by the Court.

Pandit *Nand Lal*, for the appellants.

The respondent did not appear.

The Court (STRAIGHT and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—The first plea appears to be based upon the ruling of the majority of the Full Bench of this Court in *Madho Prakash Singh* v. *Murli Manohar* (1), in so far as we are inferentially invited to apply the provisions of the Civil Procedure Code relating to awards to the construction placed thereon by a recent decision of this Court (2). The same remark may also be made with regard to the second plea. The substantial grounds put forward are—(i) that the Judge had power to entertain an appeal from a decision passed in a suit on the basis of an award when the objection taken was that there was no award in law; (ii) that there was no award in law because it was made after the time fixed by the Deputy Collector. The first of these contentions appears to us to have no force. The ruling of the majority of the Full Bench mentioned above is not applicable, because s. 96-A of the Rent Act specifically imports the procedure of the Revenue Act, ss. 220 to 231, with regard to arbitrations, into that Act, and thus provides a machinery of its own, independent of the Civil Procedure Code, to regulate references of suits to arbitration. Under s. 229 "no award shall be liable to be set aside except on the ground of corruption or misconduct of all or any of the arbitrators;" and by s. 230, if an application to set aside an award, as in the present case, has been refused, the officer making the reference "shall decide in accordance with the award of the [172] majority of the arbitrators," which decision by s. 231 is declared "not to be open to appeal." We think, therefore, that in substance the order of the Judge was right, though instead of using the word "rejected" it would have been more strictly correct to say "dismissed." This appeal is dismissed.

Appeal dismissed.

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6 A. 172=4 A.W.N. (1884) 16=8 Ind. Jur. 454.

CIVIL REVISIONAL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

SHEORAJ SINGH (*Petitioner*) *v.* BANWARI DAS (*Opposite party*).*
[22nd January, 1884.]

Civil Procedure Code, ss. 335, 622—Resistance to execution of decree—High Court's powers of revision.

An order under s. 335 of the Civil Procedure Code is subject to revision by the High Court under s. 622 of that Code. *Shiva Nathaji* v. *Joma Kashinath* (3), followed.

[R., 8 Ind. Cas. 613.]

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* Application No. 280 of 1883, for revision, under s. 622 of the Civil Procedure Code, of an order of Maulvi Mazhar Hussain, Munsif of Nagina, dated the 20th March, 1883.

(1) 5 A. 406. (2) *Lachman Das v. Brijpal*, 6 A. 174. (3) 7 B. 341.

1884 JAN. 22. CIVIL REVISIONAL. 6 A. 172 = 4 A.W.N. (1884) 16 = 8 Ind. Jur. 454.

THIS was an application for revision under s. 622 of the Civil Procedure Code. It appeared that Banwari Das, the purchaser of certain immoveable property sold in execution of a decree, having been resisted in obtaining possession of the property by Raja Sheoraj Singh, the applicant in this case, who was not the judgment-debtor, complained, under the provisions of s. 335 of the Civil Procedure Code, to the Court executing the decree. The Court inquired into the matter, and, disallowing the claim of Sheoraj Singh, made an order directing that possession should be delivered to the purchaser.

Sheoraj Singh applied to the High Court for revision, under s. 622 of the Civil Procedure Code, of the lower Court's order.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), Babu *Jogendra Nath Chaudhri*, and Babu *Yatan Chand*, for the petitioner.

Mr. *T. Conlan* and Pandit *Ajudhia Nath*, for the purchaser.

The Court (BRODHURST and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

BRODHURST, J.—A preliminary objection was taken to the hearing of this application, on the ground that an order under s. 335 of the Civil Procedure Code, being provisionally final, is not liable to [173] revisional, any more than to appellate interference; but with reference to a recent Full Bench ruling of the Bombay High Court in *Shiva Nathaji* v. *Joma Kashinath* (1), we disallowed this objection, and heard the case. The result is, that we find the order of the Court below is not open to revision on any of the grounds set out in s. 622 of the Civil Procedure Code, nor indeed questionable on any of the pleas taken in this case.

Application dismissed.

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6 A. 173 = 4 A.W.N. (1884) 16.

CIVIL REVISIONAL.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

BAWAN DAS AND ANOTHER (*Decree-holders*) *v.* MUL CHAND AND OTHERS (*Judgment-debtors*).* [22nd January, 1884.]

Civil Procedure Code, s. 266 (g)—Gratuity—Liability to attachment in execution of decree.

The bar in s. 266 of the Civil Procedure Code to the attachment of gratuities allowed by Government to its ex-servants, military and civil, is not limited to such gratuities as are allowed to "pensioners," but applies to a gratuity granted in consideration of past services.

THIS was an application for revision under s. 622 of the Civil Procedure Code. It appeared, that a Government servant named Mul Chand, whose period of service had expired, and who was not entitled to a pension, had been granted a gratuity of Rs. 420 by Government in consideration of past services. This sum of money, while lying in the Treasury to his credit, was attached in execution of a decree held by the

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* Application No. 227 of 1883 for revision, under s. 622 of the Civil Procedure Code, of an order of Maulvi Zain-ul-abdin, Subordinate Judge of Mirzapur, dated the 17th August, 1883.

(1) 7 B. 341.

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applicants, Bawan Das and Bhawani Prasad, against him. Mul Chand objected to the attachment on the ground that under the words "stipends allowed to military and civil pensioners of Government" in clause (*g*) of s. 266 of the Civil Procedure Code, the gratuity was not liable to attachment. The Court executing the decree allowed this objection, and removed the attachment. The decree-holders applied to the High Court for revision of the order allowing the objection.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the petitioners.

The Court (BRODHURST and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

[174] TYRRELL, J.—By s. 266 (*g*) of the Civil Procedure Code the attachment of gratuities, as such, allowed by Government to its ex-servants, military and civil, is expressly prohibited. We cannot give effect to the argument of the learned pleader for the applicants, that the bar applies to such gratuities only as are allowed to "pensioners." We do not consider that this is a legitimate, much less the only admissible, reading of this part of the law. We disallow the application.

Application dismissed.

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6 A. 174 (F.B.) = 4 A.W.N. (1884) 16 = 8 Ind. Jur. 448.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

LACHMAN DAS AND ANOTHER (*Defendants*) *v.* BRIJPAL AND ANOTHER (*Plaintiffs*).* [22nd January, 1884.]

Arbitration—Judgment in accordance with award—Appeal—Civil Procedure Code, s. 522.

Held, that an appeal lies from a decree passed in accordance with an award when such decree is impugned on the ground that there is no award in law or in fact upon which judgment and decree could follow under s. 522, Civil Procedure Code. *Joymungul Singh* v. *Mohan Ram* (1) and *Bhagirath* v. *Ram Ghulam* (2), observed on.

[F., 8 A. 64 (66) = A.W.N. (1886) 2; 8 A. 548 (550); Appr., 11 C. 37 (41); R., 6 A. 170 (171); 18 A. 414 (418) = A.W.N. (1896) 116; 18 A. 422 (428) (F.B.) = A.W.N. (1896) 137; 17 B. 357 (361); 20 B. 596 (605); 25 C. 141 (144); 25 C. 757 (773) (F.B.); 15 M. 348 (349); 5 O.C. 13 (14) (F.B.); 74 P.R. 1894; Disc., A.W.N. (1892) 151.]

THIS was an application, under s. 622 of the Civil Procedure Code, for revision of a decree made by the Subordinate Judge of Meerut in a suit instituted in this Court. It appeared that by the consent of the parties the matters in difference in the suit on the 17th July, 1882, referred to the arbitration of four persons, two being appointed by the plaintiffs and two by the defendants, and that it was agreed that, should the arbitrators disagree, an umpire was to be appointed by them, the opinion of the majority to prevail. On the 31st July the arbitrators

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* Application No. 303 of 1882, for revision, under s. 622 of the Civil Procedure Code, of an order of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 22nd September, 1882.

(1) 8 Suth. P.C.C. 145 = 23 W.R. 429. (2) 4 A. 283.

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6 A. 174 (F.B.) = 4 A.W.N. (1884) 16 = 8 Ind. Jur. 448.

appointed by the defendants made an application to the Court, stating that the arbitrators could not agree as to who should be appointed umpire, and that they therefore returned the record to the Court. On the 2nd August the record was returned to the arbitrators with orders to appoint an umpire and to make an award within fifteen days. Again, on the 16th August the arbitrators appointed by the plaintiffs presented an application to [175] the Court, stating that the arbitrators were unable to agree as to the appointment of an umpire. On the same day the arbitrators appointed by the defendants presented a similar application. On the 21st August, the Court, under s. 511 of the Civil Procedure Code, appointed an umpire. Eventually the umpire, together with two of the arbitrators, made an award. To this award the defendants, Lachman Das and Pirthi Singh, objected on the ground that the Subordinate Judge was not competent to appoint an umpire; that two of the arbitrators did not join in the arbitration; that the arbitrators had not taken evidence on points in issue; that they had decided matters not referred; and that Lachman Das, one of the defendants, was not a party to the appointment of the arbitrators. The Subordinate Judge disallowed all these objections and gave judgment in accordance with the award.

The defendants applied to the High Court for revision of the Subordinate Judge's decree, and the case came on for hearing before a Divisional Bench (STRAIGHT and OLDFIELD, JJ.). On behalf of the plaintiffs a preliminary objection was taken that, as the application of the defendants clearly showed that from their view there never had been any valid award upon which judgment and decree could follow under s. 522 of the Civil Procedure Code, they should have preferred an appeal, and that consequently this application for revision was not entertainable.

The question raised by this objection was referred to the Full Bench, the order of reference being as follows:—

STRAIGHT, J.—When this application for revision was called on for hearing, Pandit Ajudhia Nath, on behalf of the opposite parties, took a preliminary objection to our entertaining it under s. 622 of the Procedure Code, on the ground that the decree of the Subordinate Judge of Meerut, which the petitioners sought to have revised, was appealable, the points taken by them in their petition going to show that there never was any valid award upon which judgment and decree could follow under s. 522 of the Code. The question thus raised was the subject of decision in a case in which my brother OLDFIELD and I have differed, the learned Chief Justice subsequently concurred with the views enunciated by me—*Bhagirath* v. *Ram Ghulam* (1). Pandit Ajudhia Nath, however, [176] has now referred us to a Privy Council ruling to be found in Sutherland's Privy Council Judgments, vol. 3, p. 145, where a contrary opinion to that of the Chief Justice and myself appears to have been expressed, and though that no doubt has reference to s. 325 of Act VIII of 1859, the *ratio decidendi* is perhaps applicable to the present law. At any rate the existence of such authority appears to me to render it necessary that this revision case No. 303 of 1882 should be referred to the Full Bench for disposal, and I propose that we do so. I may add that in favour of the view hitherto held by the Chief Justice and myself are *Ramonoogra Chobey* v. *Putmoorta Chobayan* (2); *Sreenath Ghose* v. *Raj Chunder Paul* (3); *Elahee Baksh* v. *Hajoo* (4); *Wazir Mathon* v. *Lulit*

(1) 4 A. 283. (2) 7 W.R. 205. (3) 8 W.R. 171. (4) 14 W.R. 33.

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Singh (1); while to the contrary *Sunt Lal* v. *Bhubboojee* (2); and *Boonjad Mathoor* v. *Nathoo Sahoo* (3).

OLDFIELD, J.—I concur in making the proposed reference.

Pandit *Bishambhar Nath* and Babu *Jogindro Nath Chaudhri*, for the petitioners.

Pandits *Ajudhia Nath* and *Nand Lal*, for the opposite parties.

The following opinions were delivered by the Full Bench :—

OPINIONS.

STUART, C.J.—With great deference to the referring Judges in this case, I do not see that the ruling of STRAIGHT, J., and myself in the case of *Bhagirath* v. *Ram Ghulam* (4) is in the least degree opposed to the judgment of the Privy Council mentioned in their referring order. On the contrary, that judgment appears to me to be a still stronger authority in favour of our ruling. That Privy Council judgment was delivered in the case of *Joymungul Singh* v. *Mohun Ram* (5). In that case there had been certain peculiarities of procedure, and they might even be called irregularities, arising from the circumstance of the two arbitrators not having acted together, but in some respects separately, and from the award adopted by them also not having been signed by the arbitrators separately. These were irregularities which the High Court of Calcutta considered they could take notice of, and to that extent they entertained an appeal, without, however, going behind the award, or in any way [177] going into the merits of the case, the Judges simply remanding the case in order that an award might be duly and regularly signed by the arbitrators in presence of each other. This was done, and then there was an appeal to the High Court, who, however, held that, under the circumstances, a proper award had ultimately been made, and that being so, there was no appeal. This view was affirmed by the Privy Council, who held that the award having been found to be a good award, there was no appeal from the judgment determining its validity. In the case before STRAIGHT, J., and myself, the award was made under Act X of 1877, ss. 520 and 521, which show the grounds on which an award may be remitted or set aside, and unless any of the objections mentioned in these sections are stated, there is no ground for interference by appeal with the award. Accordingly, in my judgment in that case I stated as follows :—" The record shows that there were no objections to the award on the grounds stated in ss. 520 and 521. It appears to have been made in accordance with the arbitrator's view of the evidence, which consisted of the deposition or statement on oath of the defendant given on the application of the plaintiff himself. As to the procedure in other respects relating to the conduct of such an arbitration under Chap. XXVII of Act X of 1877, we may assume that it was followed, and, indeed, there is nothing to show it was not. That being so, and the procedure directed by s. 522 having been also observed, it is clear that there is no appeal from the Munsif's order made according to the award." And that being so, the judgment of the Munsif being according to, or in terms of, the award, there was no appeal.

The law in such cases is very clear, and it is this. A Court of appeal can entertain objections to an award, so far as these objections relate to matter of prescribed procedure; and if the Court of appeal is of opinion

(1) 7 C. 166. (2) N.W.P.S. D.A.R. (1863), Vol. II, p. 42.
(3) 3 C. 375. (4) 4 A. 283. (5) 3 Suth. P.C.C. 145 = 23 W.R. 429.

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that the award is open to such objections, it will to that extent entertain the appeal, and correct the arbitrator's procedure, sending the case back, if necessary, that a proper award may be made, and such award being made and judgment thereon, there is no appeal. See on this subject a judgment of GARTH, C.J., in *Debendra Nath Shaw* v. *Aubhoy Charan Bagchi* (1), where the law to the effect I have stated is explained very clearly. [178] Where, however, as in the case before STRAIGHT, J., and myself, no valid grounds of objection to the award are stated, the judgment of the Court in terms of the award is simply final, and there is no appeal whatever. In the present case the grounds of revision are as follows:—"(i) The award should have been set aside as invalid, inasmuch as it was submitted after the time allowed by the Court; (ii) that petitioner Lachman Das was not a party to the reference, nor did he authorize any one to make the reference on his behalf; (iii) that the appointment of an umpire by the Court on the failure of the arbitrators to appoint one, and consequent refusal of the arbitrators to proceed with the arbitration, is irregular; (iv) the lower Court has failed to consider and dispose of the objections (entered in the memorandum filed in that Court under numbers 3, 4, 5 and 6) imputing improper conduct to the arbitrators."

These being objections to the award within the meanings of ss. 520 and 521 of the Code of Procedure, the appeal to that extent could clearly be entertained, the object of the law in allowing such an appeal being to secure to parties in arbitration cases the protection of the procedure provided by law, and if that procedure, either after appeal or in the first instance, is correctly followed, the judgment, according to the award, is final. That is my answer to this reference.

OLDFIELD, J.—I see no reason to alter the opinion which I expressed in *Bhagirath* v. *Ram Ghulam* (2), to the effect that "it is only when the decree follows a judgment in accordance with an award that an appeal does not lie under s. 522. Before, however, a Court of appeal is in a position to apply this provision in s. 522, it is necessary that it satisfy itself that there is an award which can rightfully be so considered; that the thing called an award is an award which the Code of Civil Procedure contemplates: and an appellate Court must so far look behind the decree. If there is nothing which is properly an award, there can be no final decree such as s. 522 refers to."

I believe this view is in accordance with the current decisions, and is supported by the decision of the Privy Council in the case cited in our order of reference.

I would reply accordingly to this reference.

[179] BRODHURST, J.—The judgment of their Lordships of the Privy Council, in the case of *Joymungul Singh* v. *Mohan Ram* (3), appears to be applicable also to the present law; and with reference to that judgment, the decree of the Subordinate Judge of Meerut in the case before us was, I consider, appealable, and the preliminary objection noticed in the referring order as having been taken by the opposite parties was therefore, I think, valid.

STRAIGHT, J.—As the rest of the Court are disposed to hold that an appeal does lie from a decree passed under the circumstances mentioned in the referring order, it will be more convenient upon a mere question of procedure like this, as to which it is very desirable to have unanimity of opinion, for me to avoid a difference with my colleagues. I therefore

(1) 9 C. 905. (2) 4 A. 283. (3) 3 Suth. P.C.C. 145 = 23 W.R. 429.

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would answer the reference by saying that, where a decree purports to be passed upon an award, when in fact or law there is no award, such decree is appealable on the ground that there was no award upon which judgment and decree could properly follow.

TYRRELL, J.—I am of the same opinion.

The case having been returned to the Divisional Bench, the following judgment was delivered :—

JUDGMENT.

STRAIGHT and OLDFIELD, JJ.—Having regard to the Full Bench answer to the reference made in this case, the preliminary objection to our entertaining this application for revision, on the ground that an appeal might have been preferred, must prevail, and we reject it without costs.

Application dismissed.

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6 A. 179 = 4 A.W.N. (1884) 19.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Tyrrell.

NARAIN DAS AND OTHERS (*Plaintiffs*) *v.* CHAIT RAM AND OTHERS (*Defendants*).* [24th January, 1884.]

Bond—Interest—Penalty—Act IX of 1872 (*Contract Act*), s. 74.

The obligor of a bond for the payment of money agreed therein in respect of interest as follows :—" I will pay the money with interest at one rupee one anna per cent. per mensem on demand : as regards interest, I agree that I will [180] pay the interest of the amount every six months which may be found due under the accounts : in the event of non-payment every six months I will pay the interest at the rate of one rupee eight annas per mensem from the date of the execution of the bond."

Held by STUART, C.J., that the stipulation to pay the higher rate of interest in case of non-payment of interest at the lower rate was a stipulation in the nature of a penalty, and should be so treated in the accounts to be taken.

Bichook Nath Panday v. *Ram Lochun Singh* (1), referred to. *Kharag Singh* v. *Bhola Nath* (2), observed on.

Held by TYRRELL, J., that the non-payment of interest at the lower rate was not a breach of the contract, the contract being that the obligor might adopt either of the scales of payment, and therefore the stipulation in question was not in the nature of a penalty. *Mackintosh* v. *Hunt* (3), followed. *Kharag Singh* v. *Bhola Nath* (2), distinguished.

[N.F., 15 A. 232 (255) (F.B.).]

THIS was a suit on a bond for Rs. 5,000, dated the 1st November, 1870. The suit was instituted on the 9th August, 1882, and was brought against the sons and widow of the deceased obligor Dal Chand. The bond, after reciting that the obligor had borrowed Rs. 5,000 from the obligee, Tula Ram (represented by the plaintiffs in this suit), ran as follows :—

"I therefore covenant and record that I will pay the money with interest at one rupee one anna per cent. per mensem on demand, without any objection, and put forward no excuse ; that I shall get the payments endorsed on the bond which I make to the said Tula Ram towards the liquidation of the bond-debt ; that should I plead payments orally acknowledged without their being endorsed on the bond, such plea shall be invalid ;

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* First Appeal No. 49 of 1883, from a decree of M. S. Howell, Esq., District Judge of Shahjahanpur, dated the 25th January, 1883.

(1) 11 B.L.R. 135. (2) 4 A. 8. (3) 2 C. 202.

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that as regards interest I agree that I will pay the interest of the amount every six months which may be found due under the accounts, and to this I will make no objection; that in the event of default of payment of interest I will pay it without any objection or contention at the rate of one rupee eight annas per mensem, from the date of the execution of the bond; that I pledge and hypothecate my zamindari interests in Manihar, Nagla, Surpur, Sanjhra, and Rustampur in pargana Rajpura, and Gyanpur, Takribpur, Talpur, and Tahbpur in pargana Asadpur, tahsil Ganaur, in lieu thereof; and covenant that until the repayment of the above amount, I will not transfer the hypothecated property to any one else; should I do so by mistake, it shall be **[181]** untenable in a Court of Justice. I further covenant that in default of payment of the bond-debt the creditor shall be at liberty to arrange for the recovery of the amount entered herein from my personal and real property; I and my heirs shall have no objection. The plaintiffs claimed Rs. 5,000, the principal amount of the bond, and Rs. 10,595 interest on that amount from the 1st November, 1870, the date of the bond, to the 9th August, 1882, the date of the institution of the suit, at Re. 1-8 per cent. or Rs. 15,595 in all, less Rs. 2,460, which they alleged the defendants had paid in part satisfaction of principal and interest after demand of payment of the amount of the bond, which was made on the 12th February, 1882. The defendants set up as a defence to the suit, *inter alia*, that they had made certain other payments in satisfaction of the principal amount of the bond, and that the rate of interest claimed was penal, and it would be inequitable to allow interest at that rate. The Court of first instance (District Judge) found that the defendants had made the payments which they alleged they had made, and held that the plaintiffs should not be allowed interest at the rate claimed, such rate being penal, but should be allowed interest at the rate of Re. 1-1 per cent. per mensem.

The plaintiffs appealed to the High Court from the decree of the Court of first instance contending, *inter alia*, that the payments alleged by the defendants to have been made in satisfaction of the principal amount of the bond were not proved to have been made, and that the rate of interest claimed by them was not penal and excessive.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Babu *Jogindro Nath Chaudhri*, for the respondents.

The judgments of the Court (STUART, C.J., and TYRRELL, J.), so far as they related to the question of interest (which is the only question material to the purposes of this report), were as follows:—

JUDGMENTS.

STUART, C.J.—In regard to the question of interest, the bond is expressed in these terms:—(After stating the terms the judgment continued)—And then the bond proceeds to hypothecate consider- **[182]** able zamindari interest in no less than eight mauzas in lieu of the debt under the bond, and to covenant that until repayment the obligor will not transfer the hypothecated property to any third party; and it further covenants that the creditors shall be at liberty to recover from the obligor's personal and real property.

Now, according to my reading of this bond, it really contains two contracts, or rather, I should say, two alternative contracts, one primary

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and the other subsidiary, the hypothecation of the immoveable property being intended to secure the debt as it may he calculated at the time of taking the account under the bond. The distinction between the primary and the subsidiary or alternative provisions of the bond as to interest is shown by the fact that the primary contract was in its nature capable of being fully performed without any regard to the alternative engagement, as if the obligor had said—"so long as you perform your contract with me, paying interest, at the rate of Re. 1-1 per cent., you shall not be interfered with, but if you make default in the payment of that interest, and so break your contract, you shall be debited with a much higher rate." Now, is this latter stipulation in its nature penal, or may it be taken to be part of one whole and entire contract? If the latter, such a view involves the absurdity of a person being taken bound to pay a large amount because he fails to pay a comparatively small one. In fact, the stipulation for the payment of the larger rate of interest is only a part of the contract as an alternative entirely separable from the first or primary covenant, and in my opinion an alternative of a penal character. In any other or larger aspect such an alternative stipulation was surely unnecessary, seeing that the hypothecation of the immoveable property was amply sufficient for the security of the entire debt, principal and interest.

The legal doctrine which determines the conclusion I have thus stated, is laid down with great distinctness by Mr. Justice PONTIFEX of the Calcutta High Court, in his judgment in *Bichook Nath Panday* v. *Ram Lochun Singh* (1)—a judgment which has been frequently referred to with approbation by myself and other Judges of this Court. In that case Mr. Justice PONTIFEX quotes from a judgment **[183]** of the Privy Council, where it is laid down that "if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest grounds for supposing that a stipulation, applying generally to a breach of all or any of them, was intended to be a penalty." And as expounding the same principle Mr. Justice PONTIFEX refers to the observations of TINDAL, J., "that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered a penalty appears to be a contradiction in terms, the case being precisely that in which Courts of Equity have always relieved and against which Courts of Law have also in modern times endeavoured to relieve, by directing juries to measure and assess the damages actually sustained by the breach of the agreement." See also the opinion of CHAMBER, J., in Addison on Contract, 5th ed. (1862), p. 1075, to the effect generally that where a smaller sum is secured by a larger sum, that larger sum may be looked upon as a penalty. In the present case the conditional rate of interest stipulated for is considerably larger than that first agreed on, although not so large as in many cases we have had before us, but according to the law laid down in the cases referred to, the principle is the same, a comparatively large sum being stipulated to be paid on non-payment of a smaller sum—a state of things that is only intelligible on the idea of the larger payment being intended as a penal condition for helping and securing to the creditor full recovery of his true debt, principal and interest.

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(1) 11 B.L.R. 135.

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The case to which the Judge of the lower Court refers in support of his view of the law was that of *Kharag Singh* v. *Bhola Nath* (1), decided by STRAIGHT, J., and myself, sitting as a Division Bench, and in regard to its main features was on all fours with the present, the bond stipulating for the payment of interest at Re. 1-4 to be increased to Rs. 2 per mensem in the event of a breach of contract, and it also hypothecated zamindari property as security; and we there did not hesitate to hold that the condition for the higher rate of interest was in the nature of a penalty, I myself in my judgment pointing out that in that case the plaint itself showed that the plaintiff in his own mind regarded the additional interest [184] stipulated for in itself strictly penal, by the allegation that "in case he (the defendant) shall fail to pay six-monthly interest, then *on account of breach of contract* he shall pay interest at the rate of Rs. 2 per cent. per mensem from the date of the execution of the bond"—language which I said plainly showed that such a provision of the contract was intended to be penal, and it appears to me that the law to be applied to the present cause is in principle the same.

The order I would therefore propose is, that we allow the appeal from the decree of the lower Court as to the disputed payments, but affirm that decree, and so far dismiss the present appeal, by directing that in the account to be taken the increased interest at Re. 1-8 per cent. per mensem be regarded as penal, with costs in proportion.

TYRRELL, J.—In respect of the interest payable by the contract between the parties, the following are the terms of the bond, *viz.*, "I will pay the money with interest at one rupee one anna per cent. per mensem on demand; that as regards interest I agree that I will pay the interest of the amount every six months which may be found due under the accounts; that in the event of non-payment six-monthly, I will pay the interest at the rate of Re. 1-8 per mensem *from the date of execution of the bond.*" The District Judge found that "the higher rate of interest is obviously penal, and ought to be reduced to Re. 1-1 per cent. per mensem; I decide this upon the authority of *Kharag Singh* v. *Bhola Nath* (1)."

The principle to be applied to the determination of this question is furnished by the Law of Contracts for India, Act IX of 1872, the 6th Chapter of which is devoted to provisions for "the consequences of breach of contract." By s. 74 in that Chapter it is laid down that "*when a contract has been broken*, if a sum is named in the contract as the amount to be paid in case of such breach," there and then a title to compensation or penal damages accrues to "the party complaining of the breach," &c. In other words, *breach of the contract* is the sole and essential precedent condition to a title to damages by way of penalty. Applying this principle, then I ask if the contract of the bond before us has been broken in [185] whole or in part by the obligor. The contract was that the interest exigible by the creditor would be at the annual rate of Rs. 12-12 per cent. if paid six-monthly, or of Rs. 18 if not so paid. That is to say, an alternative rate of interest was stipulated to be paid at the option of the debtor. If he could and would pay at the end of every six months the rate would be less, but if he elected to pay irregularly it would be a little more—an arrangement not dissimilar to the "prompt or deferred," "lower or higher" rates familiar to us in trade transaction. This being the covenant respecting interest, how can it be said that the debtor broke the contract by adopting one of two scales of

(1) 4 A. 8.

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payment equally and alike conformable to, and provided for by, the terms of the bond. He observed and followed his contract, whichever rate of interest he submitted to. But it may be said that as it would not be ascertained with certainty, till the expiry of the first six months after the date of the bond, which rate would be adopted by the debtor, and the higher rate, if it took effect, was "to be reckoned from the date of execution of the bond," the same was therefore necessarily a retrospective rate, which has always been held to partake of the nature of a penalty. I do not find any real force in this suggestion, for, as explained above, I read the bond as providing an alternative rate payable by the debtor at his own option and convenience, each or either to be deemed to run at his own particular rate from the date of the execution of the bond. No question of retrospection *nomine pœnæ* then arises in this case.

The ruling cited by the Judge is distinguishable in essential particulars from the present case. In that case the parties declared in terms that it was their intention that the higher rate of interest should be exigible "because of the breach of contract in respect of the lower rate." I think that the principle applied in *Mackintosh* v. *Hunt* (1) is that which governs the decision in the present case.

For these reasons I would allow this plea also in favour of the appellants, whose appeal I would decree in full with costs of both Courts.

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6 A. 186 (F.B.) = 4 A.W.N. (1884) 31.

[186] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

BHOLA AND OTHERS (*Plaintiffs*) *v.* GOBIND DAYAL AND ANOTHER (*Defendants*).* [25th January, 1884.]

Arbitration—Refusal to file award in Court—"Decree"—Appeal—Civil Procedure Code, ss. 2, 525.

Held (OLDFIELD, J., *dissenting*), that an appeal does not lie from an order disallowing an application to file an award under s. 525 of the Civil Procedure Code.

Janki Tewari v. *Gayan Tewari* (2), distinguished by STUART, C.J.

The same case followed by OLDFIELD, J.

[N.F., 7 C.L.J. 486 (487); F., 26 A. 205 = A.W.N. (1903) 234; 28 A. 21 (22) = 2 A.L.J. 450 = A.W.N. (1905) 165; 32 A. 484 (487) = 7 A.L.J. 425 (428) = 6 Ind. Cas. 127 (129); 1 O.C. 22 (23); R., 16 C. 482 (484); 3 C.L.J. 450 (458) (F.B.) = 10 C.W.N. 609; D., 117 P.R. 1916 = 107 P.W.R. 1916.]

THIS was an appeal from an order refusing an application to file an award in Court under s. 525 of the Civil Procedure Code, preferred as an appeal from a "decree." The Divisional Bench (OLDFIELD and BRODHURST, JJ.), before which the appeal came for hearing, referred to the Full Bench the question whether such an order was appealable, the order of reference being as follows:—

OLDFIELD, J.—We refer to the Full Bench the question which arises in this case, whether an appeal will lie from an order disallowing an application to file an award of arbitration under s. 525, Code of Civil Procedure.

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* First Appeal No. 79 of 1881, from an order of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 18th March, 1881.

(1) 2 C. 202. (2) 3 A. 427.

An appeal was allowed by a Divisional Bench of this Court (STUART, C.J., and SPANKIE, J.) in *Janki Tewari* v. *Gayan Tewari* (1). 1884 JAN. 25.

That case was similar in all respects to the one before us, but the majority of the Full Bench of the Court have recently, in *Daya Nand* v. *Baktawar Singh* (2), held that there is no appeal from an order disallowing an application to file an agreement to refer a dispute to arbitration under s. 523 of the Code of Civil Procedure. FULL BENCH. 6 A. 186 (F.B.) = 4 A.W.N. (1884) 31.

As the principle upon which the Full Bench decision proceeds appears to be opposed to that which governs *Janki Tewari* v. *Gayan Tewari* (1), and as at the same time the Full Bench ruling does not expressly touch the question now raised, we think it desirable to make this reference.

[187] Mr. *C. Dillon*, Babu *Jogindro Nath Chaudhri*, and Maulvi *Mehdi Hasan*, for the appellants.

Messrs. *T. Conlan* and *J. E. Howard*, for the respondents.

The Full Bench delivered the following opinions:—

OPINIONS.

STUART, C.J.—The question put in this reference is whether an appeal lies from an order disallowing an application to file an award of arbitration under s. 525 of the Code of Civil Procedure.

This question has reference to the facts and procedure out of which it rose, for it describes it as "the question which arises in *this* case;" and my answer is, that no appeal lies. The law on the subject has been considered in other cases in this Court, and the present referring order mentions two cases decided by us, and suggests that these two cases are opposed to, or inconsistent with, each other. Those cases are *Janki Tewari* v. *Gayan Tewari* (1) before Spankie, J., and myself, and the Full Bench case of *Daya Nand* v. *Bakhtawar Singh* (2). Two Calcutta cases were also referred to at the hearing, and it is satisfactory to know that the conclusion I have arrived at is in agreement with those Calcutta cases. It is unnecessary, however, for me to refer to these cases, as the question they decide was fully considered and determined in a subsequent Full Bench case in this Court to the same effect. No doubt in that case Oldfield, J., dissented from the other Judges, but my own opinion in it is sufficiently clear; and I point out in it that where the arbitration procedure has been as directed by the Code, an order refusing to file an agreement to arbitration was not a decree as defined in the Code of Procedure. In that Full Bench case the other case referred to in the referring order before Spankie, J., and myself was cited as supporting the contention that in such a case an appeal would lie, but in my judgment I pointed out a clear distinction between the two cases, showing that in *Janki Tewari* v. *Gayan Tewari* (1) the procedure directed by ss. 525 and 526 had not been followed; in fact, that there had been no such private arbitration as the Code contemplated, if, indeed, there was any arbitration at all,—the Munsif giving a decision and order by which he dismissed the claim, and making a decree in the ordinary form, and which decree therefore was clearly appealable. Here [188] the arbitration procedure distinctly falls within the principle applied in that Full Bench case, and my answer therefore is unhesitatingly in the negative.

STRAIGHT, BRODHURST and TYRRELL, JJ.—We do not think that the refusal of an application under s. 525 of the Code, to file an award made in a matter referred to arbitration without the intervention of a

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(1) 3 A. 427. (2) 5 A. 333.

1884 JAN. 25. — FULL BENCH. — 6 A. 186 (F.B.) = 4 A.W.N. (1884) 31.

Court of Justice, constitutes a "decree" within the meaning of the "interpretation-clause" of Act XIV of 1882, and, as such, is appealable. S. 526 points out the grounds upon which cause may be successfully shown against such an application, namely, those that are mentioned in ss. 520 and 521, but it stops there, and does not go on to empower the Court either to remit the award to the arbitrators for reconsideration, or to set it aside. On the contrary, the only discretion given, if such cause is shown, is to refuse to file the award. In our opinion it was intended to leave the party affected by a refusal of this kind to resort to a suit to enforce the award, in which he would have full scope to open up all the matters relating thereto, instead of limiting him to the question of the propriety or otherwise of the Court's action in refusing it. We have not overlooked the ruling of this Court in *Janki Tewari* v. *Gayan Tewari* (1) mentioned in the referring order, nor do we think it necessary to discuss that case at length, as the reasoning of SPANKIE, J., therein appears to us conclusively answered in three Calcutta decisions—*Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* (2); *Bijadhur Bhugut* v. *Monohur Bhugut* (3); *Hurronath Chowdhry* v. *Nistarini Chowdhrani* (4). The judgment of the learned Chief Justice on that occasion does not call for any observation from us, as he himself has very fully explained the grounds upon which it proceeded in *Daya Nand* v. *Bakhtawar Singh* (5), where he concurred with the majority of the Judges upon a question of a somewhat similar kind, relating to s. 523 of the Procedure Code.

Our answer to this reference must therefore be in the negative.

OLDFIELD, J.—The order disallowing an application for filing an award under s. 525, Civil Procedure Code, in my opinion, falls clearly within the definition of "decree" given in s. 2, and, in consequence, an appeal will lie from it.

[189] I entirely concur in the opinion expressed by Mr. Justice Spankie in *Janki Tewari* v. *Gayan Tewari* (1). That case appears to me in all respects similar to the one before us. I have already expressed my opinion at length in the analogous case of *Daya Nand* v. *Bakhtawar Singh* (5), and to the view there taken I adhere.

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6 A. 189 (F.B.) = 4 A.W.N. (1884) 22.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

MUSHARRAF BEGAM (*Judgment-debtor*) *v.* GHALIB ALI (*Decree-holder*).*
[29th January, 1884.]

Execution of decree—Act X of 1877 *(Civil Procedure Code)*, s. 230—*Act XIV of* 1882 *(Civil Procedure Code)*, s. 230.

The holder of a decree applied for execution under s. 230 of Act X of 1877, and the application was granted. Within three years after the passing of Act XIV

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* Application No. 119 of 1883, for revision, under s. 622 of the Civil Procedure Code, of an order of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 22nd March, 1883, affirming an order of Maulvi Ahmad Hasan, Munsif of Amroha, dated the 15th February, 1883.

(1) 3 A. 427. (2) 7 C. 490. (3) 10 C. 11.
(4) 10 C. 74. (5) 5 A. 333.

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of 1882, by which Act X of 1877 was repealed, he applied, for the first time, under s. 230 of the former Act, for execution of the decree. At the time this application was made more than twelve years had elapsed from the date of the decree.

Held by STRAIGHT, BRODHURST and TYRRELL, JJ., that the application might be granted, it being the first made under s. 230 of Act XIV of 1882, and the first made after the expiration of twelve years from the date of the decree, and not being barred by the last paragraph of s. 230 of that Act, read in conjunction with the 3rd paragraph of s. 230 of Act X of 1877, the "law in force" mentioned in the last paragraph of s. 230 of Act XIV of 1882, referring to the law of limitation in force at the time the Act was passed, and not to the third paragraph of s. 230 of Act X of 1877.

Held by STUART, C.J. and OLDFIELD, J., that the application should not be granted, the effect of the last paragraph of s. 230 of Act XIV of 1882 being to bar any proceedings to enforce a decree under that Act which would have been barred under s. 230 of Act X of 1877, if taken thereunder, on the ground that the period of twelve years had elapsed from the dates specified in that section.

[Diss., 12 C. 559 (561); N. F., 11 B. 524 (525); 9 M. 454 (456); F., 8 A. 419 (421); 8 M. 536 (538); D., 6 A. 388 (390).]

THIS was an application for revision under s. 622 of the Civil Procedure Code. It appeared that on the 19th December, 1881, an application for execution of a decree bearing date the 30th November, 1870, was made under s. 230 of Act X of 1877, as amended by Act XII of 1879, and granted. On the 3rd February, 1883, the next application for execution was made under s. 230 of Act XIV of 1882. The judgment-debtor objected that this application was [190] barred by the provisions of that section, the decree being more than twelve years old. The lower Courts disallowed this objection. On the judgment-debtor making this application to the High Court for revision, in which he raised the same objection, the Divisional Bench (STRAIGHT and TYRRELL, JJ.) before which the application came for disposal, referred it to the Full Bench for disposal.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the judgment-debtor.

Mr. *W. M. Colvin*, for the decree-holder.

The following judgments were delivered by the Full Bench :—

JUDGMENTS.

STRAIGHT, BRODHURST and TYRRELL, JJ.—It has been ruled on several occasions by Division Benches of this Court, in advertence to the terms of s. 230 of Act X of 1877, amended by Act XII of 1879, as also of the same section of the Code now in force, that the holder of a decree which is more than twelve years old has one opportunity, and only one, to execute it, whether he succeeds in obtaining satisfaction of it or not. The same view has been expressed by the Calcutta Court in *Sreenath Gooho* v. *Yusoof Khan* (1). In the execution proceedings to which this reference relates the respondent-decree-holder's application to execute the decree of November, 1870, was not only the first preferred by him under s. 230 of Act XIV of 1882, but the first he had made after the expiration of twelve years from the date of the decree, and, as such, was, we think, entertainable. It is urged in opposition to this view that the respondent having already made a successful application to execute under s. 230 of Act X of 1877, is now barred by the third paragraph of that section, read in conjunction with the last paragraph of the same section in Act XIV of 1882. We are unable to adopt this contention. There was no "period prescribed for taking proceedings" in paragraph 3 of s. 230 of Act X of

(1) 7 C. 556.

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1877; on the contrary, the effect of that paragraph was simply to declare the extent of the right of a twelve-year old decree-holder to apply for execution, and left his application to the operation of the ordinary law of limitation, governing the time within which applications for execution must be preferred. The concluding paragraph of s. 230 of Act XIV of 1882, in using the expression "law in [191] force," appears to us solely to refer to the Limitation Law in operation at the time the Act was passed, and to the periods therein prescribed for execution applications. Its words are identical with those to be found in the same paragraph of s. 230 of Act X of 1877, and it is obvious that, as they stood in this last-mentioned Act, they could not have been intended to have, nor, indeed, had they, any reference back to the third paragraph of the same section. It would seem to us that this last paragraph from s. 230 of the old Code has been mechanically re-copied into the same section of the new, without any intention to give it a wider scope or meaning than it originally had, and that the exception from the word "unless" to the end of the paragraph was to guard against a contention, which might have been placed upon the very general words of the opening sentence, that the provisions of the general Limitation Law had been superseded. We are therefore of opinion that this application for revision, which has been referred to the Full Bench for disposal, should be refused with costs.

STUART, C.J.—The facts and dates material to this reference are these. The decree—*i.e.*, the appellate decree,—sought to be executed is dated the 30th November, 1870, and on the 3rd February, 1883, an application for execution was made under s. 230 of Act XIV of 1882. A previous application, however, to execute this decree had been made and granted under s. 230 of Act X of 1877. The dates appear to be these. The application was made on the 19th December, 1881, and on the 13th May, 1882, the Munsif of Amroha issued a certificate for execution to the Court of the Munsif of Moradabad; in other words, the application for execution, made on the 19th December, 1881, was granted, and this procedure took place under s. 230 of Act X of 1877. By that section it is provided that no subsequent application for execution shall be granted after the expiration of twelve years from any of the dates there given, the two first of which mentioned are the dates of the decree sought to be enforced or of the decree on appeal affirming the same. Under these circumstances the last clause of s. 230 of Act XIV of 1882 takes effect, for it provides:—"Notwithstanding anything herein contained, proceedings may be taken to enforce any decree within three years after the passing of this Code, unless when the period prescribed for taking such proceedings by [192] the law in force immediately before the passing of this Code shall have expired before the completion of the said three years." As I have already mentioned, the decree in the present case is the decree of the appellate Court, which is dated the 30th November, 1870, and the twelve years' limitation provided by Act of 1877 expired on the same day of November, 1882, that is, about six months after Act XIV of 1882 came into force; or, in the words of the section, "before the completion of three years," thereby and otherwise allowed, so that this clause in s. 230 of the Act of 1882 covers the present case, seeing that the twelve years' limitation provided by the Act of 1877 expired before the completion of the three years, and the application for execution made on the 3rd February, 1883, is barred. It occurs to me to add that the conclusion which I have thus arrived at appears also to be supported by s. 6 of the General Clauses Act I of 1868, which provides that

"the repeal of any Statute, Act, or Regulation shall not affect anything done, or any offence committed, or any fine or penalty incurred, or any proceedings commenced before the repealing Act shall have come into operation." The law, however, on which I have otherwise based my answer to this reference is sufficient for that purpose.

OLDFIELD, J.—The application for execution of the decree, which is the subject of this reference, was made on the 3rd February, 1883, under s. 230 of Act XIV of 1882, and no previous application to execute this decree has been made and granted under that section, but admittedly an application to execute this decree has been made and granted under s. 230 of Act X of 1877. That section provides that where an application for execution of a decree has been made and granted under it, no subsequent application to execute the same decree shall be granted after the expiry of twelve years from certain dates specified, among them the date of the decree or of the decree on appeal. The present application has been made more than twelve years from the date of the decree on appeal, which was the 30th November, 1870, consequently it has been made after the expiry of the period prescribed by s. 230 of Act X of 1877, and under that law is barred by limitation. Now, the limitation prescribed by s. 230 of Act X of 1877 for taking proceedings to execute a decree has been expressly made applicable to executions under Act XIV of 1882, for the last paragraph of s. 230 [193] of that Act provides that "proceedings may be taken to enforce any decree within three years after the passing of this Code, unless when the period prescribed by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years."

The law in force immediately before the passing of Act XIV of 1882 was Act X of 1877, and the effect of the last paragraph of s. 230 of Act XIV of 1882 is, in my opinion, that no proceedings can be taken under Act XIV of 1882 to enforce any decree, which would be incapable of execution by the provisions of s. 230 of Act X of 1877, on the ground that the period of twelve years had elapsed from the dates specified in that section. Undoubtedly no previous application has been made and granted under s. 230 of Act XIV of 1882; but that section confers no privilege to make an application for execution because it may happen to be the first made under that law. On the contrary, the last paragraph of the section explains distinctly that proceedings may be taken to enforce any decree within three years after the passing of the Code, only when the period prescribed for taking such proceedings by the law in force immediately before the passing of the Code shall not have expired before the completion of the said three years. The orders of the Courts below should be set aside, and the application for execution disallowed with costs.

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Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

HANUMAN SINGH, MINOR, BY HIS MOTHER AND GUARDIAN GAURA (*Plaintiff*) *v.* NANAK CHAND (*Defendant*).* [31st January, 1884.]

Hindu Law—Joint Hindu family—Alienation of ancestral property by father—Suit by son to recover his interest—Obligation of son to pay father's debts—Burden of proof.

Where a Hindu, a minor, governed by the law of the Mitakshara, sued to set aside an alienation of ancestral property by his father, on the ground that such alienation was made to satisfy a debt contracted for immoral purposes: *Held* by STRAIGHT, J., that the burden of proving that the debt was contracted for such purposes, and that the defendant had notice that it was contracted for such [194] purposes, lay on the plaintiff, and that the plaintiff was not discharged from such burden, because he had proved generally that his father had been guilty of extravagant waste of the ancestral property.

Hanuman Persaud Pandey v. *Babooee Manraj Koonweree* (1) and *Suraj Bansi Koer* v. *Sheo Persaud Singh* (2), referred to.

Held also by STRAIGHT, J., that it could not be presumed from such conduct of the father that the debt in question had been contracted for immoral purposes.

Per STUART, C.J., that the plaintiff's father having been guilty of extravagant waste of the ancestral property, the burden of proof in this case lay on the defendant. As, however, there was reason to suspect that the suit was a collusive one, brought at the instance of the plaintiff's father, if not really by him, and it was very doubtful whether the alienation was objectionable on the ground taken in the name of the plaintiff, it would not be safe to give the plaintiff a decree.

[Appr., 9 A. 493 (495); 14 B. 320 (327).]

THE facts of this case are sufficiently stated for the purposes of this report in the order of STRAIGHT, J., directing that further evidence should be taken.

Pandits *Ajudhia Nath* and *Nand Lal*, for the appellant.

Munshi *Hanuman Prasad* and Pandit *Bishambar Nath*, for the respondent.

The Court (STUART, C.J. and STRAIGHT, J.) made the following orders directing that such evidence should be taken :—

ORDERS.

STRAIGHT, J.—This is an appeal from a decision of the Subordinate Judge of Meerut, passed on the 11th August, 1881. The minor plaintiff appellant, by his mother as guardian, instituted a suit against the defendant-respondent, a pleader of the Meerut Civil Court, on the 2nd June, 1881, for possession of a half share in certain immoveable properties and for rent and damages, as well as to have it declared that a sale-deed of the 23rd November, 1876, executed in favour of the respondent by Balwant Singh, father of the plaintiff, was invalid to the extent of such half share. This claim was based on the allegation, that the property in suit was part of the ancestral estate of Ranjit Singh, the plaintiff's grandfather, who died on the 24th March, 1864, and that at his death it came by inheritance to himself and his father Balwant Singh. The plaint, after stating these matters, goes on to say that Balwant Singh "indulged in the prime of his life in immoral pursuits, gambling and extravagance,

* First Appeal No. 143 of 1881, from a decree of Rai Baktawar Singh, Subordinate Judge of Meerut, dated the 11th August, 1881.

(1) 6 M.I.A. 393. (2) 5 C. 148.

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and consequently involved himself in debt: the creditors knowingly advanced loans for immoral purposes and [195] extravagance: the defendant also lent money while Balwant Singh was in a state of infatuation, for defraying the expenses of gambling and licentiousness, as well as to meet other immoral expenditures; and notwithstanding that he knew that the plaintiff had an equal interest in the ancestral property with Balwant Singh, and that the money he had advanced to Balwant Singh was not for the joint interest of the whole family, and that neither they nor the ancestral property were responsible for its payment, not only got a decree against Balwant Singh alone, but on the 23rd November, 1876, obtained a deed of sale of the property in suit, in which the plaintiff had a right by inheritance to the extent of one-half, and entered into possession of such property."

In answer to these allegations the defendant pleaded that Balwant Singh was the sole and absolute proprietor of the property in suit; that on the 22nd February, 1872, for lawful and necessary purposes, Balwant Singh executed to the defendant a bond, of which the consideration was Rs. 616-4-0, on account of interest on a bond of the 29th June, 1868, Rs. 1,630 for notes of hand unpaid, and Rs. 1,253-12-0 cash paid at the time of registration. As security for this advance he hypothecated his ten biswas zamindari share in Aurangshahpur, half of which the plaintiff now seeks to recover. He further states that when this bond was executed, Balwant Singh was not a person of bad character, nor was the loan made to him for immoral purposes, but in the belief that it was required for legitimate and necessary expenses; and that it was in discharge of the debt thus created that the transfer of the property now in suit was subsequently completed. The defendant further alleged that, at the time of the loan being made and the property being hypothecated, the plaintiff was not born, and that Balwant Singh, his father, was therefore sole owner; but even supposing the plaintiff was then in existence, he is bound by the sale, because it was made to satisfy a debt which it would have been the plaintiff's pious duty under the Hindu Law to discharge.

The Subordinate Judge found that the plaintiff was born in January, 1871, and was therefore entitled to impugn the validity of the debt contracted by his father after his birth; that the consideration set out in the bond of the 22nd February, 1872, was [196] given by the defendant to the plaintiff; that the money borrowed from the defendant was spent in the construction of a house, and was not used for immoral or unlawful purposes. The Subordinate Judge further found in substance, that the plaintiff had established by witnesses that his father, Balwant Singh, "was extremely extravagant, and that he had squandered the ancestral property left by Ranjit Singh worth two or two and a half lakhs," but that it had not been proved that the proceeds of the loan involved in the present suit had been spent for immoral or unlawful purposes. In this aspect of the case the Subordinate Judge held that the plaintiff having failed to prove that the money borrowed from the defendant was applied to immoral purposes, and the defendant having succeeded in establishing that the debt was devoted to legitimate and moral purposes, the deed of sale executed for that debt was not liable to be cancelled. He accordingly dismissed the suit.

The plaintiff now appeals to this Court, and when the case first came before us for hearing on the 19th July last, his pleader by way of preliminary objection to our entering upon the merits of the appeal, so far as the facts were concerned, urged his sixth plea, which was to

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the effect that the Subordinate Judge had refused to allow the examination of a number of witnesses, it was proposed to call before him on behalf of the plaintiff to prove that the house, to the building of which it was said that the money lent by the defendant had been devoted, was in fact built in furtherance of immoral purposes.

After hearing the other side upon this point, we thought it right to adjourn the case for an affidavit to be prepared on behalf of the plaintiff verifying the statement made to us by his pleader, with a direction that a copy thereof should be served on the respondent for the purpose of his replying to it, if so advised. In obedience to this order two affidavits, one marked A, of Lala Thakur Dass, mukhtar, dated the 24th July, 1882, and a second marked B, of Sayyid Muhammad Mir, pleader, dated the 25th July, 1882, were made and sworn, and copies of the same were delivered to the respondent's counsel and pleader, who have not filed any answer thereto. On the 15th January last the hearing of the appeal was resumed by us, and after some discussion of the preliminary point, we thought it [197] desirable that the pleader for the appellant should enter generally upon the merits of the appeal. At the close of his arguments we took time to consider whether the evidence of the witnesses the Subordinate Judge was alleged to have refused to allow to be examined was material and necessary to a proper determination of the suit. We must therefore carefully examine the circumstances under which the plaintiff comes into Court, and see what it is incumbent upon him to prove in order to establish his claim. Assuming for the moment that he was in existence at the time the loan was made in 1872 and when the sale-deed was executed in 1876, it follows, as a necessary consequence, that he was jointly interested in the property transferred under that instrument, as being part of the ancestral estate left by his grandfather Ranjit Singh. Equally clear is it that Balwant Singh, his father, was as such the manager of this joint property for himself and the plaintiff, and any advances he might obtain or debts he might incur for the purpose of improving or preserving the ancestral property would, if he (Balwant Singh) had died without liquidating them, have had to be discharged by the plaintiff as a pious obligation, such obligation attaching to him by reason of the nature of the debt, and not from the nature of the estate inherited by him.

The primary presumption arising from the fact of the transfer of the property now in suit by Balwant Singh to the defendant would therefore seem to be, that the plaintiff is bound by it until he has established that it was made in consideration of moneys borrowed by his father for illegitimate and immoral purposes. It must be confessed that the point is not without difficulty, nor is it altogether easy to reconcile the numerous authorities on the question as to with whom the burden of proof lies in such a case. Seeing that the defendant is admittedly in possession of property, one-half of which at least originally belonged to the plaintiff by right of inheritance, the natural position would appear to be that it should lie with the defendant to make his title to the whole of it good, by showing that his vendor in effectuating the sale to him made it for considerations that bound his co-parcener. On this head the remarks of their Lordships of the Privy Council in a well-known case—*Hanuman Persaud Panday* v. *Babooee Munraj Koonweree* (1) [198]—are valuable and instructive. "The argument for the appellant in the reply, if correct, would indeed

(1) 6 M.I.A. 393.

reduce the matter for consideration to a very short point; for according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is *prima facie* to support the charge, and the *onus* of disproving it rests on the heir. For this position a decision or rather a *dictum* of the Sadar Diwani Adalat at Agra, in the case of *Oomed Rai* v. *Heera Lall* (1) was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a very correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father, in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently this *dictum* may perhaps be supported on the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the *onus* of proof lie in such suits as the present, is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and dependent on them. Thus, where the mortgagee himself with whom the transaction took place is setting up a charge in his favour made by one whose title to alienate he necessarily [199] knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate and the motives influencing his immediate loan (pp. 418-419)."

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It will be gathered from these observations of their Lordships, that a distinction is to be drawn in cases where the vendee or mortgagee of ancestral property from the father is asserting his title to the whole of it against the other heirs, and those in which the heirs come into Court to obtain exemption from alienations or sales made by the father. In *Suraj Bansi Koer* v. *Sheo Persad Singh* (2) their Lordships, after discussing another well-known decision of their Board—*Muddun Thakoor* v. *Kantoo Lall* (3)—proceed to observe on it as follows:—"This case then is undoubtedly an authority for these propositions—(1st) that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debts, his sons, by reason of their

(1) 6 N.W.P., S.D.A.R. (1851) 218.
(2) 5 C. 148.
(3) 14 B.L.R. 187=1 I.A. 333.

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duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted, and (2ndly) that the purchasers at an execution-sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings."

Applying the principles thus expounded to the present case, it is for the plaintiff to establish that the sale of the 3rd November, 1876, was made by Balwant Singh, his father, in respect of past advances and a present loan for which he is not responsible, by reason of the moneys so obtained having been devoted to immoral and unnecessary purposes, and further, when he has proved this, he must go on to show that the defendant acted "*mala fide*" in the matter, and was aware of the purpose to which the consideration he gave was to be devoted. The Subordinate Judge has found in terms that "Balwant Singh was extremely extravagant and squan-[200]dered his father Ranjit Singh's property worth two or two and a half lakhs of rupees," and the pleader for the plaintiff contends that this having been proved, it rested with the defendant to establish that the transaction of the 23rd November, 1876, was *bona fide* and entered into after all necessary inquiries.

After carefully considering this argument I think that in face of the remarks in *Suraj Bansi Koer* (1) it cannot be sustained, and that the plaintiff was bound to go further and prove the other two points to which we have adverted. As to the first of these the Subordinate Judge records: "None of the plaintiff's witnesses can point to any act of extravagance to which the debt, the subject of the present dispute, was applied: the plaintiff's witnesses, Ram Narain and Bankey Rai, state that they do not know to what purpose the debt contracted by Balwant Singh from defendant was devoted;" and if we were to accept this finding, it would decisively conclude the plaintiff's claim. In face, however, of the two affidavits of which we have already spoken in the earlier part of this judgment, and the sworn assertion of the plaintiff's mukhtar, that he had witnesses in the Subordinate Judge's Court to prove that the moneys, in consideration of which the sale of the 23rd November, 1876, was effected, were devoted to immoral purposes, and that he was not allowed to call them, we think it desirable, in order to satisfactorily dispose of the litigation between the parties, to direct the Subordinate Judge, under ss. 568 and 569 of the Code, to take the evidence of such witnesses, and when he has recorded it, to return it to this Court. We further order that if after this evidence has been taken the defendant requests to be permitted to call witnesses on his side to prove that he made all necessary inquiries and acted *bona fide* in the transaction, leave shall be granted, and then, their examinations having been taken, they shall be returned to this Court.

STUART, C J.—I concur in the order proposed by my learned colleague, Mr. Justice STRAIGHT, but I reserve my remarks on the merits of this case until the evidence, which has now been directed to be taken, has been returned to us.

I may only remark at present that, notwithstanding the Privy Council judgments referred to by my learned colleague, I entertain [201] serious doubts whether the burden of proof in this case is not on the defendant.

(1) 5 C. 148.

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The further evidence required by the High Court having been taken by the lower Court and sent to the High Court, the Court (STUART, C.J. and STRAIGHT, J.) delivered the following judgments:—

JUDGMENTS.

STRAIGHT, J.—On a former occasion I discussed at length the circumstances of this case and the rule of law by which it appeared to me to be governed, and no useful purpose would be served by my now recapitulating what I then said. The Subordinate Judge, in obedience to the order of this Court, has recorded the statements of eleven additional witnesses for the plaintiff and of five for the defendant, and I have been at pains to read them through, and very carefully to consider them in conjunction with the evidence originally on the record. The only conclusion I find myself able to arrive at, after a close examination of the proof on the one side and the other is, that the view taken by the Subordinate Judge in his judgment in the cause was a just and proper one, and that his decision ought not to be disturbed. The evidence given on behalf of the plaintiff no doubt goes far to establish gross extravagance and grave misconduct on the part of Balwant Singh, and the fact seems abundantly established, that by the most reckless and profligate expenditure, he has frittered away the entire ancestral estate, which came to him on the death of his father Ranjit Singh. But without stopping to discuss the many contradictions and inconsistencies between the statements of the several witnesses for the plaintiff, it seems to me enough to say that not one of them is able to speak as to the purposes to which the money borrowed from the defendant was devoted having been of an immoral kind in the sense of the Hindu Law. The learned pleader very frankly admitted that he could not carry the matter further, but he contended that, having established such a clear and conclusive case of general extravagance of the most reckless kind on the part of Balwant Singh, we were reasonably entitled to infer that the consideration for the bond of the 22nd February, 1872, was required for, and devoted to, purposes of an immoral and improper kind in the sense already mentioned. Looking, [202] however, to the fact that the plaintiff is a minor, who at the time of institution of this litigation was little more than ten years of age, and that he was then and is now residing at Meerut with his mother, in the same house as his father Balwant Singh, against whom he has by the plaint preferred such grave charges of profligacy and extravagance, there is certainly some ground for suspecting that Balwant Singh is at the bottom of this suit, as suggested by the defendant; and, moreover, I think it reasonable to infer that if it had been possible to prove that the money was borrowed for and devoted to illegitimate expenses, the plaintiff, under existing circumstances, would have had no difficulty to obtain evidence to that effect.

None, however, is to be found in the record: indeed more than one of his witnesses admits himself unable to give any information on the subject. Under such circumstances I cannot admit that, given general extravagance on the part of Balwant Singh as proved, it would be safe or proper to presume, that the debt, to which the bond of the 22nd February, 1872, had reference, was necessarily contracted for purposes, in respect of which no pious obligation on the part of the plaintiff to discharge them could have arisen. Having regard to the admitted social and pecuniary position of Balwant Singh upon his father's death, his subsequent loan transactions with the defendant were of a very limited kind—*viz.*, Rs. 8,500

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borrowed on the 22nd June, 1868, to pay off some notes-of-hand held by one Kishan Sahai; three sums of Rs. 500 borrowed in May and June, 1871, and Rs. 1,253-12-0 taken at the time of registration of the bond of the 22nd February, 1872, or Rs. 11,253 in all. The first of these loans was nearly three years before the plaintiff was born, and at a time when the defendant had no reason to doubt Balwant Singh's capacity to mortgage the immoveable property in Aurangshahpur, while the latter ones were for small amounts, and in either case the interest charged was unusually low. Even if the *onus* lay on the defendant to establish his "*bona fides*" in his monetary dealings with Balwant Singh, I think he has discharged it. There seems every reason for believing that the three sums of Rs. 500, and the Rs. 1,253-12-0 were spent on the house "Kamboh Darwaza," which it is now abundantly proved was not given to the prostitute Hira. On the [203] contrary, it was subsequently sold, and a portion of the price realized by the sale was expended in purchasing in the plaintiff's name the residence at Meerut now occupied by him, his father and mother. Taking the case as made for the plaintiff in its entirety, I agree with the Subordinate Judge that the plaintiff has failed to substantiate enough to invalidate the sale of the 23rd November, 1876, or to establish that the proceeds of the loan, in consideration of which it was made, were devoted to immoral purposes, and that his claim to possession of half the property cannot be sustained. The appeal should therefore, in my opinion, be dismissed with costs.

STUART, C.J.—I have read the evidence ordered by us to be taken by the Subordinate Judge, and transmitted to us for our consideration. I am not at all clear that the Privy Council rulings referred to at the hearing before us apply to and conclude the law respecting the burden of proof in such a case as the present. I retain the opinion formerly expressed by me, although with some doubt, that the burden of proof is on the defendant. Nothing can be stronger than the opinion expressed by the Subordinate Judge on the evidence before him as to Balwant Singh's reckless and wanton extravagance, although he distinguishes between such misconduct and the debt incurred to the present defendant. Balwant Singh's misconduct as a spendthrift is fully proved by the evidence which has been taken, and more than one of the defendant's own witnesses speak to facts showing his character in this respect, and it is in my opinion perfectly fair to suggest that if it had not been for Balwant Singh's reckless extravagance as truly described by the Subordinate Judge, the money advanced to him by the defendant for the purpose of building the house mentioned in the pleading would never have been required. The debt, therefore, to the defendant was not of a faultless character. At the same time the plaintiff's *bona fides* in the suit may reasonably be suspected. Balwant Singh is alive, and the plaintiff is living with him, and it appears to me to be quite within the facts and circumstances of the case that Balwant Singh himself has encouraged, if he has not instigated, the present proceedings against the defendant, and that indeed he may be the real plaintiff. Altogether, although I cannot draw so clear a distinction as the Subordinate Judge does between [204] Balwant Singh's general extravagance and the debt incurred by him to the defendant, I yet consider it is so doubtful as to its being open to the objection to it urged in the name of the plaintiff that it would be unsafe for us to give him our judgment. I therefore concur in the order proposed by my colleague, Mr. Justice Straight, and the present appeal is dismissed with costs.

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CRIMINAL REVISIONAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* KHAIRATI. [31st January, 1884.]

Act XLV of 1860 (*Penal Code*), *s.* 377—*Unnatural offence—Charge—Particulars as to time, place, and person—Criminal Procedure Code*, *s.* 222.

Held where a person was tried for an unnatural offence and convicted on a charge which did not allege the time when, place where, or point to any known or unknown person with whom, the offence was committed, and without any proof of these particulars, the facts proved against him only being that he habitually wore woman's clothes and exhibited physical signs of having committed the offence, that the conviction was not sustainable.

THIS was a case called for by the High Court, in which one Khairati had been convicted by Mr. J. L. Denniston, Sessions Judge of Moradabad, of an offence under s. 377 of the Penal Code. The charge on which the appellant was committed and tried was "that he, within four months previously to the 15th June (1883), the exact time it being impossible to state, did in the district of Moradabad abet the offence of sodomy, by allowing some unknown person to commit the offence of sodomy on his person, and was at the time of the commission of the offence present, for which reason he must, under the provisions of s. 114 of the Indian Penal Code, be deemed to have committed the offence itself, and thereby committed an offence punishable under s. 377 of the Indian Penal Code." The grounds of the conviction appear in the following extract from the judgment of the Sessions Judge:—

"This case relates to a person named Khairati, over whom the police seem to have exercised some sort of supervision, whether strictly regular or not, as a eunuch. The man is not a eunuch in the literal sense, but he was called for by the police when on a visit to his village, and was found singing dressed as a woman among the [205] women of a certain family. Having been subjected to examination by the Civil Surgeon (and a subordinate medical man), he is shown to have the characteristic mark of a habitual catamite—the distortion of the orifice of the *anus* into the shape of a trumpet—and also to be affected with *syphilis* in the same region in a manner which distinctly points to unnatural intercourse within the last few months.

"The accused admits that he habitually wears woman's clothes. He says that he was not singing on the occasiou in question. He denies that he has ever been the subject of unnatural intercourse; and he explains the enlargement of the organ by saying he has had piles (or as he possibly means dysentery). He denies that he has ever had *syphilis*.

"The evidence adduced to show that the accused was singing is sufficient, and the accused, when he has admitted the wearing of female garments, has conceded the most important fact as to his public habits. As to the *syphilis*, the evidence is quite unimpeachable. As to the distortion of the organ, his explanation cannot be admitted. The disease (or diseases) to which he alludes must have been perfectly well known to the medical witnesses, and, in pronouncing the enlargement to be attributable only to sodomy among conceivable causes, they anticipated any suggestions that it might be the result of the commonplace disorder (or disorders) alluded to by the accused.

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"The three facts proved against the accused—his appearance as a woman, the misshapement, the venereal disease—irresistibly lead to the conclusion that he has recently subjected himself to unnatural lust. Any one of the facts would not justify this precise conclusion. Any single one of the three might either (as is the case with the venereal disease) be attributed by a stretch of the imagination to some other cause or agency, or might leave the mind in that state of dissatisfaction which follows an isolated, though powerful, argument. But taking the three considerations together, I do not see how a reasonable man can doubt that the accused has recently been the subject of sodomy.

"The question remains, whether there is anything in the Procedure Code, or in the general spirit of the law, which protects the [206] accused from punishment, on the ground that neither the individual with whom the offence was committed, nor the time of committal, nor the place is ascertainable.

"S. 222 of the Procedure Code has been before now considered to be unfavourable to convictions in such cases, but, as the committing Magistrate points out, the enactment in question does not describe the circumstances which require to be known in order that misconduct may be punishable; it merely details the particulars which, if known, must be set forth for the benefit of the accused, in order that he may be able to defend himself. That such particulars should be imperfectly known weakens the defence; and *pro tanto* weakens the prosecution, for the strongest case for the prosecution is one which the accused, on the face of the accusation, ought to, but cannot, rebut. The absence, therefore, of the particulars alluded to in s. 222 of the Criminal Procedure Code weakens the case, but it does not destroy it. To mention an illustration: a man could be convicted of a murder committed on a journey, of which the time and place were totally unknown. Such a case can easily be conceived. As to the *person against whom* the offence has been committed, there is, as the Magistrate observes, no such person in the present case.

"I think, therefore, it is clear that the enactment in question has not any necessary bearing upon the case. The only question which remains relates to the spirit of the law. On this subject I forbear to dogmatize; but it seems to me that distinct misconduct of this sort, within a recent period, cannot reasonably be exempted from punishment, merely because of certain obscurities which do not commonly present themselves. The case is one of an uncommon character, but part of its peculiarity it owes to the peculiarity of the offence in which there is no injured party.

"The Court therefore finds that there is good reason for convicting the accused of participation in sodomy. The Magistrate calls his offence abetment, being present, referred to in s. 114 of the Penal Code. The question is one of terms; but it is conducive to brevity, and also I think accurate to speak of the offence as that of 'having carnal intercourse,' rather than as abetment of the same. Two persons are required for intercourse, and both may be spoken [207] of as holding intercourse, the one with the other. In the matter of ordinary sexual intercourse, that is the phraseology commonly, though perhaps not invariably, used."

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

JUDGMENT.

STRAIGHT, J.—This conviction cannot possibly be sustained. The charge upon which the accused was committed and subsequently tried

alleges neither time when, place where, nor points to any known or unknown person with whom, the particular act charged as an offence against s. 377 of the Penal Code was committed, and for aught that appears to the contrary, the suggested unnatural intercourse may have taken place out of the jurisdiction of the Moradabad Court, and at some place where the Penal Code is not in force. At best the case for the prosecution is, that the accused is a habitual sodomite, but at present there is no provision of the law that covers it or renders him amenable to punishment upon evidence of so vague and general a description as that to be found in the present record. I fully appreciate the desire of the authorities at Moradabad to check these disgusting practices; but neither they nor I can set law and procedure at defiance in order to obtain an object, however laudable. The conviction is quashed, and the accused, Khairati, must be released.

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Conviction quashed.

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6 A. 207 (F.B.) = 4 A.W.N. (1884) 34.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

MEDA BIBI (*Plaintiff*) *v.* IMAMAN BIBI AND OTHERS (*Defendants*).* [4th February, 1884.]

Act XV of 1877 (Limitation Act), sch. ii, No. 91—Suit for cancellation of instrument—Muhammadan Law—Gift—Suit for possession of immoveable property.

One of the heirs of a deceased Muhammadan sued for her share, under the Muhammadan Law, of the estate of the deceased, and to set aside a gift of his estate by the deceased, as invalid under that law, by reason that possession of the property transferred by the gift had not been delivered by the donor to the donee. *Held* that, because the suit was not brought within three years from the date of the gift, it did not necessarily follow that the suit was barred by art. 91 of [208] the Limitation Act, 1877, inasmuch as the plaintiff's title to impeach the gift could only accrue from the moment when, by receipt of possession, the gift had become operative by law.

[F., 28 M. 349 (350) = 15 M.L.J. 228.]

THE plaint in this case stated that the plaintiff's father, Ghulam Ghaus, died on the 5th May, 1879, leaving as his heirs according to Muhammadan Law his son, the defendant Chedi, and the plaintiff his daughter; that the defendant Chedi was entitled to two-thirds of the property of the deceased, and the plaintiff to one-third; that on the 17th December, 1877, the defendant Chedi had fraudulently caused his father to execute a deed-of-gift of his property in favour of the defendant Imaman Bibi, his daughter-in-law, which was invalid under Muhammadan Law, as possession had not been delivered by the donor to the donee; that on the death of his father, the defendant Chedi had taken possession of his property, and caused mutation of names to be effected in the revenue records in favour of the defendant Imaman Bibi in respect of a portion of the property conveyed by the gift; and that on the 16th January, 1880, he had sold a house which had belonged to his father.

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* Second Appeal No. 1355 of 1882, from a decree of J.W. Power, Esq., District Judge of Ghazipur, dated the 28th September, 1882, reversing a decree of Rai Raghu Nath Sahai, Additional Subordinate Judge of Ghazipur, dated the 5th April, 1882.

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On these allegations the plaintiff claimed a one-third share of the immoveable property left by Ghulam Ghaus, her father; to have the sale-deed, dated the 16th January, 1880, set aside to the extent of a one-third share; and to have the deed-of-gift in favour of the defendant Imaman Bibi set aside to the same extent.

The deed-of-gift which the plaintiff sought to have set aside, after reciting the reasons which led to its execution by the donee, continued in these terms:—

"Consequently, while in the enjoyment of a sound state of body and mind, without reluctance or coercion, I willingly and voluntarily record that I have given all the moveable and immoveable property mentioned below, which is in my proprietary and undisputed possession and which I can manage as I like, to Imaman Bibi, wife of the said Shaikh Chedi, on the following conditions: that I will get her name recorded in place of my name in respect of mauza Miranpur in pargana Haveli, Ghazipur, and houses in mohalla Saidwara and in the city of Ghazipur, in the Revenue Court; that she shall be at liberty to look after and manage all the affairs in connection with the property, and by remaining [209] in proprietary possession quietly enjoy the same; that at the time of necessity the Musammat has all the powers, *i.e.*, of making an alienation by sale, &c.; that as long as I live she shall look after me and after my maintenance, my son shall have no hand in the matter; that after her death, Shaikh Chedi, my son, and Meda Bibi, my daughter, shall become the proprietors of the entire property herein mentioned; that the heirs of Imaman Bibi or any other person shall have no interest in it; that I owe some money to Kishen Chand, banker, and I will pay it during my lifetime; should I fail to do so, the Musammat shall pay it; should she also fail to pay the debt, it shall be charged upon the property mentioned in this deed: I have therefore executed these presents as an agreement that it may be of use when needed."

The defendant, Imaman Bibi, contended, *inter alia*, that the suit was barred by limitation under art. 91 of the Limitation Act, 1877, three years from the date of the gift having expired. The Court of first instance held that the suit was within time, as it included a claim for possession of immoveable property based on the right of inheritance to Ghulam Ghaus, and had been brought within twelve years from his death. It also held that the gift in favour of the defendant, Imaman Bibi, was invalid under Muhammadan Law, as possession of the property covered by the gift had not been delivered to the donee, but the donor had remained in possession until he died. In the event the Court gave the plaintiff a decree against the defendants, Chedi and Imaman Bibi, for possession of one-third of the property claimed, and cancellation of the deed of gift. On appeal by the defendant, Imaman Bibi, the lower appellate Court (District Judge) held that the suit was barred by limitation under art. 91 of the Limitation Act, 1877, with reference to the ruling of STUART, C.J., in *Hazari Lal* v. *Jadaun Singh* (1).

The plaintiff appealed to the High Court, contending that the suit was within time, the decision relied on by the District Judge not being applicable to the case; and that the gift in favour of the defendant was invalid under Muhammadan Law, the donee never having obtained possession of the property by virtue thereof.

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(1) 5 A. 76.

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[210] Mr. *T. Conlan*, Pandit *Ajudhia Nath*, and Shah *Asad Ali*, for the appellant.

Mr. *C. H. Hill*, Mr. *M. Sirajuddin*, and Mr. *H. C. Niblett*, for the respondents.

The Divisional Bench (STRAIGHT and BRODHURST, JJ.), before which the appeal came for hearing, referred it to the Full Bench, on the ground that the judgment of STUART, C.J., in *Hazari Lal* v. *Jadaun Singh* (1) was not concurred in by STRAIGHT, J.

The following judgment was delivered by the Full Bench :—

JUDGMENT.

STUART, C.J., and STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ.—It appears to us that the Judge has allowed the plea of limitation without first sufficiently ascertaining the facts material to its determination.

It was essential for him, before holding the suit barred, to find in terms whether the alleged gift by Ghulam Ghaus ever took effect in law during his lifetime, so as to afford the plaintiff a complete cause of action on which to come into Court. Her case is that Ghulam Ghaus remained in possession of the whole of the property covered by that instrument until his death, and that no possession of it, as required by the Muhammadan Law to render the transaction legal and binding, was ever obtained by the donee as long as he remained living. It does not necessarily follow that because the alleged deed-of-gift was made on a particular date, that time at once began to run against the plaintiff under art. 91 of the Limitation Act. Her title to impeach it could only accrue from the moment when, by receipt of possession, it had become operative in law. As in this view of the matter the Judge has not only disposed of the suit on a preliminary point, but determined that point upon inadequate materials, we have no alternative but to allow this appeal, and, remanding the case to him under s. 562 of the Code, we direct him to restore it to his file of pending appeals and dispose of it according to law. The costs of the appeal to this Court will be costs in the cause.

Case remanded.

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6 A. 211 = 4 A.W.N. (1884) 28.

[211] CIVIL REVISIONAL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

KALIAN SINGH AND OTHERS (*Defendants*) v. LEKHRAJ SINGH (*Plaintiff*).* [4th February, 1884.]

Arbitration—Withdrawal of suit—Appeal from order permitting withdrawal—High Court's powers of revision—Civil Procedure Code, ss. 2, 373, 588, 622—Practice—Notice to show cause—Amendment of plaint.

An order under s. 373 of the Civil Procedure Code permitting the withdrawal of a suit, with liberty to bring a fresh one, not being made appealable by s. 588, or being a "decree" with the meaning of s. 2, is not appealable.

When the plaintiff in a suit applies for permission to withdraw it with liberty to bring a fresh one, such permission should not be granted without the

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* Application No. 232 of 1883, for revision under s. 622 of the Civil Procedure Code of an order of Maulvi Samiullah Khan, Subordinate Judge of Aligarh, dated the 23rd June, 1883.

(1) 5 A. 76.

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defendant being served with notice to show cause why such permission should not be granted.

L, claiming as heir to *H*, a deceased Hindu, sued *K*, his widow, and *G* a minor represented by his mother and guardian *B*, to have the adoption by *K* of *G* set aside and for certain other reliefs. The matters in difference in the suit were referred to arbitration, and an award was made in favour of the defendants. The plaintiff preferred objections to the award. Before these were disposed of *K* died. The Court of first instance subsequently allowed the objections and set aside the award. The minor defendant then applied to the High Court for revision of the order setting aside the award. This application was rejected on the ground that the order might be impugned on appeal from the decree in the suit. The plaintiff subsequently applied for permission to withdraw the suit, with liberty to bring a fresh one, on the ground that, *K* having died, he was entitled to possession of the immoveable property left by *H*. This permission was granted. The minor defendant applied to the High Court for revision.

Held that it might have been a very good ground for allowing the plaintiff to withdraw the suit that *K*, the adoptive mother of the minor defendant, had died *pendente lite* had no arbitration proceedings taken place in the course of the suit; but when the parties had referred their differences to arbitration, and an award had been made in favour of the defendant, and had been set aside, and an application for revision of the order setting it aside had been refused, on the ground that the matter could be made the subject of appeal from the final decree in the suit, permission to withdraw the suit and bring a fresh one should not have been granted. The minor defendant might be seriously prejudiced by such a course, and the suit had not abated against him by the death of *K*, while on the other hand, a decree in the suit if in his favour, would decide the litigation, and if in favour of the plaintiff, would not prevent his bringing a suit for possession on each separate cause of action which had arisen. *Stahlschmidt* v. *Walford* (1), referred to.

The High Court refused to allow the plaint in the suit to be amended, by the addition of a claim for possession of the property left by *H*.

[F., 15 A. 169 (170); 16 A. 19 (20); 17 A. 97 (98); 18 C. 322 (323); R., 9 A. 253 (267).]

[212] THE facts of this case are sufficiently stated in the judgment of the Court.

Pandit *Ajudhia Nath*, for the petitioner.

Mr. *C. H. Hill* and Babu *Jogindro Nath Chaudhri*, for the opposite parties.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—This is an application brought by Kalian Singh, guardian of Ganga Sahai, a minor, for revision, under s. 622 of the Civil Procedure Code, of an order made by the Subordinate Judge of Aligarh under s. 373, Civil Procedure Code, permitting Lekhraj Singh to withdraw the suit brought by him against the petitioner, with permission to bring a fresh suit. The suit was brought by the plaintiff, Lekhraj Singh, as heir of Hira Singh against Khushal Kuar, widow of Hira Singh, and Ganga Sahai, represented by Bhawani Kuar, his mother, as guardian, on the 2nd July, 1881, and the relief sought was to have declared invalid an adoption alleged to have been made by Khushal Kuar of the minor defendant against Ganga Sahai, and to set aside Khushal Kuar's acts in connection with the said adoption, and declare all alienations of the property made by her should not be prejudicial to the plaintiff. On the 10th September, 1881, the day fixed for the hearing, an agreement to refer the matter in dispute to arbitration was filed by the parties, the minor defendant being represented by his mother and guardian, and

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the reference to arbitration on his part had the sanction of the Court, and the matter was referred to the arbitrator, and an award was made on the 25th October, 1881, which was in favour of the defendants. The plaintiff filed objections to the award on the 1st November, 1881. In the meantime, on the 8th December, 1881, the defendant Khushal Kuar died, and Chattar Singh was made guardian *ad litem* for the minor defendant, in place of Bhawani Kuar, and on the 24th April, 1882, the arbitration was set aside. The defendant then applied to the High Court to revise the order setting aside the award, and this application was rejected on the 1st February, 1883, on the ground that the order might become the subject of appeal on the final disposal of the suit. On the 20th January, 1883, Chattar [213] Singh having died, Kalian Singh was appointed guardian *ad litem* for the minor. On the 23rd June, 1883, the plaintiff applied for leave to withdraw the suit on the ground that Khushal Kuar having died, he had become entitled to immediate possession of the estates of Hira Singh, and would bring a fresh suit, and permission to withdraw, with leave to bring a fresh suit, was given on the same day.

A preliminary objection was taken to the present application on the ground that the order is open to appeal, and consequently not one to which s. 622 will apply. This objection, however, is invalid in our opinion. The order is not one which under s. 588, Civil Procedure Code, is expressly open to appeal, and it cannot be regarded as an order amounting to a decree within the meaning of "decree" in s. 2, Civil Procedure Code.

On the main question before us, we are of opinion that the Subordinate Judge's order should be set aside. The order was made without giving the opposite party any opportunity to show cause against it, and is on this account alone open to objection, but it is also objectionable on the merits. It might have been a very good ground for allowing the plaintiff to withdraw with leave to bring a fresh suit that Khushal Kuar, the adoptive mother of the minor defendant, had died *pendente lite* had no arbitration proceedings taken place in the course of the suit; but when the parties had referred their differences to arbitration, and an award had been made in favour of defendant and had been set aside on objections, and an application to revise the order had been refused by this Court, on the ground that the matter could be made subject of appeal from the final decree in the suit, leave to withdraw the suit and bring a fresh one should not have been given. The minor defendant might be seriously prejudiced by such a course, and the suit had not abated against him by the death of Khushal Kuar; while, on the other hand, a decree in the pending suit, if in his favour, would decide the litigation, and if in favour of plaintiff would not prevent his bringing a suit for possession on the separate cause of action which had arisen. We may refer to the case of *Stahlschmidt* v. *Walford* (1). It was suggested at the hearing that the [214] plaint in this suit might be amended so as to ask for further relief by possession of the property, but we are not prepared at the present stage and in the present application to make any such order.

We set aside the order of the Subordinate Judge, and direct him to dispose of the case. The applicant will have costs of this application.

Application allowed.

(1) L. R. 4 Q.B.D. 217.

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Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* NATHU AND OTHERS. [4th February, 1884.]

Security to keep the peace—Criminal Procedure Code, ss. 107, 112, 115—*Substance of information—Joint inquiry.*

A Magistrate ordered sixty-nine persons to show cause why they should not give security to keep the peace, it having been reported to him by the police and the tahsildar of the pargana in which such persons resided that they were likely to commit a breach of the peace at a religious procession which was about to take place, and the holding of which was opposed to their religious tenets. After an inquiry, as against all the accused jointly, the Magistrate, on the evidence of the tahsildar and a sub-inspector of police, ordered that ten of the accused, who were said to be the "ringleaders," should enter into bonds with sureties and the rest should enter into their own recognizances to keep the peace for one year.

Held that the Magistrate's order purporting to be prepared under s. 112 of the Criminal Procedure Code did not adequately or properly disclose the substance of the report or information upon which he issued his summons; the parties were entitled to something more than a mere assertion by the Magistrate that he had been informed that a breach of the peace was likely to occur, in order to enable them, if they were in a position to do so, to bring evidence to rebut the truth of such information—that the very loose statements of the tahsildar and the sub-inspector as to the large majority of the persons summoned were quite insufficient to justify the wholesale order for security passed by the Magistrate —that as the religious procession would have been over in a fortnight, it was a most excessive exercise of power to require all the parties to give security for one year—and that the Magistrate should have dealt with the cases of the ten alleged "ringleaders" first, and should have required the tahsildar and sub-inspector to give much fuller statements *seriatim*, and particularly as to each individual man; and as to the remaining fifty-nine there should have been some clear and distinct proof, affecting each of them, and warranting the inference that such person was likely to commit a breach of the peace or to do a wrongful act likely to occasion a breach of the peace.

[R., 9 A. 453 (463); 5 O.C. 313 (314); 8 S.L.R. 207 = 16 Cr. L.J. 235 = 27 Ind. Cas. 907; D., A.W.N. (1896) 73.]

THIS was an application for revision of proceedings taken by Mr. W. R. Burkitt, Magistrate of the Muttra District, under s. 107 **[215]** and following sections of the Criminal Procedure Code against the applicants. It appeared that the Magistrate, having received information that the applicants, sixty-nine in number, residing at a place called Kosi, were likely to molest a religious procession, which the Jains (Saraogis) of Kosi had obtained sanction from Government to hold, required them to show cause why they should not be ordered to execute bonds with or without sureties to keep the peace for one year. The order of the Magistrate made under s. 112 of the Criminal Procedure Code, dated the 12th November, 1883, was in effect as follows:—"It appears that the "*Rath-jatra*" (1) *mela* (fair) will be held by the Jains at Kosi on the 22nd November. From reports made by the police and the tahsildar of pargana Kosi it seems that there is danger of a breach of the public peace by the persons mentioned below, because the sect of Vaishnus, a rival sect to the Jains, is opposed to the celebration of the "*Rath-jatra*" *mela*. It is rumoured that when the "*rath*" is brought out, they will make a riot, and thereby commit a breach of the public peace. It is ordered therefore that the following

(1) "*Rath-jatra*" (*rath*, the car in which idols are conveyed—*jatra*, a procession), a procession of the car of a Hindu god—*Fallon.*

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persons be summoned to my Court on the 14th November to show cause, &c., &c." The summonses issued to the applicants stated as follows :—" Whereas it appears from credible information that you are likely to commit a breach of the peace at the "*Rath-jatra*" *mela* which is to be held on the 22nd November at Kosi, you are hereby, &c., &c." On the 14th November, 1883, the applicants appearing before him, the Magistrate recorded the following proceeding :—" All the above accused being present in Court, it was explained to them by the Magistrate that information had been received that they intended to commit a breach of the peace on the occasion of the approaching Saraogi procession, and that they were called on to show cause why they should not enter into bonds, with or without security, to keep the peace for the term of one year. All of them in reply unanimously state that they have no intention of committing any breach of the peace, and are not unwilling to enter into bonds to keep the peace, but some of them say they are too poor to procure sureties. One of them, Nathu *Bania* (No. 1), says he wants to have the procession countermanded till he has a [216] reply to the appeal he has made to the Secretary of State against it being held." After recording this proceeding, the Magistrate examined two witnesses, namely, Abul Hasan, the tahsildar of Kosi pargana, and Ram Prasad, sub-inspector of police stationed at Kosi. The memorandum of the evidence of these witnesses made by the Magistrate was in these terms :—

"*Abul Hasan*—Is tahsildar of Kosi tahsil; knows and is acquainted with all the sixty-nine persons (mentioned above), whom he now sees sitting before him in Court; witness knows personally that all these persons have a quarrel with the Saraogis of Kosi in the matter of the procession which the latter are about to carry out in accordance with the orders of the former Magistrate (Mr. *Neale*), witness has had conversations from time to time during the past year with all the accused respecting this procession, and endeavoured to induce them not to oppose the carrying out of the procession; they persistently refused to listen to witness's advice, and said they would, if necessary, give up their lives in opposing the procession; witness most strongly apprehends that if the accused be not bound over to keep the peace, a disturbance will take place at the procession; the Banias are the persons who especially dislike and oppose the procession, and who are most likely to urge on other castes to oppose it; witness has been informed and believes that the accused of other castes than the Banias have joined in an agreement with the latter to oppose the procession; the ringleaders in this matter and those who have most put themselves forward in opposing the Saraogi procession are the accused Nathu *Bania* (No. 1), Baldeo *Bania* (No. 2), Gordhan *Bania* (No. 3), Bihari *Bania* (No. 4), Daula *Bania* (No. 5), Tanda *Bania* (No. 6), Ujagar Mal *Bania* (No. 17), Fateh Ram *Bazaz* (No. 32), Salgu *Bania* (No. 36), Lalchand *Bania* (No. 39), and also especially the two absent men, Bihari *Bania* and Hira Lal *Bania*. *Cross-examined.*—Witness thinks the bonds, if taken, should be for a year, as during the year there are other Saraogi ceremonies.

"*Ram Prasad*—Is sub-inspector of police stationed at Kosi; knows and is acquainted with all the accused whom he now sees sitting in Court; they are all of them residents of the town of Kosi and of contiguous hamlets; deposes to the existence of bitter enmity between the accused and the Saraogis on account of the [217] procession which the latter intend to hold; witness is informed and believes that unless

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security to keep the peace is taken from the accused, a disturbance and breach of the peace will inevitably occur when the procession takes place; witness has had conversation with many of the accused respecting this matter, and found them determined to oppose the procession; those of the accused who are most violently opposed to the procession are those of the *Bania* caste who are Vaishnus, and they have induced Jats and butchers to join them; witness further mentions the names of the first six accused, and of Ujagar Mal (No. 17) and of Bihari *Bania* (absent) as being the ringleaders among the Banias. *Cross-examined.*—Several of the accused did use threats to witness to the effect that they would molest the procession."

The Magistrate, after taking the evidence of these witnesses, made the following order, dated the 14th November, 1883:—

"This case has arisen out of a procession which the Saraogis of Kosi have obtained permission from Government to hold next week. The Banias of Kosi are very indignant at this, as they consider the holding of the procession of the idol of Parasnath to be an outrage on their religious feelings. I have no doubt that unless some preventive measures are taken, the Banias and their adherents will molest this procession. The evidence on that point taken to-day is, in my opinion, conclusive. I do not, however, think it necessary to take security from all the accused. It will suffice to take security from the ringleaders only, while as to the others personal recognizances will suffice. I further think the securities and recognizances should be for the term of one year, as during the coming year several Saraogi ceremonies will take place. I accordingly direct that all the sixty-nine persons named above do enter into security in the sum of Rs. 500 each person to keep the peace for the term of one year from to-day." The Magistrate further directed that the ten "ringleaders" should give two sureties in the sum of Rs. 250, or one surety in the sum of Rs. 500, to keep the peace during the term of one year from the same date.

On the 17th November, 1883, the day on which the ten "ringleaders" were ordered to produce the security demanded of them, five of them refused to furnish security; and on the same day the [218] Magistrate ordered that they should suffer simple imprisonment for the term of one year, unless they put in the required security before the expiration of that period.

Mr. *J. D. Gordon*, for the applicants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

The following order was made by the Court:—

ORDER.

STRAIGHT, J.—The procedure of the Magistrate in this matter has been most irregular, and though I feel sure he acted with the very best intention, it is impossible that I can allow orders passed in so high-handed a fashion to stand. Putting aside for a moment the obvious inconvenience, to use the mildest term, of dealing with sixty-nine different persons in a single proceeding, his order, as purporting to be prepared under s. 112 of the Criminal Procedure Code, does not adequately or properly disclose the substance of the report or information upon which he issued his summons. Parties against whom process is issued under the section relating to sureties of the peace are entitled to something more than a mere assertion in writing by the Magistrate, that he

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has been informed that a breach of the peace is likely to occur, in order to enable them, if they are in a position to do so, to bring evidence to rebut the truth of such information. But further than this, the very loose statements of the tahsildar and sub-inspector of police, as to the large majority of persons summoned, were quite insufficient to justify the wholesale orders for security passed by the Magistrate. Moreover, as the *mela*, at which a disturbance was anticipated, would have been over in less than a fortnight, it was a most excessive exercise of power to require all the parties to find security for one year. As a matter of fact, five of them have now been in jail for upwards of two months for non-compliance with an order passed upon the flimsiest materials. I do not say that such was the case here; indeed, I am certain the Magistrate had the most laudable objects in view, but the provisions of the Code of Criminal Procedure as to finding security for the peace may be easily converted into an engine of injustice and oppression, and this Court is bound to watch proceedings adopted thereunder with the closest scrutiny. The Magistrate should have dealt with the cases of the ten alleged ring-[219] leaders first, and should have required the tahsildar and sub-inspector to give much fuller statements *seriatim*, and particularly as to each individual man. So as to the remaining fifty-nine, there should have been some clear and distinct proof on record affecting each of them, and warranting the inference that such person was likely to commit a breach of the peace or to do a wrongful act likely to occasion a breach of the peace. If the Magistrate's notions of his powers under Chapter VII of the Code are correct, there would be nothing to prevent his ordering the whole of the Hindu or Muhammadan inhabitants of a place over which he has charge, upon information of the vaguest character, to enter into large recognizances with heavy sureties. I do not wish to say a word more than is absolutely necessary, as I am aware that the Magistrate has an exceedingly difficult district to deal with, and I should be sorry in any way to weaken his legitimate authority or action. But the Criminal Procedure Code must not be made use of for the purpose of supplying administrative deficiencies in the shape of an inadequate police force to keep a place in order. Every person, to whom a summons is issued calling on him to show cause why he should not find security, is entitled to proper information as to the materials upon which process has been granted against him, and to a reasonable interval within which to prepare himself to meet such information by evidence or otherwise, as the matter may require. Moreover, his case should be considered by itself and on its own merits, and except in rare instances it should not be mixed up with, and should never be prejudiced by, that of other persons. Nor should the order for security be in an excessive sum, or for the extreme term of twelve months, except when absolutely necessary.

The Magistrate's orders of the 14th and 17th of November last are set aside, and the recognizances of those persons who gave security will be discharged. The five who are in custody will be released.

Application allowed.

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APPELLATE CRIMINAL.

6 A. 220= 4 A.W.N. (1884) 53.

6 A. 220=4 A.W.N. (1884) 53.

[220] APPELLATE CRIMINAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* DHUM SINGH. [15th February, 1884.]

Defamation—Act XLV of 1860 (*Penal Code*), s. 499, *Eighth Exception—Privileged communication — Good faith — Justification — Practice — Cross-examination of complainant.*

Held, on the evidence in this case, in which the question was whether a person accused of defamation was protected by the *Eighth Exception* to s. 499 of the Indian Penal Code, that the accused had failed to establish that he acted in good faith. *Abul Hakim* v. *Tej Chandar Mukerji* (1), referred to.

Where the accused in a case of defamation intends to bring evidence to prove the truth of the defamatory matter, his advocate should cross-examine the complainant upon every matter upon which evidence is intended to be brought. If he does not do so, it is a subject of serious consideration whether he should subsequently be allowed to tender proof as to the material incidents of which he has not cross-examined.

[R., 10 A. 425 (459); 17 B. 573 (577).]

THIS was an appeal by one Dhum Singh, who had been convicted by Mr. T. B. Tracey, Sessions Judge of Bareilly, of defamation, an offence punishable under s. 500 of the Indian Penal Code. The facts of the case, so far as they are material for the purposes of this report, were as follows :—

The appellant was a merchant of the town of Pilibhit, and Badr-ul-Hasan, the person who instituted the prosecution, a sub-inspector of police. The document in which the defamatory matter was contained was a petition in English, presented to the Inspector-General of Police, Mr. H. B. Webster, at the instance of the appellant, on the 2nd April, 1883. The statements set forth in the charge as being defamatory were as follows :—(i)—That Badr-ul-Hasan takes bribes. (ii)—That he takes bribes through Aziz Ahmad. (iii)—That he takes bribes through Mohan Lal. (iv)—That he often manufactures false cases. (v)—That he beats and ill-uses accused persons. (vi)—That he detains accused persons in the lock-up till they pay him money. (vii)—That when asked by you Dhum Singh to pay you Rs. 200 due on a promissory note, he sent Rs. 50 and desired the *rukka* be returned, and that since that time he fell in enmity with you and entangled your son, Chandra Sen, in a false charge. (viii)—That he kept Chandra Sen in the lock-up for three days, during which time they beat him severely and treated him unkindly. (ix)—That he took [221] against Chandra Sen the false evidence of bad conducted and misbehaved men. The defence to the charge was that the allegations contained in the petition were true in fact, and that it was for the public good they should be made and published, and that they were accusations preferred in good faith to the Inspector-General of Police against one of his subordinates, in respect of matters as to which such subordinate was subject to his authority. Badr-ul-Hasan, the prosecutor, was examined on behalf of the prosecution, and denied the truth of the allegations. For the defence witnesses were called to prove specific acts by Badr-ul-Hasan of extortion, cruelty, and corruption. Badr-ul-Hasan was not cross-examined in regard to any of these alleged acts. The Sessions Judge, holding that the imputations contained in the petition were unfounded, convicted the appellant.

(1) 3 A. 815.

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The grounds of appeal were—(i) that the evidence for the defence established the truth of the allegations set forth in the charge as the defamatory portions of the petition of the 2nd April, 1883; and (ii) that if it did not go so far, it at least showed that the appellant's accusations were made in good faith to the proper authorities, and so brought him within the protection of *Exception* 8 to s. 499 of the Penal Code.

Mr. *W. M. Colvin* and Mr. *J. D. Gordon*, for the appellant.

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

JUDGMENT.

STRAIGHT, J. (After deciding that the Sessions Judge had good ground, so far as the imputations contained in paragraphs 7, 8 and 9 of the charge were concerned, in holding that the appellant had failed to make out the truth of his allegations, observed on the question of good faith as follows) :— But then there arises the further point for consideration—*viz.*, whether in petitioning the proper authority, as he undoubtedly did in the person of Mr. Webster, for an inquiry into the conduct of one of his subordinates, the appellant acted in good faith for the purpose of having a matter, in which he was directly interested, properly investigated. *Exception* 8 to s. 499 of the Penal Code is nothing more than a reproduction of the rule of English law, which was stated by Lord Campbell in the well-known case of *Harrison* v. *Bush* (1) in the following terms:—"A communication made [222] *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter, which without the privilege would be slanderous and actionable." Under *Exception* 8 an accusation preferred in good faith to one person, who has authority over another, in respect of the subject-matter of that accusation, is not defamation. It will be observed that two ingredients are essential to the establishing of this protection—(i) that the accusation must be made to a person in authority over the party accused; and (ii) that the accusation must be preferred in good faith—that is to say, with such reasonable care and attention on the part of the person making it, in first satisfying himself of the truth and justice of his charge, as an ordinary man should be expected to exercise. I am not at liberty to resort in the present case to the provisions of s. 27 of Act XVIII of 1862, which enacts that "in proving the existence of circumstances as a defence under the 2nd, 3rd, 5th, 6th, 7th, 8th, 9th, or 10th exception to s. 499 of the Penal Code, good faith shall be presumed, unless the contrary appear," as that Act is not in operation here. On the contrary, I can only look to s. 105 of the Evidence Act, which throws upon the appellant the burden of proving the existence of circumstances bringing the case within *Exception* 8, and directs the Court *prima facie* to presume "the absence of such circumstances." That the appellant addressed his accusations to a person who had lawful authority over Badr-ul-Hasan with respect to the subject-matter of such accusations, is a point upon which no dispute can arise. The only remaining question for consideration is, whether the appellant has established that he acted in good faith in making those accusations? There are two circumstances which at once strike one as favourable to him: first, that at the time he presented his petition of the 2nd April, his anger had very naturally and justly been

(1) 25 L.J.Q.B. 25.

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aroused by the unfounded charge that had been brought against his son Chandra Sen ; and, secondly, that he appended his name to, and so made himself personally liable for, the statements contained in that paper. Still it was more than likely that this very exasperation under which he was suffering made him too ready to believe anything his son told him as to the treatment he had received, and the general gossip that [223] came to his ears with regard to the conduct of the police. At any rate this is certain, that in giving instructions for the drafting of the petition, he was not so careful and discriminating as to the shape in, and the materials on, which he advanced his charges as he should have been. I am far from saying that where the occasion of a defamatory communication is privileged, the language in which the accusations are formulated should be too strictly scrutinized. As I remarked in *Abdul Hakim* v. *Tej Chandar Mukarji* (1), "it is not essential that before a person can be held entitled to the privilege of having made a statement in good faith for the protection of his interests, he should establish that every word he has spoken or written is literally true, though it is obvious that according as it is more or less true or false, the question of his good faith or otherwise must be determined. In the present case I am not prepared to say that as regards the 7th, 8th, and 9th heads of the charge the appellant has altogether satisfactorily shown that he acted in good faith. I think it most probable that he suspected the loan business with Badr-ul-Hasan had had something to do with the criminal charge being preferred against his son, partly from facts that were within his own knowledge, and much more from what his son, no doubt with a good deal of coloring and exaggeration, told him of what had happened at the police station. But this was not enough, and he should have exercised greater care and attention in making himself sure of his facts before committing his accusations on this point to writing. As to the residue of matters mentioned in the six earlier heads of charge, it is clear to my mind from the evidence and his own statement before the Magistrate that the appellant acted upon mere rumours that were flying about Pilibhit, and as they referred to the cases of other persons, in which he had no direct interest, more stringent tests must be applied in determining the question of his good faith. Even if proof of such rumours was admissible, of which I am by no means clear, it was his duty, before committing them to writing as direct charges against Badr-ul-Hasan, to satisfy himself by all reasonable means at his command that they were well founded in fact, and if he failed in this respect, he published them at his peril, and must take the responsibility [224] for them that the law imposes. I therefore have come to the conclusion that the appellant did not satisfactorily make out his good faith, and that the Judge was right in so holding. (With reference to the fact that Badr-ul-Hasan, the prosecutor, had not been cross-examined upon any of the matters in respect of which the appellant produced evidence, the learned Judge observed as follows:—) As a matter of practice I must point out to the Judge that he should have required the counsel for the accused distinctly and separately to put to Badr-ul-Hasan in cross-examination each and all of the matters upon which evidence was to be produced on the other side. Indeed, if an advocate fails to do this, it is a subject for serious consideration whether he should subsequently be allowed to tender proof as to the material incidents of which he has not cross-examined. In justice to the

(1) 3 A. 815 (817).

learned counsel who appeared in the Court below as well as before me, I should add that he stated to me at the hearing of this appeal that although he pressed the Judge to be allowed to cross-examine in the manner I have suggested, he was not allowed to do so on the ground that it was a waste of time. Possibly it may have seemed to the Judge that such a course was tedious and unnecessary, but it was part of his duty to take care that this important rule of practice was not disobeyed, and I make these remarks for his guidance in future.

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6 A. 224 = 4 A.W.N. (1884) 55.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield.

QUEEN-EMPRESS *v.* T. BURKE. [16th February, 1884.]

Act XLV of 1860 (*Penal Code*), *s.* 411—*Retaining stolen property—Proof that the property is stolen property necessary—Guilty knowledge of retainer—Criminal Procedure Code, s.* 503—*Commission for the examination of witness—Act I of* 1872 (*Evidence Act*), s. 33.

Where a person is accused of an offence under s. 411 of the Indian Penal Code, he cannot, where the circumstances do not raise the presumption that he received the property knowing it to be stolen, be convicted of that offence merely because he is in possession of the property and does not account for his possession. The prosecution must prove both that the property was stolen and that the accused received it dishonestly.

At the trial of a person for an offence under s. 411 of the Indian Penal Code, the Court of Session, under s. 33 of the Indian Evidence Act, 1872, used against the accused the evidence of the owner of the property in respect of [225] which the accused was charged and of his wife taken by commission during the inquiry, and the evidence of the servant of those persons taken at the inquiry, and also the evidence of the owner of the property taken during the trial under a commission issued by the Sessions Judge under s. 503 of the Criminal Procedure Code. The grounds upon which the Sessions Judge admitted the evidence taken during the inquiry were that the attendance of the witnesses could not be procured without an expense of Rs. 500, an amount which he considered unreasonable, that the witnesses would be inconvenienced, and that their evidence did not concern the accused personally, having reference only to the identification of the property in respect of which the accused was charged. *Held* that the Sessions Judge had improperly admitted such evidence. Inconvenience to witnesses is no ground allowed under s. 33 of the Evidence Act, and the question of identification was a most material one, and the evidence of the witnesses in question was of the utmost moment, the whole case resting on it; and as regards the ground of expense, it was impossible to consider the amount unreasonable, considering that the entire case rested on the evidence of those witnesses, and that the accused had not cross-examined those whose evidence had been taken by commission, nor, looking at his position, could he arrange for their cross-examination.

Held also that on similar grounds the Sessions Judge was not justified in issuing a commission under s. 503 of the Criminal Procedure Code.

[F., 29 A. 318 = 3 A.L.J. 808 = A.W.N. (1906) 314 = 4 Cr. L.J. 436 = 1 M.L.T. 449; R., 19 B 749 (756); 19 C. 113 (120); 15 C.P.L.R. 66 (68).]

THIS was an appeal from a judgment of Mr. J. C. Leupolt, Sessions Judge of Agra, dated the 18th December, 1883, convicting the appellant, Thomas Burke, of an offence under s. 411 of the Indian Penal Code. It was proved at the trial of the appellant before the Sessions Judge at Agra, that the prosecutor, Major Hackett, travelled on the 17th May, 1883, from Saharanpur to Agra, by the East Indian Railway, having travelled to Saharanpur from Chakrata by road. Before he left Chakrata, his wife had

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packed seven pocket-handkerchiefs in one of her husband's boxes or in his portmanteau. These boxes and the portmanteau were conveyed from Tundla Junction to Agra in a train of which the appellant was the guard; and he had access to the boxes and the portmanteau. A day or two after, on Major Hackett wanting a handkerchief, his servant Najaf Khan opened his boxes and portmanteau and could not find one. About a month later the appellant was in possession of a handkerchief similar in all respects to those which had been packed in Major Hackett's boxes or portmanteau. It was this handkerchief that the appellant was charged with dishonestly retaining possession of, knowing it to be stolen. During the preliminary inquiry the evidence of Major and Mrs. Hackett was taken at Chakrata by commission. Their servant, Najaf Khan, [226] was examined personally. At the trial of the appellant a commission was issued by the Sessions Judge for the examination of Major Hackett at Chakrata, and his evidence so taken, and his evidence and that of Mrs. Hackett, taken by commission at the preliminary inquiry, and the evidence of Najaf Khan, taken at such inquiry, was used against the appellant by the Sessions Judge. The defence of the appellant was that he had received the handkerchief from a prostitute living at Delhi, but he produced no evidence to prove his statement. The Sessions Judge held that, as it was proved that the handkerchief belonged to Major Hackett, and the appellant failed to account for its possession in a satisfactory manner, he was guilty under s. 411 of the Indian Penal Code.

The grounds of appeal were—(1) that there was no evidence to prove that the handkerchief was stolen; (2) that there was no evidence to show that the appellant possessed himself of the handkerchief "with a dishonest or guilty knowledge;" and (3) that the examination of the complainant and his wife by commission was unjust and prejudicial to the appellant.

Mr. *G. E. A. Ross* and Mr. *A. Rudra*, for the appellant.

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

JUDGMENT.

OLDFIELD, J.—This conviction cannot be sustained, as although the evidence may establish that the handkerchief found in the possession of the appellant is the property of Major Hackett, it has not been satisfactorily proved that the handkerchief was stolen, and that the appellant received it dishonestly, knowing or having reason to believe it to be stolen property. The fact that it was stolen must be as sufficiently proved in this case, in which the appellant is charged under s. 411 in respect of its receipt, as is needed in a case against a person charged with the theft. Now this fact rests on conjectural grounds only: there is nothing to show either the time when, or place where, the theft took place, or the circumstances under which it occurred or who committed the theft.

It appears that the handkerchiefs like the one found were packed in a box belonging to Major Hackett on the occasion of his journey from Chakrata to Agra in May, and a few days after arrival at Agra, when the box was opened, the handkerchiefs were missing. [227] They might of course have been stolen, but they might equally have been stolen in the train or at a previous part of the journey, or after the journey was over, or equally they might have been mislaid or lost: all is conjectural.

Then, it has not been proved that the particular handkerchief found with the appellant was one of those in the box. Nor is there sufficient evidence to prove the dishonest receipt. Assuming, and this is mere assumption, that this handkerchief was in Major Hackett's possession

till or about the 17th May, it was found in appellant's possession more than a month after: that is a considerable time, and the circumstances will not afford a presumption that he received it knowing it to be stolen, unless he can account for its possession. The fact that he is in possession of the handkerchief and does not account for it is no doubt suspicious, but nothing more; and the prosecution is not relieved from the obligation of proving beyond reasonable doubt both that the handkerchief was stolen and that the appellant received it dishonestly. This has not been done, and I set aside the conviction and sentence, and direct that the appellant, T. Burke, be released.

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I observe that the material evidence in this case is that of Major and Mrs. Hackett, and their servant, Najaf Khan. The evidence of the two former was taken by commission in the course of the preliminary inquiry; the latter in person. The Judge, acting under s. 33 of the Evidence Act, admitted the evidence thus taken at the trial instead of requiring their attendance and himself taking their depositions, and he issued a supplementary commission for the examination of Major Hackett. In acting thus, he acted improperly. The grounds on which he admitted the evidence taken at the preliminary inquiry are stated by him to be, that the presence of the witnesses could not be obtained without an amount of expense which under the circumstances of the case he considered unreasonable, also the inconvenience to the witnesses, and the fact that their evidence does not concern the accused personally, having reference only to the identification of the handkerchief. Now inconvenience to witnesses is no ground allowed under s. 33 of the Evidence Act, and the question of identification was a most material one in the case, and the evidence of these witnesses was of the [228] utmost moment, the whole case resting on it; and as regards the ground of expense, the amount of which the Judge puts at Rs. 500, it is impossible to consider the amount unreasonable under the circumstances of the case, considering that the entire case rested on the evidence of those witnesses, and that the accused had not cross-examined them, nor, looking to his position, could he arrange for their cross-examination at Chakrata. Nor, on similar grounds, can this be held to be a case in which the Judge was justified, under s. 503 of the Criminal Procedure Code, in issuing a commission.

Conviction quashed.

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6 A. 228 = 4 A.W.N. (1884) 41 = 8 Ind. Jur. 523.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MAKUND RAM AND OTHERS (*Defendants*) v. MAKUND RAM AND OTHERS (*Plaintiffs*).* [18th February, 1884.]

Execution of decree—Contract superseding decree—Fresh suit.

In the course of proceedings in execution of a decree, by which a simple mortgage of immoveable property was enforced, the judgment-debtor made an application to the Court executing the decree dated in April, 1877, stating that the decree had been partially satisfied by the sale of a part of the mortgaged property; that the decree-holder had remitted a portion of the decree; that the balance should be paid by a certain date; and that a certain banker had given a

* First Appeal No. 73 of 1882, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 10th April, 1882.

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note of hand for the payment of interest on the balance at a certain rate. The judgment debtor then stated as follows:—"So long as the petitioner does not pay the money to the decree-holder, *i.e.*, during the term fixed above, the banker shall pay interest to the decree-holder, the decree holder shall not have power to take out execution within the said term, but after the expiry thereof he shall be at liberty to realize his money together with interest from the petitioner and his property by executing the decree: excepting the property sold all the property mortgaged and attached under the decree shall continue so mortgaged and attached: the decree-holder's pleader has affixed his signature at the foot of this petition showing that he consents to it: the petitioner therefore prays that the case may be struck off as partially executed." The decree-holder subsequently sued the judgment-debtor to recover the balance of the decree, claiming under the arrangement set forth in the petition of April, 1877, as a contract superseding the decree.

Held, having regard to the terms of that petition, that no new contract superseding the decree was either intended or effected, and the suit was consequently not maintainable.

[229] *Billings* v. *The Uncovenanted Service Bank* (1), distinguished: *Ganga* v. *Murli Dhar* (2); S.A. No. 25 of 1882 (3); and *Champat Rai* v. *Pitambar Das* (4), followed.

[R., 12 A. 571 (576).]

THE plaintiffs in this suit held a decree for the enforcement of a simple mortgage against the defendants. On the 3rd April, 1877, they applied for execution thereof, and in the course of the execution proceedings the pleader for the defendants presented a petition to the Court executing the decree, in which he informed the Court that the defendants had sold mauzas Sheopuri and Lodhipur (part of the mortgaged property, which, as well as the other mortgaged property, was under attachment), and had out of the sale-proceeds paid a certain sum in part satisfaction of the decree; that the plaintiffs had remitted a certain amount; that the balance amounted to Rs. 11,000, and this amount should be paid by the 3rd March, 1880; and that a certain banker had given his note-of-hand for payment of interest on Rs. 11,000 at the rate of 13 annas 4 pies per cent. The petition then stated as follows:—"So long as the petitioners (defendants) do not pay the money to the decree-holders, *i.e.*, during the term fixed above, the banker shall pay interest to the decree-holders: the decree-holders shall not have power to take out execution within the said term, but after the expiry thereof the decree-holders shall be at liberty to realize their money, together with future interest, at 13 annas 4 pies per mensem, from the petitioners and their property, by executing this decree: excepting mauzas Sheopuri and Lodhipur, all the property hypothecated and attached under the decree shall continue so hypothecated and attached: the decree-holders' pleader has affixed his signature at the foot of the petition, showing that he accepts and consents to it: the petitioners therefore pray that, after inquiry from the decree-holders' pleader, the case may be struck off as partially executed." The Court ordered this petition to be filed. In December, 1881, the plaintiffs instituted the present suit against the defendants to recover Rs. 11,000, "principal amount of the mortgage-money, by enforcement of the hypothecation lien and the sale of the property hypothecated"—that is to say, they treated the arrangement set out in the petition of the 3rd April, 1877, as a contract superseding the decree, and sued on such contract. The Court of first instance [230] gave them a decree. The defendants appealed to the High Court, and it was contended on their behalf that the suit was not

(1) 3 A. 781.
(2) 4 A. 240.
(3) Weekly Notes, (1883), 93.
(4) 6 A. 16.

1884 FEB. 18. APPELLATE CIVIL. 6 A. 228 = 4 A.W.N. (1884) 41 = 8 Ind. Jur. 523.

maintainable, as no new contract in supersession of the decree had been entered into between the parties.

Mr. *T. Conlan* and Pandit *Ajudhia Nath*, for the appellants.

Munshi *Hanuman Prasad* and Babu *Sital Prasad*, for the respondents.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—There can be no question that the appellants' answer to the suit is good and that we must allow the pleas of this appeal. It is obvious from the terms of the petition of the 3rd April, 1877, that no new contract superseding the decree then under execution was thereby either intended or effected. It is the application known as a "postpone petition;" and the result of its admission by the Court was, that the execution case was struck off the file *for a time* as partially executed; the attachment made under the decree continuing to subsist; and the right of "realizing his money by taking out execution of his decree" being expressly reserved to the creditor in the event of the debtors not paying before the 3rd of March, 1880. This last date is also significant, for it leaves just one month to the decree-holder to take action before his decree would become time-barred by the expiration of three years from the date of the transaction of the 3rd April, 1877. The Court below has been misled by applying the principles laid down in *Billings* v. *The Uncovenanted Service Bank* (1), the facts of which are essentially distinguishable from those of the present case. In that case it was clearly the intention of the parties to abandon the decree and in supersession and extinction of it to enter on a new and different contract. The law as declared in *Ganga* v. *Murli Dhar* (2), in S. A. No. 25 of 1882 (3), and in *Champat Rai* v. *Pitambar Das* (4) is applicable to and must govern this case. We allow the appeal, and dismiss the respondents' suit with costs of both Courts.

Appeal allowed.

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6 A. 231 = 4 A.W.N. (1884) 42 = 8 Ind. Jur. 524.

[231] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

MUHI-UD-DIN AHMAD KHAN (*Plaintiff*) v. MAJLIS RAI AND OTHERS (*Defendants*).* [19th February, 1884.]

Vendor and purchaser—Contract of sale—Suit for specific performance of contract—Suit for possession of immoveable property—Act XV of 1877 (*Limitation Act*), *sch. ii, Nos.* 113, 144.

A contract was made for the sale of certain immoveable property, in the event of the vendor obtaining a decree establishing his title to the property, in a suit which had been brought for that purpose. The vendor obtained such decree in that suit. The purchaser subsequently brought a suit "to have a sale-deed executed and completed," and for possession of the property. It was contended that the limitation applicable to the suit was that provided by art. 144 of the Limitation Act, 1877, and not art. 113. *Held* that the suit was essentially one

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* First Appeal No. 117 of 1883, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 21st July, 1883.

(1) 3 A. 781.
(2) 4 A. 240.
(3) Weekly Notes (1883) 93.
(4) 6 A. 16.

1884 FEB. 19. — APPELLATE CIVIL. — 6 A 231 = 4 A W.N. (1884) 42 = 8 Ind. Jur. 524.

for specific performance of contract, and the limitation applicable was art. 113. The contention that, so far as the suit was for possession of immoveable property, it should be governed by art. 144 was invalid. The right to possession sprang out of the contract of sale, and the relief by giving possession was comprised in the relief by specific performance of the contract of sale, and could not be governed in this suit by any but art. 113. But assuming the suit might, so far as limitation was concerned, be entertained, still as the right to possession was dependent on the contract of sale, if the suit could not be maintained for specific performance of the contract, it could not be maintained for possession of the property sold under the contract.

[F., 5 O.C. 140 (142); 217 P.L.R. 1911 = 11 Ind. Cas. 299 = 138 P.W.R. 1911; R., 38 A. 292; 10 O.C. 218 (224).]

THE plaintiff in this suit claimed to have a sale-deed "executed and completed" and possession of immoveable property. It appeared that on the 26th March, 1876, the defendants in this suit, who had instituted a suit for possession of certain immoveable property, an appeal in which was pending in the High Court, entered into an agreement in writing with one Aftab Begam for the sale of such property to her for Rs. 3,000, in the event of the decree made by the High Court being in their favour. On the 16th August, 1876, the High Court gave the vendors a decree for the property. On the 23rd May, 1878, Aftab Begam transferred to one Ahmad-ud-din Khan her rights and interests under this agreement. Ahmad-ud-din Khan sued for the specific performance of the contract, but the suit was dismissed on the ground that he had not paid the balance of the purchase-money. This decision was affirmed by the High Court on the 7th June, 1880. On the 2nd April, 1883, Ahmad-ud-din made a similar transfer to the plaintiff in this suit. The latter thereupon tendered to the defendants the balance of the [232] purchase money, but they refused to accept it or to execute a conveyance of the property. In April, 1883, the plaintiff brought the present suit for specific performance of the agreement of sale and possession of the property. The Court of first instance dismissed the suit on the ground that before it was instituted more than three years had elapsed from the date on which the defendants had refused to perform the agreement, and therefore the suit was barred by limitation under art. 113 of the Limitation Act, 1877.

The plaintiff appealed to the High Court on the ground, amongst others, that the suit was not governed by art. 113 but by art. 144 of the Limitation Act, it being one for possession of immoveable property, and that, assuming that the suit was governed by art. 113, limitation should be computed from the High Court's decision of the 7th June, 1880.

Pandits *Ajudhia Nath* and *Nand Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the suit is barred by limitation, and must fail. It has been brought on a contract, which, looking to its terms, is a contingent contract of sale of property—that is, the vendor offers to sell, and the vendee to buy, contingent on the vendor's title being decreed in a suit pending. The decree in the suit then pending having been in favour of the vendor's title, plaintiff seeks in the present suit to have the sale-deed executed and possession given on payment of the balance of the purchase-money. This is essentially a suit for specific performance of the contract, and the limitation applicable is art. 113 of

the Limitation Act. The contention that, so far as the suit is for possession of immoveable property, it should be governed by twelve years' limitation under art. 144 is invalid.

The right to possession springs out of the sale-contract, and the relief by giving possession is comprised in the relief by specific performance of the sale-contract, and cannot be governed in this case by any but art. 113; but assuming the suit might, so far as limitation is concerned, be entertained, still as the right to posses-[233]sion is dependent on the sale contract, if the suit cannot be maintained for specific performance of the contract, it cannot be maintained for possession of the property sold under the contract.

The limitation under art. 113 runs from the date fixed for the performance of the contract, or if no such date is fixed, when the plaintiff has notice that performance is refused.

If the date of the decree of the High Court on which the contract was contingent be taken as the date, the suit is barred; and at any rate it is barred under the last part of the article; for a former suit brought by plaintiff for the same relief he now seeks, shows that at the institution of that suit, more than three years before the present suit was instituted, he had notice that defendants unconditionally refused performance. The appeal is dismissed with costs.

Appeal dismissed.

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6 A. 233=4 A.W.N. (1884) 45=8 Ind. Jur. 529.

CIVIL REVISIONAL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

FARID AHMED AND OTHERS (*Defendants*) v. DULARI BIBI (*Plaintiff*).*
[19th February, 1884.]

Civil Procedure Code, ss. 21, 622—Transfer of suit—High Court's powers of revision.

Held that an order under s. 25 of the Civil Procedure Code transferring a suit in which an appeal would lie from the decree made therein was not subject to revision by the High Court under s. 622.

[**Diss.**, 14 C. 768 (780); **Appr.**, 20 A. 395 (396); **R.**, A.W.N. (1899) 210; 40 B. 86 (89); 76 P.R. 1903=170 P.L.R. 1903; 22 P.L.R. 1900.]

THIS was an application for revision, under s. 622 of the Civil Procedure Code, by the defendants in a suit, of an order of the District Court at Ghazipur, transferring it from the Court of the Additional Subordinate Judge of Ghazipur to its own file, under s. 25 of the Code. The order of transfer was made on the application of the plaintiff, and without notice to the defendants. The grounds on which revision was sought were, that the District Court was not competent to transfer the suit without notice to the defendants to show cause against the transfer, and that it was not competent to transfer it, as the trial of the suit was nearly concluded at the time of the order of transfer.

Mr. *G. T. Spankie* and Mr. *Amir-ud-din*, for the defendants.

[234] The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the plaintiff.

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* Application No. 14 of 1884, under s. 622 of the Civil Procedure Code, for revision of an order of J. W. Power, Esq., District Judge of Ghazipur, dated the 20th December, 1883.

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The preliminary objection was taken on behalf of the plaintiff that the application was not entertainable as the order of transfer might be impugned in appeal from the decree in the suit. S. 591 of the Civil Procedure Code was referred to.

For the defendants it was contended that when the application for the transfer of the suit was preferred to the District Court, a "case" was instituted in that Court in which there was no appeal. The order for transfer was not an order made by the District Court in the course of the suit, as the suit was not pending in that Court, nor was it an order of the nature mentioned in s. 591.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the plaintiff's objection is valid, that this is not an order which we can revise under s. 622 of the Civil Procedure Code, as it is an order made in a suit, and there is an appeal in the case from the final decree. We dismiss the application with costs.

Application dismissed.

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6 A. 234 = 4 A.W.N. (1884) 47 = 8 Ind. Jur. 525.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

MAHABIR PRASAD AND ANOTHER, MINORS, BY THEIR NEXT FRIEND PARBATI (*Plaintiffs*) *v.* BASDEO SINGH (*Defendant*).*
[28th February, 1884.]

Hindu Law—Joint Hindu family—"Ancestral property"—Right of occupancy at fixed rates—Act XII of 1881 (*N.W.P. Rent Act*), *s.* 9—*Liability of son for father's debts—Purchaser at execution sale—Notice.*

A decree was made against a Hindu, governed by the law of the Mitakshara, for money which he had criminally misappropriated. The transferee by sale of the decree brought to sale in execution thereof the judgment-debtor's right of occupancy in certain land as a tenant at fixed rates. The judgment-debtor's two sons brought a suit against the purchaser to recover two-thirds of the holding. *Held* that the right of occupancy at fixed rates in such land was ancestral pro-[235]perty, that is, property in which under Hindu Law the sons took a vested interest by birth.

Held also, that as the decree was not one to satisfy which the family property could be sold, being a mere money-decree against the father personally, and for a debt which it was not the duty of the sons to pay, and as the purchaser was bound to have satisfied himself as to whether the family property was liable to be sold in satisfaction of the decree, the purchaser could not, on the principles laid down in *Girdharee Lall* v. *Kantoo Lall* (1) and *Suraj Bansi Koer* v. *Sheo Persad Singh* (2), be protected as a *bona fide* purchaser for value, without notice that the family property was not liable to be sold in satisfaction of the decree, but must be taken to have had constructive notice of that fact.

[F., 27 M. 71 (75); R., 11 C.L.J. 599 (600) = 14 C.W.N. 659 (661) = 6 Ind. Cas. 258 (259); 6 S.L.R. 150; D., 31 M. 472 (473) = 8 C.L.J. 147 = 3 M.L.T. 394; Cons., 16 Ind. Cas. 410.]

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* Second Appeal No. 976 of 1882, from a decree of D. M. Gardner, Esq., District Judge of Benares, dated the 8th July, 1882, reversing a decree of Munshi Madho Das, Munsif of Benares, dated the 31st March, 1882.

(1) 14 B.L.R. 187. (2) 5 C. 148.

1884 FEB. 28.

APPELLATE CIVIL.

6 A. 234 = 4 A.W.N. (1884) 47 = 8 Ind. Jur. 525.

THIS was a suit in which the plaintiffs claimed a two-thirds share of land held under a right of occupancy at fixed rates of rent. It appeared that one of the defendants in the suit, by name Ranjit Lal, a patwari of a village, and who also acted as a karinda of a zamindar called Syed Muhammad, in his capacity as karinda committed criminal breach of trust in respect of certain moneys belonging to his employer. For this offence he was sentenced to two years' imprisonment. His employer also sued him for the moneys and obtained a decree against him for the same. This decree was transferred to one Ram Sundar, and he, in execution thereof, brought to sale certain land held by Ranjit Lal under a right of occupancy at fixed rates of rent. The holding was purchased by another of the defendants named Basdeo Singh.

This suit was brought on behalf of the two minor sons of Ranjit Lal to recover two-thirds of the holding, on the ground that the debt in satisfaction of which it had been sold was not one for which, under Hindu Law, they were liable.

The decree-holder, his transferee Ram Sundar, the purchaser of the holding Basdeo Singh, and Ranjit Lal, were all made parties to the suit. Ram Sundar and Basdeo Singh defended the suit on the ground that Ranjit Lal had expended the money he had misappropriated for the benefit of his family, and consequently the debt to satisfy which the holding had been sold was one for which the plaintiffs were liable, and they therefore could not recover their shares of the holding. The Court of first instance (Munsif) held that the decree against Ranjit Lal was passed against him in his personal capacity, and not as manager of a joint Hindu family, **[236]** and that consequently the sale in execution thereof could only transfer to the purchaser his personal share in the property amounting to one-third (the other two-thirds having vested in the plaintiffs at their birth), and accordingly gave the plaintiffs a decree. The defendant Basdeo Singh appealed to the District Judge, who reversed the decision of the Munsif, on the ground that the defendant Basdeo Singh had purchased *bona fide*, for valuable consideration, and without notice of the nature of the debt for which the holding had been sold, and therefore the plaintiffs could not recover from him their shares of the holding.

The plaintiffs appealed to the High Court, contending that, having regard to the nature of the debt for which the property had been sold, they were entitled to recover their shares of the property.

Munshi *Hanuman Prasad*, for the appellants.

Pandit *Ajudhia Nath*, for the respondent.

The Court (STUART, C.J. and OLDFIELD, J.) delivered the following judgments :—

JUDGMENTS.

STUART, C.J.—The argument in this appeal was very laboured on both sides, and very unnecessarily so. Numerous references to texts of Hindu Law and to various works on that law were referred to; but the simple questions are—(i) whether a right of tenancy at a fixed rate is property, and as such inheritable, within the meaning of s. 9 of the Rent Act; (ii) whether the share of a son in such property can be sold in execution of a decree of a Civil Court against his father on account of the father's criminal embezzlement; and (iii) whether a purchaser at a sale of such property in execution of a decree against the embezzling

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father may, under the circumstances of the case, be taken to have purchased in good faith without notice, and the sale to him is therefore valid.

I am quite clear that a right of tenancy at a fixed rate, such as we have in this case, is property within the meaning of s. 9 of the Rent Act, and as such inheritable, or, in other words, in its nature ancestral, and I am therefore of opinion that a son can object to the sale of such property unless it can be shown that the sale is for a proper and necessary purpose, and that the father's act of embezzlement was not such a purpose; but thirdly, I am opinion that the purchaser in the present case must be taken to have had [237] at least constructive notice of the objectionable nature of the debt, and that the sale to him was therefore invalid.

Such a view of the case is quite in accordance with the rulings of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (1) and *Muddun Thakoor* v. *Kantoo Lall* (1) and in *Suraj Bansi Koer* v. *Sheo Persad Singh* (2). This to me clearly appears from what has taken place among the parties in the present case. There is, however, a peculiar element in the present case which I have not found in any of the Privy Council Reports, nor have I discovered any similar case in the books. To my mind it is a very serious question whether the criminal element in the conduct of the father by reason of the embezzlement of which he was convicted did not, so far as the plaintiffs' rights were concerned, vitiate the proceedings ending in the sale from the beginning, inasmuch as it was an inherent vice which tainted the sale, and could not be got rid of or be removed by the mere fact of the decree in the Civil Court. And it is further to be considered whether, under such circumstances, *any* notice to the purchaser was necessary. The maxim, *in jure, non remota causa, sed proxima spectatur*, does not, however, apply to any transaction originally founded in fraud, and much less in proved crime, "for the law will look to the corrupt beginning and consider it as one entire act;" and again, on the same page, "neither does the above rule hold in criminal cases, because in them the intention is matter of substance, and, therefore, the first motive, as showing the intention, must be principally regarded" (Broom's *Legal Maxims*, 2nd ed., 1858, p. 170). The principle of the law so stated appears to me to render the question of notice immaterial.

But if the question of notice be material, I think constructive notice must be taken to have been given to the purchaser, and that as a consequence the father, Ranjit Lal, took advantage of his own wrong, and at the same time involved the two parties concerned with him in the execution of the decree and in the sale in a similar disability. The embezzlement, which gave rise to all the litigation in the Criminal and Civil Courts, was committed by the father in 1875, and he was convicted and sentenced to imprisonment for two years. While the father was undergoing this punishment, the party whose money he had embezzled sued him in the Civil Court, [238] the plaint distinctly stating that the claim was for the money embezzled, and the plaintiff obtained a decree. The decree was a mere money-decree against the father personally. The plaintiff appears to have applied for execution of this decree in March, 1877, but to have ultimately sold the decree to Ram Sundar Singh, one of the defendants in the present suit, and who proceeded to execute the decree by sale of the property, *i.e.*, the right of

(1) 14 B.L.R. 187. (2) 5 C. 148.

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tenancy at a fixed rate, and it was sold to Basdeo Singh, defendant-respondent.

The plaintiffs in the present case are the minor sons of Ranjit Lal, the father, and they sue through their mother, Parbati, as their next friend, to have the sale set aside and their share of the property restored to them, on the ground that the debt to satisfy which the property was sold was not binding on them. The first Court gave effect to these views and decreed the claim, but the Judge reversed the decree on speculations and conjectures which I cannot entertain. In second appeal to this Court it is contended that the Judge was wrong, and that it could not be held that the plaintiffs' share of the property in the suit could be sold for a debt incurred by the father's criminal embezzlement. This contention is, in my opinion, well founded, and the present appeal ought to be allowed. With reference to the Privy Council rulings before mentioned, two questions arise: first, what is the legal character and scope of such a decree as these rulings appear to contemplate; and secondly, what amounts to constructive notice in such a case as this. In *Girdharee Lall* v. *Kantoo Lall* (1) decided by the Privy Council in 1874, it was decided by their Lordships that "the purchaser * * * was not bound to go further back than to see that there was a decree against those two gentlemen, that the property *was property liable to satisfy the decree*, if the decree had been given properly against them." Here the decree was a simple money-decree which on the face of it gave no information as to the property which was intended to be sold under it, but if read with the plaint, which it ought to be, it would at once appear what was the nature of the original debt, that that debt was one incurred by their father's criminal embezzlement, and that the property therefore, so far as the plaintiffs' interests were concerned, was not property liable to [239] satisfy the decree, and that the decree had not been given properly against them. This view of the decree is also supported by the judgment in *Suraj Bansi Koer* v. *Sheo Persad Singh* (2) where it is said (p. 173):—"It seems to be clear upon the authorities that if the debt had been a mere bond debt (as in this case) not binding (*i.e.*, not necessarily binding) on the sons by virtue of their liability to pay their father's debts, * * * his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands." Such appeared to be the qualifications and limits under which the law was laid down by the Privy Council. As to the question of notice in such cases, that appears to have been also considered in this case of *Suraj Bansi Koer*, where, although the circumstances showing constructive notice were a little stronger than in the present case, the two cases in this respect are very similar. In *Suraj Bansi Koer* the plaint prayed for the adjudication of their right of the plaintiffs, and the confirmation of their right in the property, and the report states that:—"The claim to this relief was founded on the right which, under the law of the Mitakshara, a son acquires on his birth in ancestral property, and the consequent limitation on the father's power to alienate, incumber, or waste that property." And the Subordinate Judge held that the rights of the purchasers stood on no better grounds than those of the execution creditor, that they were "not innocent purchasers in the proper sense of the term, since notice was given before the sale by the plaintiffs that the family property advertized for sale could not legally be

(1) 14 B.L.R. 187. (2) 5 C. 148.

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sold for the debt of one of the joint members of the family." It does not appear from the report that the notice which was said to have been given was express or constructive notice; it probably was constructive, although either was sufficient, their Lordships in their judgment observing that (p. 173)—"The respondents must be taken to have had notice, actual or constructive, of the plaintiff's objections * * *. It follows as against them * * * the plaintiffs have established that by reason of the nature of the debt neither they nor their interest in joint ancestral estate are liable to satisfy their father's debt." In the present case the facts show reasonable constructive notice. Undoubtedly the original decree-holder could [240] not plead want of notice, for in his own plaint, as I have stated, he distinctly describes his claim to be in consequence of his debtor's embezzlement. It does not appear whether his purchaser, the defendant Basdeo Singh, had in fact similar knowledge of the nature of the debt, but it appears to me to be impossible to believe this, and in any case he cannot be regarded as in a better position as against the plaintiffs' interest in the property, than that of the first decree-holder, and he was bound to see to the nature of the debt, and what the decree was intended to cover.

I may here repeat the views I expressed in *Salig Rai* v. *Rampardip Rai* (1), where I said:—"As I understand the Hindu Law, a *bona fide* purchaser for value from a father is not protected from challenge by a son without reasonable inquiry on the part of the purchaser; that is, such inquiry as may be suggested by the proceedings, otherwise gross and fraudulent invasions of the rights of sons might with case be committed, or, as it might be said, quietly and cunningly arranged for. All that would be necessary in such a case to do would be to put matters before the intending purchaser in such a plausible light as that he would enter into the transaction with perfect honesty and entire good faith, while all the time the rights of the son had been illegally and fraudulently disregarded by the father. Mere good faith, then, on the part of the purchaser is not enough. He is bound, at least within reasonable limits, to see to his title, and whether his vendor has a right to sell, and he is safe to purchase. The *bona fides* in question, therefore, must be reasonable good faith and circumspection, such as every intelligent Hindu would be expected to exercise in the management of his own affairs. As to the expressions 'immoral purpose' and 'pious duty,' they perhaps require a little definition. If the purpose for which a father raises money on the security of his ancestral property is distinctly immoral, there cannot be any doubt that the transaction cannot prejudice or in any way injuriously affect the son or sons of the family. But then the burden of proof is on the objector, and the son or any one in his right must show the immorality of the father's purpose by the character of the debt. The expression 'pious duty' in a system of law is peculiar. It is difficult to put it on a separate and distinct footing of its own, either in con-[241]nection with legal liability on the one hand or legal immunity on the other. It is the pious, or, as it might otherwise be said, the filial and religious duty of a Hindu son to pay his father's debts, but the pious or religious character of the obligation depends entirely on the nature of the debt. If the debt was incurred by the father clearly for an immoral purpose, there can, of course, be no pious duty on the part of the son to discharge it; that is, no pious duty legally recognizable, although, of course,

(1) Weekly Notes (1883), 108.

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the expression, in a loose and general sense, might be understood and acted upon by a son from a family feeling and from a desire to protect the memory of his father, and the son under such circumstances could no doubt, so far at least as his own estate was concerned, and from filial feeling, meet his father's obligations. But in law there is, I apprehend, no pious duty on the part of a son where it appears that a father's purpose in raising money on the family property was plainly immoral, and it may be in reckless disregard of his sons, ignorant—and if minors, necessarily ignorant—of their rights." These views are, I trust, quite consistent with the rulings of the Privy Council, if indeed they do not fairly carry out the principle on which such rulings are based. To go upon nothing but good faith on the part of a purchaser of immoveable property and the mere existence of a money-decree against the father, would in many, if not most, cases of the same kind lead to gross injustice to the other members of a Hindu family, especially to those who are minors, equally entitled with him.

I would reverse the order of the lower appellate Court, and, restoring that of the Munsif, I would allow the present appeal with costs in all the Courts.

OLDFIELD, J.—In execution of a decree held by one Ram Sundar against Ranjit Lal, a tenant at fixed rates, the tenancy-right in certain land was put up to sale and purchased by the respondent Basdeo Singh.

The plaintiffs are the minor sons of Ranjit Lal, and bring this suit, represented by their mother, described as guardian or next friend, to recover their shares in the property sold on the ground that the debt was contracted for immoral purposes and the property is joint ancestral property in which they have an interest by birth. [242] The Munsif decreed the claim, but the lower appellate Court has dismissed the suit, and the plaintiffs have appealed.

It has been contended by the respondent that the tenant-right in dispute is not property in which sons can by birth take a vested interest under Hindu Law. I understand the contention to be that this right is a creation of the Rent Act and not a right of full and complete ownership in land in respect of which alone such vested interests can arise.

I cannot allow the contention. The property in which a son takes an interest by birth is described in Mitakshara, ch. I, s. v, vv. 3, 4 in the text:—" The ownership of father and son is the same in land which was acquired by the grandfather, or in a corrody, or in chattels which belonged to him; 'land,' a rice-field or other ground; a 'corrody,' so many leaves receivable from a plantation of betel pepper, or so many nuts from an orchard of areca; 'chattels,' gold, silver or other moveables" (Stoke's Hindu Law Books, pp. 391-392).

This passage, which occurs also in Viramitrodaya, is thus given in Gopal Chandra Sarkar's translation of that book, ch. ii, pt. i, s. 13 :—"The meaning of this text is this :—'land' signifies rice-field and the like; 'any settled income' is what is given by reason of written grants by kings to the following effect:—'To such and such a person, so many betel-leaves or the like shall be given from such and such a plantation of betel-leaves or orchard of betel-nuts; 'moveables' are gold, &c.;" and the text of Vrihaspati is cited:—"In the property acquired by the grandfather, whether immoveable or moveable, the parcenership of both father and son is ordained to be co-equal indeed" (p. 66).

From these texts it is clear that a son obtains by birth a right in every kind of ancestral property—that is, in whatever a man has,

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independent of another's permission; and immoveable property will include any interest in land which is owned by the ancestor.

It is immaterial whether this particular form of tenancy at fixed rates was or was not recognized in Hindu Law, though we may say that there is abundant proof that that law recognizes cultivatory rights, for it is a right to hold land at fixed rates of rent which may devolve by succession or be transferred, and is in every sense [243] of the word property, and in consequence a son obtains in it vested rights by birth.

With regard to the pleas in appeal, there is no doubt that the debt for which the decree was obtained was one not binding on the sons, the decree being obtained for money which Laljit had embezzled; and I concur with the Chief Justice in holding that the respondent is not entitled to be protected as a purchaser at an execution-sale without notice, on the principle laid down by the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (1) and *Suraj Bansi Koer* v. *Sheo Persad Singh* (2). The decree was a mere money-decree against the father of plaintiffs personally, and the family property was not properly liable to be taken in execution of the decree, and the respondent could and should have satisfied himself on these points by examining the decree.

The appeal should therefore be allowed, and the decree of the lower appellate Court be reversed, and that of the first Court restored with all costs.

Appeal allowed.

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6 A. 243 (F.B.) = 4 A.W.N. (1884) 69.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

PARBATI CHARAN (*Decree-holder*) *v.* PANCHANAND (*Judgment-debtor*).*
[29th February, 1884.]

Execution of decree—Power of Court to attach salary—Small Cause Court—Civil Procedure Code, ss. 223, 268.

A mufassal Court of Small Causes must adopt the machinery of s. 223 of the Civil Procedure Code in all cases where execution is sought against persons or property outside its local jurisdiction.

Such a Court, therefore, cannot attach the salary of a public officer where the same is disbursed outside its local jurisdiction.

Husain Ali v. *Ashotosh Gangully* (3), followed.

[F., 30 C. 713 (716); R., 28 B. 198 (200); 11 C.P.L.R. 148 (149).]

THIS was a reference under s. 617 of the Civil Procedure Code by Mr. R. D. Alexander, Judge of the Court of Small Causes at [244] Allahabad. The Divisional Bench (STUART, C.J. and OLDFIELD, J.), before which the reference was laid, referred the principal question raised therein, *viz.*, as to "the competency of a Civil Court to execute a decree passed by it against moveable property situated out of its jurisdiction, by issuing an attachment order against salary, under s. 268 of the Civil Procedure Code, 1882," to the Full Bench. The facts, as stated by the

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* Reference No. 25 of 1883, under s. 617 of the Code of Civil Procedure, by R. D. Alexander, Esq., Judge of the Court of Small Causes at Allahabad.

(1) 14 B.L.R. 187. (2) 5 C. 148. (3) 3 C.L.R. 30.

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Small Cause Court Judge, the points on which doubt was entertained by him, and his opinion on the point which was referred to the Full Bench, are stated in the decision of the Full Bench.

Mr. *T. Conlan*, for the decree-holder.

Munshi *Ram Prasad*, for the judgment-debtor.

The following judgments were delivered by the Full Bench :—

JUDGMENTS.

STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ.—The following case was referred to this Court by the Judge of the Allahabad Small Cause Court under s. 617 of Act XIV of 1882 in Parbati Charan Chatterji, decree-holder, *versus* Panchanand Chatterji, judgment-debtor :—

Statement of case.—On the 5th October, 1882, the decree-holder applied for execution of his decree, dated 3rd July, 1882, by attachment of the judgment-debtor's pay, the said judgment-debtor being a public officer and employed in the office of the Examiner of Accounts, Rajputana State Railway, at Ajmere. A notice was issued to the judgment-debtor, under the provisions of s. 248, Act XIV of 1882, and received by him on the 10th October, and on the 4th December a written order of attachment of the judgment-debtor's salary, as required by s. 268, Act XIV of 1882, was sent to the Examiner of Accounts. That officer, by his letter No. X. 45-III, dated 12th December, 1882, returned the order of the Court, stating that, under the circumstances, he was unable to attach the pay of a man living outside this Court's jurisdiction that is to say, he disputed the Court's jurisdiction to make the order. It appears to me that two questions arise here which have not yet been settled by any authority in the shape of a ruling of a High Court, and that, therefore, it is most desirable that there should be authority [245] on the matter ; I therefore refer the following questions to the Hon'ble High Court for their decision :—

Questions.

(i) Is an officer whose duty it is to disburse the salary of a public officer, which has been attached by the written order of a Court, directed to him, the disbursing officer, competent to take exception to the jurisdiction of the Court making the order ?

(ii) Is a Court of Small Causes competent to execute a decree passed by it against moveable property situated out of its jurisdiction—*e.g.*, by issuing an attachment order against salary under s. 268, Act XIV of 1882 ?

The referring Judge's opinion was that a Small Cause Court is competent to execute its decrees against moveable property situated out of its local jurisdiction in the same way as against similar property within its local jurisdiction. The Division Bench, before which this reference came, referred to the Full Bench the question of the "competency of a Civil Court to execute a decree passed by it against moveable property situated out of its jurisdiction by issuing an attachment order against salary under s. 268, Act XIV of 1882."

There is only one mode known to the law whereby a Civil Court of the class contemplated by Chap. XIX of the Civil Procedure Code may execute its decree, and that mode is prescribed in s. 223 of that Chapter. The Court may execute its own decree within its local jurisdiction, or it may "send the decree for execution under the provisions hereafter contained"—*i.e.*, contained further on in the said section. The second

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paragraph of this section with its four sub-divisions declares the conditions under which alone the Court which passed a decree may delegate its execution to another Court. They are :—

(i) Application made by the decree-holder ;

(ii) the circumstance that the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court ; or

(iii) that such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient [246] to satisfy such decree, and has property *within the local limits of the jurisdiction of such other Court* ; or

(iv) if the decree directs the sale of immoveable property situate *outside the local limits of the jurisdiction of the Court which passed it* ; or

(v) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by *such other Court*.

These are the only conditions under which a Court which passed a decree can send its decree for execution to another Court ; and, with one exception, such other Court must necessarily be a Court outside the local jurisdiction of the Court which passed the decree. That single exception is found in the provision (paragraph 3 of s. 223) that "the Court which passed a decree may of its own motion send it for execution to any Court subordinate thereto"—that is to say, the District Judge may delegate execution of his own decree to a Court subordinate to him within his district. But it is obvious that this provision has no reference to Small Cause Courts, which have no Courts subordinate to them. We note here that sch. ii, attached to Act XIV of 1882, read with s. 5 of that Act, confers on mufassal Small Cause Courts powers under s. 223 *id.* It follows, then, that a Small Cause Court can execute its own decrees in two ways only : it must itself execute its decrees against all such persons and property as are within its local jurisdiction ; and it may execute against persons and property outside its jurisdiction as provided by s. 223, and in no other way. The referring Judge was wrong in thinking that "in all cases the Court is competent to execute its own decree." The law of procedure governing the question as to "*the Court by which decrees may be executed*" (Chap. XIX, Civil Procedure Code) is exhausted in Division A of that Chapter. This question being settled, the Act proceeds to provide for the subsidiary points as to (B) "*Application for execution,*" (C) "*Staying execution,*" (D) "*Questions in execution,*" (E) "*Mode of executing*" and (F) "*Of attachment of property.*" This Division (F), comprising ss. 266 to 285 inclusive, contains the s. 268 on which the Judge of the Allahabad Small Cause Court bases his right to execute his decrees outside his local [247] jurisdiction. But this section pre-supposes jurisdiction in the executing Court as prescribed in Division A. "The Court" and the "court-house" of s. 268 connote the Court which passed the decree if the property is within its jurisdiction, or the Court to which the decree has been referred if the property is not within the said jurisdiction. Given the competence of the Court, s. 268 instructs it as to the mode in which the judgment-debtor, being "a public officer or the servant of a Railway Company," the "attachment of his salary" may be made. This section gives no authority to the original Court to exercise jurisdiction in execution outside its own local limits otherwise than by delegation as provided in Division A, *supra*. In the case referred to, the Allahabad

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Court should have declined execution unless it was moved by the decree-holder to send the decree for execution to the proper Court at Ajmere, and the proceedings under s. 268 would have been taken by that Court. It is needless to dwell on the inconvenience or hardship that might be caused to debtors residing far from the local jurisdiction of the original Court by the procedure adopted by the referring Court. It is conceivable that such persons might have valid objections to make to the execution of the decree or to the attachment of their salary: but their remedy under this procedure would be, not before the local and easily accessible Court, but in the remote Court at Allahabad. It was contended before us that to make execution by transfer compulsory in all cases outside the jurisdiction of the Small Cause Court which passed the decree would entail heavy expense on decree-holders. It is sufficient to say that even if this were a consideration which might be imported into the determination of a question respecting the law of procedure, it is without force, for the charges of obtaining the transfer of a decree of a Small Cause Court exercising jurisdiction within Rs. 500 could not exceed Rs. 2-1-0, and would ordinarily be Re. 1-9-0, or thereabouts. The question has perhaps been treated at length out of proportion with its intrinsic difficulty, but it is one of general importance; and the law in the matter has been laid down to the contrary effect by a Bench of the Calcutta High Court (PEACOCK, C.J., and MITTER, J.). *In the matter of J. Hollick* (1). The correct view of the law has, however, been taken in a recent ruling of the [248] same Court—*Hossein Ally* v. *Ashotosh Gangoolly* (2)—where it was ruled by MARKBY and PRINSEP, JJ., that a Judge of a Small Cause Court cannot issue an order under s. 268, Act X of 1877, out of his own jurisdiction. The answer in Full Bench would therefore be, that the Small Cause Court must adopt the machinery of s. 223 in all cases where execution is sought against persons or property outside its local jurisdiction.

STUART, C.J.—I am quite clear that the opinion suggested by the Judge of the Small Cause Court in this case is wrong, and that he had no power to execute a decree passed by his Court against moveable property situated out of his jurisdiction, by issuing an attachment order under s. 268, Act XIV of 1882. S. 223 read with s. 268 of the Code leaves no doubt whatever on the subject; s. 223 prescribing the mode of procedure for the Courts passing and executing the decree, and s. 268 providing for the manner and method of the attachment, which in this case was clearly the officer at Ajmere acting under the orders of the proper Court there. I hold this opinion so clearly that it is unnecessary to give authorities. The ruling of the Bombay Court cited by the counsel for the decree-holder in *Munsuk Mosundas* v. *Shivaram Devising* (3) was made with reference to the first edition of of the second schedule to the Code, and assuredly would not be repeated under the same schedule as it now stands.

(1) 2 B.L.R. A.C.J. 108. (2) 3 C.L.R. 30. (3) 2 B. 532.

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CRIMINAL REVISIONAL.

6 A. 248 = 4 A.W.N. (1884) 71.

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CRIMINAL REVISIONAL.

Before Mr. Justice Oldfield.

QUEEN-EMPRESS *v.* NAND KISHORE. [8th March, 1884.]

Act XLV of 1860 (*Penal Code*), *s.* 304-*A—Causing death by a rash or negligent act.*

N, a servant of a railway company, charged with moving some trucks by coolies on an incline, discharged this duty negligently, and in consequence lost control of the trucks. Under his orders one of the coolies attempted to stop the trucks and was killed in such attempt. *Held* that *A* had caused the coolie's death by his negligence, within the meaning of s. 304-A of the Penal Code.

Reg. v. *Longbottom* (1); *Reg.* v. *Swindall* (2); and *Reg.* v. *Williamson* (3), referred to.

[R., 32 A. 73 (76); 2 Cr. L.J. 207 = 22 P.R. 1905 = 23 P.L.R. 1905.]

[249] THIS was an application for revision, under s. 439 of the Criminal Procedure Code, of the order of Mr. W. R. Burkitt, Magistrate of the Muttra District, dated the 23rd October, 1883, convicting the applicant under s. 304-A of the Indian Penal Code, and of the appellate order of Mr. J. C. Leupolt, Sessions Judge of Agra, affirming that order.

The facts of this case are set out in the judgment of the Court.

Mr. *H. Niblett*, for the petitioner.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

The Court delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—The facts proved are that the petitioner, who was a sub-storekeeper at the Muttra station on the Muttra and Hathras Railway, was in charge of six trucks to convey by coolies across the river. On the line leading to the bridge there is a steep incline, and in disregard of the explicit instructions given him he carried out the duty with negligence, in that he did not uncouple the trucks so as to convey them singly, but allowed them to be sent down the incline coupled together, and with an insufficient number of coolies in charge of them, and without ropes necessary to hold them back in going down the incline. In consequence they got out of control, and in their course one of the coolies, who, under orders of the petitioner, was endeavouring to stop them, slipped under the wheels, and was run our and killed.

The petitioner was convicted under s. 304-A of the Indian Penal Code.

There is no doubt that he has committed a rash and negligent act in the conveyance of the trucks, and the only question which can arise is whether, in the terms of the section, he can be said to have caused the coolie's death by his negligent act.

It was contended that the man's death was rather caused by his own act in attempting to stop the trucks, and by the accident in slipping in the attempt, than by the negligence of the petitioner in sending the trucks along the line without sufficient precaution being taken. But the contention has no force. Had the deceased in part contributed to his own death by his negligence, that **[250]** circumstance would not exonerate the petitioner from the consequences of his negligent act,—see Russell on

(1) 3 Cox. C. C. 439. (2) 2 C. & K. 230. (3) 1 Cox. C. C. 97.

Crimes, 4th ed., vol. 1, pp. 870 and 871—*Reg.* v. *Longbottom* and *Reg.* v. *Swindall*—also *Reg.* v. *Williamson*, p. 879—where a boat overloaded with passengers had upset; if the passengers had remained seated the accident would not have happened: WILLIAMS, J., held that "if the circumstance of the passengers jumping up really caused the accident, the overloading of the boat was immediately productive of such a result, and thus the prisoner is answerable, for he should have contemplated the danger of such a thing happening."

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The case here against the petitioner is stronger, for the deceased met his death in the discharge of his duty, and in obedience to the order of the petitioner in an endeavour to stop the trucks and prevent the consequences resulting from the petitioner's negligence. Under the circumstances the petitioner must be held to have caused the death of the deceased by his negligent act in allowing the trucks to go down the line without proper precaution. The petition is dismissed.

Application refused.

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6 A. 250 (F.B.) = 4 A.W.N. (1884) 71.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

FAZUL-UN-NISSA BEGAM (*Appellant*) *v.* MULO AND ANOTHER (*Respondents*).* [17th March, 1884.]

Appeal to Her Majesty in Council—Extension of time for giving security—Civil Procedure Code, s. 602.

The time allowed by s. 602 of the Civil Procedure Code for giving the security and making the deposit required by that section may be extended.

[R., 15 A. 14 (16); D., 7 A. 79 (93) (F.B.).]

THIS was an application for leave to appeal to Her Majesty in Council from an appellate decree of the High Court, in which the question was raised whether the High Court has a discretion to extend the term of six months allowed by s. 602 of the Civil Procedure Code for giving security for costs of the respondent, and depositing the amount required to defray the expense of translating, indexing, and transmitting to Her Majesty in Council [251] a correct copy of the whole record, and depositing the amount required to defray the expense of printing such copy.

This question was referred by the Divisional Bench (OLDFIELD and BRODHURST, JJ.) to which the application was preferred to the Full Bench.

Mr. *G. T. Spankie*, Babu *Jogindro Nath Chaudhri*, and Babu *Ratan Chand*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

The following judgments were delivered by the Full Bench:—

JUDGMENTS.

STUART, C.J.—In an application for leave to appeal to the Privy Council from a decree of this Court in the case of *Jawahir Lal* v. *Narain Das* (1), and which application came on for disposal before SPANKIE, J.,

* Application for leave to appeal to Her Majesty in Council, No. 14 of 1882.

(1) 1 A. 644.

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and myself, I was of opinion—and my judgment was acquiesced in—that the limitation period of six months could not be extended beyond that period. The limitation for such an application had been that provided by s. 599 of the Procedure Code, but that section was repealed by the present Limitation Act XV of 1877, the limitation period, however, remaining the same. But strange to say s. 599 has been restored to its former place by the present Procedure Code, Act XIV of 1882, and No. 177 of sch. ii of the Limitation Act XV of 1877 must, therefore, be taken to be repealed, although perhaps that was not the intention of the framers of the present Procedure Code.

This reference, however, raises a different question, *viz.*, whether the Court has a discretion to extend the term of six months allowed by s. 602 of the Civil Procedure Code for giving security for the costs of the respondent, and for depositing the amount required to defray the expense of translating, transcribing, indexing, and transmitting to Her Majesty in Council a correct copy of the whole record, and depositing the amount required to defray the expense of printing such copy.

My attention has been directed to a judgment of the Privy Council delivered on the 23rd November, 1883, in an appeal from Oudh, in which it would appear the Judicial Commissioner of that Province had assumed and exercised a discretion by allowing an extension of the time for giving security.

[252] The words of the judgment on this subject are as follows:— "It only remains to state that a preliminary point was raised as to whether the Judicial Commissioner had a right to extend the time for giving security in this appeal. Their Lordships upon that point have to say that they concur in the view which was taken by the Full Bench of the Court in Calcutta, that the words in the Act which have been quoted relating to the giving of security are directory only, and although not to be departed from without cogent reason, in this particular case it seems to them that the Commissioner has exercised a right discretion." The name of the Calcutta case here mentioned is not given, nor is there any reference to any report of it, and I have not succeeded in finding it. In my opinion the language of s. 602, if taken by itself, is mandatory, and not directory or discretionary. That section provides that:—"If the certificate be granted, the applicant *shall within six months from the date of the decree complained of*, or within six months from the grant of the certificate, *whichever is the later date*, give security * * and deposit, &c.;" and then it is provided in the last part of this same section that:—" When the applicant prefers to print in India the copy of the record, except as aforesaid, he *shall* also *within the time mentioned in the first clause of this section*, deposit, &c." Now this is not discretionary language, but the precise peremptory terms of a mandatory law. But the meaning of this section is considerably modified if we read it, as I think we may, with ss. 603, 604 and 605. S. 603 provides that:— " When such security has been completed and deposit made," not *as before provided*, but "to the satisfaction of the Court, the Court may declare the appeal admitted, &c., &c." Then by s. 604 it is provided that "at any time before the admission of the appeal, the Court *may, upon cause shown, revoke the acceptance of any such security* and make *further directions* thereon." Then s. 605 is still more significant, providing, as it does, that:—" If *at any time after the admission of the appeal*, but *before the transmission of the copy of the record*, except as aforesaid, to Her Majesty in Council, such security appears inadequate, or further payment

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is required for the purpose of translating, transcribing, printing, indexing, or transmitting the copy of the record, except as aforesaid, *the Court may order the appellant to furnish*," not within six months or six weeks, but "*within a time to be fixed by the Court*, other and [253] sufficient security, or to make *within like time* the required payment."

Now these provisions appear to me to reflect a meaning on s. 602, which can be best given effect to by holding that the term of six months is not intended in any rigorous or exact sense, but may be extended in the events contemplated by the other sections I have referred to, although this must be within limits and for "cogent reason" as the Privy Council judgment advises, which are considerations of course within the responsible discretion of the Court making the order under this chapter of the Code of Procedure.

STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ.—The question referred is concluded by the Privy Council ruling, and we concur in the answer proposed by the learned Chief Justice.

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6 A. 253=4 A.W.N. (1884) 72.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

DEBI PRASAD (*Plaintiff*) *v.* RUPU (*Defendant*).* [18th March, 1884.]

Act I of 1879 (*Stamp Act*), *s.* 3 (17), *sch. i, No.* 52—"*Sarkhat*"—*Receipt.*

The defendant in a suit on a bond set up as a defence that the bond had been paid in part in sugar-cane juice, and as evidence of this fact produced a document called a "*sarkhat*," alleged to be signed by the plaintiff, acknowledging the receipt of sugar-cane juice, the price of which exceeded Rs. 20. There was nothing in this document which showed that the sugar-cane juice had been received in part satisfaction of the bond.

Held that the document was not a "receipt" within the meaning of the Stamp Act, 1879, but a memorandum of sugar-cane juice supplied, and required no stamp.

THIS was a reference under s. 617 of the Civil Procedure Code by Babu Nilmadub Banarji, Munsif, Haveli, Bareilly, invested with the powers of a Judge of a Small Cause Court. The facts of the case, the point on which doubt was entertained, and the opinion of the Munsif on that point, were stated by him as follows:—

"The plaintiff sued to recover from the defendant Rs. 11-12-0, balance of principal and interest, due on a bond for Rs. 31. The defendant pleaded, *inter alia*, that he had paid off Rs. 30-12-6 in [254] sugar-cane juice supplied to the plaintiff from time to time, and with a view to support his allegation, produced a paper, alleged to have been given him by the plaintiff, containing entries of the quantities of sugar-cane juice, and showing the dates on which they were supplied, each entry being made on the date of each supply. The aggregate price of the said quantities exceeds Rs. 20. This paper is alleged to bear the plaintiff's signature; it is not stamped. It purports to acknowledge receipts of goods of the value of more than Rs. 20. The defendant relies upon this paper as representing and evidencing the plaintiff's acknowledgment of

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* Reference No. 43 of 1884, under s. 617 of the Code of Civil Procedure, by Babu Nilmadub Banarji, Munsif, Haveli, Bareilly, invested with the powers of a Judge of a Small Cause Court.

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the payments made by him, and upon the strength of this acknowledgment claims a credit for Rs. 30-12-6. This paper, which is called a "*sarkhat*" by the parties to this suit, does not show any mutual accounts and has no two sides to it, the one headed "amount advanced" and the other headed "amount received." It is clear to my mind that this paper is not such a document as is contemplated by No. 1, sch. i of Act I of 1879. I am inclined to hold that this paper is a "receipt" for all intents and purposes as defined in the Act. It purports to be a note or memorandum "whereby any other moveable property is acknowledged to have been received in satisfaction of a debt or demand or any part of a debt or demand is acknowledged to have been satisfied or discharged, or which signifies or imports any such acknowledgment." True no mention is made in the paper of any debt or satisfaction of any debt, but it is said to be signed by the plaintiff-creditor, and certified by him in these words "*sarkhat sahi hai*" (the *sarkhat* is true or correct). This note or memorandum does, I humbly think, amply signify and import an acknowledgment of a debt within the meaning of the said definition.

"As a receipt the paper ought to have been stamped with an adhesive stamp of one anna; and not being thus stamped, it is not admissible in evidence even upon payment of a penalty—*vide* s. 34 of the Act. I have carefully perused and scrutinized the Act, and I could not find for such a document as the one under our consideration a place in schedule ii of the Act. As I entertain a doubt as to the admissibility of such an unstamped paper in evidence, and as such papers have been filed in numerous cases now pending in this Court, I crave leave to refer the said point of law **[255]** raised in this case to the Hon'ble the High Court for an expression of their Lordships' opinion on it for the guidance of this Court now and hereafter."

The parties to the suit did not appear.

The decision of the Court (OLDFIELD and TYRRELL, JJ.) was as follows:—

JUDGMENT.

OLDFIELD, J.—The writing in question is nothing more than a memorandum of sugar-cane juice supplied, and requires no stamp.

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6 A. 255=4 A.W.N. (1884) 67.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Oldfield.

C. W. STOWELL, MANAGER OF THE UNCOVENANTED SERVICE BANK, LIMITED (*Plaintiff*) v. AJUDHIA NATH AND OTHERS (*Defendants*).*
[17th March, 1884.]

Mortgage—First and second mortgagees—Civil Procedure Code, ss. 234, 285, 295, 368—Execution of decree—Death of judgment-debtor prior to sale.

The first mortgagee of certain immoveable property obtained a decree for the sale of the property, caused the property to be attached, and then ceased to prosecute the execution-proceedings. The second mortgagee then obtained a

* Second Appeal No. 1080 of 1883, from a decree of Babu Promoda Charan Banarji, Subordinate Judge of Agra, dated the 2nd June, 1883, affirming a decree of Maulvi Fida Husain, Munsif of Agra, dated the 27th September, 1883.

decree for the sale of the property, caused it to be attached and put up for sale, and purchased it himself. The first mortgagee then applied for the sale of the property, and the property was put up for sale and was purchased by him. After the order for this sale was made, and before it took place, the judgment-debtor died, and the sale took place without his legal representatives being made parties to the execution-proceedings. The Courts which executed these decrees were of two different grades, the Court which executed the first mortgagee's decree being of the lower grade.

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APPELLATE CIVIL.

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In a suit by the first mortgagee against the second mortgagee for possession of the property, *held* that the sale to the first mortgagee was not invalid, with reference to the provisions of s. 285 of the Civil Procedure Code, because it had not been ordered and held by the Court of the higher grade, inasmuch as when such sale was ordered by the Court of the lower grade, the property was not under attachment in execution of the decree of the Court of the higher grade, that decree having been executed by the sale of the property, and therefore the provisions of that section were not applicable. *Badri Prasad* v. *Saran Lal* (1), distinguished.

Per OLDFIELD, J., that there was nothing in the provisions of s. 285 or s. 295 of the Civil Procedure Code to support the contention that the first mortgagee, after [256] allowing the property to be sold, was debarred from enforcing execution of his decree against it, and was only entitled to look to the assets realized at the sale for the satisfaction of his decree.

Per OLDFIELD, J., that the sale to the first mortgagee was not void because the judgment-debtor had died before it took place, and it took place without his legal representatives being made parties to the execution-proceedings, inasmuch as the provisions of s. 368 of the Civil Procedure Code were not applicable to the case of the death of a judgment-debtor, and there was nothing in s. 234, even if that section is applicable to a case where the judgment-debtor dies while execution is proceeding and after sale of his property has been ordered, to imply that the sale is absolutely void, if no legal representative has been brought on the record. *Dulari* v. *Mohan Singh* (2) and *Gulabdas* v. *Lakshman Narhar* (3), referred to.

Per STRAIGHT, J., that there was no legal obligation on the first mortgagee to resort to the procedure of s. 234 of the Civil Procedure Code, since the sale to the second mortgagee had passed to him the rights and interests of the judgment-debtor, and the legal representatives of the judgment-debtor had none of his property in their hands, and there is no provision in the Code of Civil Procedure which required the first mortgagee to make the second mortgagee a party to the proceedings in execution of the former's decree, and the latter could not have successfully objected to the sale in execution of that decree, and therefore that sale was not voided by the death of the judgment-debtor antecedent to its taking place.

[**N. F.**, 27 Ind. Cas. 294 (296) = 20 C.L.J. 341 = 18 C.W.N. 1266; **Appr.**, 12 A. 440 (443, 447) (F.B.); **R.**, 19 B. 276 (282); 14 C.W.N. 752 (754) = 8 Ind. Cas. 324 = 10 C.L.J. 396; **D.**, 15 M. 399 (400); 18 C.W.N. 1266 = 20 C.L.J. 341.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of OLDFIELD, J.

Mr. *T. Conlan* and Mr. *G. E. A. Ross*, for the appellant.

Mr. *C. H. Hill*, the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Lala *Harkishen Das*, for the respondent.

The Court (STRAIGHT and OLDFIELD, JJ.) delivered the following judgments :—

JUDGMENTS.

OLDFIELD, J.—The plaintiff obtained a decree in the Court of the Munsif of Agra, dated 18th December, 1877, on a bond, dated 22nd July, 1873, executed by one Gopal Kishore, enforcing a mortgage of two houses belonging to his judgment-debtors. He took out execution on the 11th February, 1878, and caused the houses to be attached on the 13th

(1) 4 A. 359. (2) 3 A. 759. (3) 3 B. 221.

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February, 1878. The case was struck off in September, 1879, before sale, the attachment not having been removed.

The defendant, Pandit Ajudhia Nath, obtained a decree in the Court of the Subordinate Judge of Agra, on the 5th December, 1879, on a bond mortgaging the same houses, dated 3rd October, [257] 1877, and took out execution in the Subordinate Judge's Court, on 2nd February, 1880, had the houses attached on 16th February, 1880, and they were sold on 29th March, 1880, and bought by the defendant. After the sale and purchase by defendant the plaintiff again applied to execute his decree on 5th August, 1880, in the Munsif's Court, by sale of the houses; the sale was ordered on the 7th August, and took place on the 18th September, 1880, and the plaintiff bought the property, and the sale was confirmed on the 19th November, 1880. Prior to the last sale, but after the Court had ordered the sale, the judgment-debtor died, and the sale took place without his legal representatives being made parties to the execution proceedings.

The plaintiff having been obstructed in obtaining possession of the property by the defendants has brought this suit to obtain possession.

The Courts below have dismissed the suit, and the plaintiff has appealed, and defendant has filed objections to some of the findings of the Courts below. In my opinion the plaintiff, as a purchaser of the property in execution of a decree enforcing a prior mortgage of the property, has *prima facie* a title to the property preferable to the defendants, whose purchase was subject to the plaintiff's prior incumbrance, and on this point I concur with the lower appellate Court on the finding on the 2nd issue fixed by it. But there are two main contentions on the part of the defendant which, in my opinion, have no force. In the first place it is contended that the sale in execution of plaintiff's decree should have been ordered and held by the Subordinate Judge of Agra, with reference to s. 285, Civil Procedure Code, and not having been so held, it is invalid.

It is urged that the property had been attached in execution of the decree of the Munsif of Agra, held by the plaintiff, on 13th February, 1878, and also in execution of the decree of the Subordinate Judge of Agra, held by the defendant, on the 16th February, 1880, and consequently the Court to order and hold the sale which subsequently took place on plaintiff's application, was the Court of the Subordinate Judge as the Court of highest grade. But I quite concur with the Subordinate Judge that s. 285 has no application to the sale held in execution of plaintiff's decree. When [258] the plaintiff applied for execution on the 5th August, 1880, and the sale was ordered by the Munsif, there was no attachment of the property subsisting under the decree of the Subordinate Judge, as that decree had been executed by the sale of the property; and there was no execution of the decree of the Subordinate Judge's proceeding. It was not a case where there are subsisting attachments of property in execution of decrees of more Courts than one at the same time under execution, so as to make s. 285 applicable and to make the Court of higher grade the proper Court to receive and realize the property; and this case is therefore clearly distinguishable from *Badri Prasad* v. *Saran Lal* (1) as pointed out by the Subordinate Judge. Had plaintiff on his first application for execution, dated 11th February, 1878, proceeded with the execution by bringing the property to sale, it may be that the proper Court to have

(1) 4 A. 359.

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ordered that sale and to have realized the property would have been the Court of the Subordinate Judge; but not so, in regard to the sale we are concerned with, and which has taken place in the course of fresh proceedings in execution, after the execution-proceedings in the Subordinate Judge's Court under the defendant's decree had come to an end and the property had been sold.

There was nothing also, as the Subordinate Judge points out, to prevent the plaintiff, as holder of the decree of the Munsif, which enforced a prior incumbrance, from not proceeding with his application for sale, and allowing the property to be sold in execution of defendant's decree, subject to his prior incumbrance, and then enforcing execution against it, and it is not the case that he was only entitled to look to the assets realized at the prior sale for satisfaction of his decree. There is nothing in s. 285 or s. 295, Civil Procedure Code, to support such a view.

It is further contended that the execution sale on which plaintiff relies is absolutely void on the ground that the judgment-debtor had died before the sale took place, and no person was brought on the record as his legal representative, and that the execution-proceedings abated in consequence, and this objection has been held by the Subordinate Judge to be fatal to the claim. I am, however, unable to concur in this view.

[259] The sale was made on the authority of the order of the Court which had jurisdiction to make it, and is unaffected by the death of the judgment-debtor.

It has been held by this Court in *Dulari* v. *Mohan Singh* (1) that the death of the decree-holder prior to sale does not render it void, and the same rule appears to me applicable to the case before us. It was also held in that case, concurring with the view taken by the Bombay High Court in *Gulabdas* v. *Lakshman Narhar* (2), by STRAIGHT, J., and myself, that the provisions of ss. 365 and 366, Civil Procedure Code, for the abatement of a suit, where no application has been made by a representative of a deceased plaintiff within the time limited by law, would not apply to proceedings in execution of a decree where a sole judgment-creditor dies; and in the same way I am of opinion that the provisions of s. 368 are inapplicable to the case of the death of a judgment-debtor. S. 234, Civil Procedure Code, enables the holder of a decree, if a judgment-debtor dies before the decree has been fully executed, to apply to the Court which passed it to execute the same against the legal representative of the deceased; but if the section is applicable to a case where the judgment-debtor dies while execution is proceeding, and after sale of his property has been ordered, there is nothing in it to imply that the sale is absolutely void, if no legal representative has been brought on the record, when it has been made on the authority of a Court having jurisdiction.

We are not concerned with the question whether or not the sale might be voidable at the instance of the legal representative or person whose immoveable property has been sold, if they could show valid objections, under s. 311, which they had no opportunity of preferring at the time of sale, or on other equitable grounds; no such grounds are set up, for all that is contended is that the sale is absolutely void by reason of the death of the judgment-debtor without bringing the legal representative on the record.

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(1) 3 A. 759. (2) 3 B. 221.

1884 MAR. 17. — APPELLATE CIVIL. — 6 A. 255 = 4 A.W N. (1884) 67.

I would allow the appeal and disallow the objections taken by respondent, which have no force, and reverse the decree of the lower Courts, and decree the claim with all costs.

STRAIGHT, J.—I am of the same opinion. As to the objection with regard to s. 285 of the Procedure Code, no attachment from [260] the Subordinate Judge's Court was pending on the 5th August, 1880, when the sale of the 10th September, 1880, was ordered by the Munsif. On the contrary, the execution-proceedings before him at the instance of the defendant, had closed with the sale of the 29th March preceding, and the provisions of that section were therefore inapplicable. Moreover, I entertain very serious doubts whether, as in the case of the plaintiff here, when a decree in terms orders the sale of specific immoveable property in enforcement of a charge thereon, any attachment is necessary.

Upon the other point it seems to me enough to say that as by the sale of the 29th March, 1880, the rights and interests of Gopal Kishore in the property sold, whatever they were, had passed to the defendant, there was no legal obligation upon the plaintiffs to resort to the procedure laid down in s. 234 of the Code, in respect of the legal representatives of Gopal Kishore, who, as they admit in the present suit, had no property of his remaining in their hands. There is no provision in the Code, that I am aware of, which required the plaintiff to make the defendant a party to the execution-proceedings in the Munsif's Court, nor, in my opinion, could the latter have successfully objected to the sale of the 18th September, 1880, taking place. In this view of the matter it is impossible to hold that the sale of that date was voided by the antecedent death of Gopal Kishore on the 9th August, nor are any reasons apparent upon which it could have been properly set aside on the ground of irregularity. I therefore concur with my honorable colleague that the plaintiff was entitled to succeed in his suit, and I approve the proposed order.

Appeal allowed.

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6 A. 260 = 4 A.W.N. (1884) 73.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

IKRAM SINGH AND ANOTHER (*Plaintiffs*) *v.* INTIZAM ALI AND OTHERS (*Defendants*).* [21st March, 1884.]

Suit for cancellation of instrument—Suit for possession of immoveable property—Limitation.

The purchasers at a sale in execution of decree of land sued to set aside an instrument of usufructuary mortgage of the land executed by the judgment-debtor before the sale, and for possession of the land, alleging that the mortgage was frau-[261]dulent and collusive. *Held* that, as the main and substantial relief sought was the recovery of possession of immoveable property from persons trespassing on it under the title of a fictitious mortgage, and the declaration of the invalidity of the defendants' pretensions was no more than an incidental step in the assertion of the plaintiffs' title and right to possession, the limitation of twelve years was applicable to the suit. *Tawangar Ali* v. *Kura Mal* (1); S.A. No. 432 of 1882, decided the 11th August, 1882 (2); *Sobha Pandey* v. *Sahodra Bibi* (3); *Ramausar Pandey* v. *Raghubar Jati* (4); *Uma Shankar* v. *Kalka*

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* Second Appeal No. 1142 of 1883, from a decree of F. E. Elliot, Esq., District Judge of Mainpuri, dated the 23rd June, 1883, confirming a decree of Maulvi Mahmud Bakhsh, Subordinate Judge of Mainpuri, dated the 6th April, 1883.

(1) 3 A. 394. (2) Weekly Notes (1882) 173. (3) 5 A. 322. (4) 5 A. 490.

Prasad (1); and the judgment of STRAIGHT, J., in *Hazari Lal* v. *Jadaun Singh* (2), followed. *Bhawani Prasad* v. *Bisheshar Prasad* (3) and *Asghar Ali* v. *Muhammad Zain-ul-abdin* (4), distinguished.

[Appr., 25 B. 78 (80).]

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APPELLATE CIVIL.

6 A. 260 = 4 A.W.N. (1884) 73.

THE plaintiffs in this suit were the sons and heirs of a person who had purchased a village sold in execution of a decree. They sued to set aside a usufructuary mortgage by the judgment-debtor of the village, made before the sale of the village to their father, and for possession of the village, alleging that their father had no knowledge of the mortgage, when he purchased, and that the mortgage was fraudulent and collusive. The plaintiffs further alleged that their cause of action arose on the 1st September, 1870, when they became aware of the mortgage. The suit was instituted in March, 1882. Both the lower Courts held that the period of limitation applicable to the suit was three years, computed from the 1st September, 1870, and not twelve years, and the suit was therefore barred by limitation, the lower appellate Court holding that it was governed by art. 91 of the Limitation Act, 1877.

In second appeal the plaintiffs contended that the period of limitation applicable to the suit was twelve years, and it was governed by art. 144 of the Limitation Act, 1877.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *G. E. A. Ross* and Shah *Asad Ali*, for the respondents.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—Having considered the facts found, and heard arguments on both sides, we are of opinion that the limitation of twelve years is applicable to the appellants' suit. The law as explained in *Tawangar Ali* v. *Kura Mal* (5), in S. A. No. 432 of 1882 (6), in *Sobha Pandey* v. *Sahodra Bibi* (7), in *Ramausar Pandey* v. *Raghu*-[262]*bar Jati* (8), and in *Uma Shankar* v. *Kalka Prasad* (1), is applicable to the present case, in which the main and substantial relief sought by the appellants is the recovery of possession of their immoveable property from persons trespassing on it under the title of a fictitious mortgage, and the declaration of the invalidity of the respondents' pretensions is no more than an incidental step in the assertion of the appellants' title and right to possession.

The following cases were cited by the learned counsel for the respondents, *viz.*, *Bhawani Prasad* v. *Bisheshar Prasad* (3), *Hazari Lal* v. *Jadaun Singh* (2), and *Ashgar Ali* v. *Muhammad Zainulabdin* (4). But the first and the third of these three cases are clearly distinguishable from the case before us, as is pointed out in the judgments. The relief sought for by the plaintiffs was impossible of attainment in the first without getting rid of the lease given by the former proprietor, and in the other without cancelment of the sales impeached, while the case of 1882 is in favour of the appellants' contention, and we follow the judgment therein of STRAIGHT, J., by which the limitation of art. 144 of Act XV of 1877 was applied.

We must therefore allow this appeal, and remand the case to the lower appellate Court for disposal under s. 562 of the Civil Procedure Code. The costs of this appeal will be costs in the cause.

Appeal allowed.

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(1) 6 A. 75. (2) 5 A. 76. (3) 3 A. 846. (4) 5 A. 573.
(5) 3 A. 394. (6) Weekly Notes (1882) 173. (7) 5 A. 322. (8) 5 A. 490.

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FULL BENCH.

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FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

GANGA SAHAI (*Defendant*) *v.* KISHEN SAHAI (*Plaintiff*).*
[25th March, 1884.]

Mortgage—Suit for foreclosure of mortgage—Regulation XVII of 1806, *ss.* 7, 8—*Act IV of* 1882 (*Transfer of Property Act*), *ss.* 2, 67-86—*Act I of* 1868 (*General Clauses Act*), *s.* 6.

A mortgagee by conditional sale, under an instrument executed while Regulation XVII of 1806 was in force, and before the Transfer of Property Act, 1882, which repealed that Regulation, came into force, sued, after the repeal of that Regulation, for foreclosure of the mortgage, not having proceeded in accordance [263] with the provisions of s. 8 of that Regulation. *Held* (STUART, C.J., dissenting), that the procedure of that section was not saved by cl. (c) of s. 2 of the Transfer of Property Act, but the provisions of that Act were applicable to the suit.

[F., 16 A. 259 (265) (F.B.); Appl., 13 A. 432 (456, 472) (F.B.); Appr., 12 C. 583 (587) (F.B.); R., 11 A. 367 (371); 11 C. 582 (586); 30 M.L.J. 338; 3 N.L.R. 97 (100); D., 12 C. 436 (438); 14 C. 451 (454); 14 C. 599 (602); 15 C. 357 (360).]

THE plaintiff in this suit claimed foreclosure of a mortgage by conditional sale dated the 3rd July, 1877. The suit was instituted under the Transfer of Property Act, 1882, by which Regulation XVII of 1806 was repealed. The defendant set up as a defence to the suit that as that Regulation was in force when the mortgage was made, the procedure therein enacted should have been followed before institution of the suit, and such procedure not having been followed, the suit was not maintainable. The Court of first instance disallowed this contention, holding that the suit had been properly brought under the Transfer of Property Act, 1882; and, in giving the plaintiff a decree, it followed the procedure laid down in s. 86 of that Act. On appeal to the High Court the defendant raised the same contention as he had raised below. The Divisional Bench (STUART, C.J. and OLDFIELD, J.), before which the appeal came for disposal, referred the following question to the Full Bench, *viz.*, "whether, with reference to s. 2 of the Transfer of Property Act, the provisions of that Act, and among them of s. 86, are applicable to this suit?"

Mr. *J. Simeon*, for the appellant.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the respondent.

The following judgments were delivered by the Full Bench:—

JUDGMENTS.

STUART, C.J.—My answer to this reference is in the negative. The sale-deed under which the plaintiff makes his claim in the suit was executed on the 3rd July, 1877, when Regulation XVII of 1806 was in full force, and the Transfer of Property Act did not come into operation until the 1st day of July, 1882, or about five years after the date of the conditional sale-deed. The rights therefore created by that deed are saved by s. 2 of the Transfer of Property Act which, after repealing certain

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* First Appeal No. 119 of 1882, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 15th September, 1882.

enactments in the schedule thereto, provides as follows :—"But nothing herein contained shall be deemed to affect * * * any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability."

[264] This clearly applies to the case now before us, and the right or liability constituted by the deed included, in my opinion, the procedure by notice and foreclosure which was in force at the time the deed was executed; that is, the procedure prescribed by the Regulation of 1806, including, among other things, the right to a year's notice, which is a beneficial right of a most important and serious nature, for by means of it a conditional vendor might be enabled to pay off his mortgage-debt and save his property. Even if s. 2 were less distinct than it is, it could never, I think, have been intended by any retrospective operation of it to deprive a mortgagor or conditional vendor of his right to a year's notice, and to cut it down to half of that time. The effect again of s. 6 of the General Clauses Act I of 1868 is to save all rights of procedure existing before the repealing Act came into force. In fact the legal effect of s. 2 of the Transfer of Property Act, read especially with provisions of the General Clauses Act, is to save from the operation of that Act all rights whatever constituted and existing before it came into force; that is, that such rights or liabilities with their remedies are left in precisely the same position as if the Transfer of Property Act had never been passed.

Something was said at the hearing about the limitation period of sixty years, but that is a limitation that applies to either view of the case, whether under the Regulation of 1806 or the Transfer of Property Act of 1882, and does not in the slightest degree affect the question as to the effect of s. 2 of the latter Act.

OLDFIELD, J.—The suit out of which this reference has arisen is one to foreclose a mortgage with conditional sale made by deed executed on the 3rd July, 1877. The suit has been brought under the provisions of the Transfer of Property Act, and the question raised is whether the provisions of that Act relating to suits for foreclosure of mortgage by conditional sale or those of ss. 7 and 8, Regulation XVII of 1806, which it repealed, are to be enforced, the mortgage having been made before the Transfer of Property Act of 1882 came into force.

It is contended for the defendant that his right to have foreclosure made under the Regulation is saved by cl. (*c*), s. 2 of the Transfer of Property Act. S. 2 is as follows :—"In the terri- [265] tories to which this Act extends for the time being, the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

(*a*) the provisions of any enactment not hereby expressly repealed :

(*b*) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force :

(*c*) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability : or

(*d*) save as provided by s. 57 and Chap. IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction ; and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan, or Buddhist law."

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It is upon cl. (c) that the answer to this reference will depend; and in my opinion that clause does not require that foreclosure shall be made under the old Regulation. What the Transfer of Property Act by cl. (c) will not affect is any right or liability arising out of a legal relation constituted before the Act came into force, or any relief in respect of such right or liability. The right or liability must arise out of a legal relation—that is, in the case before us, out of the mortgage-contract or the relation of mortgagor and mortgagee.

The provisions of ss. 7 and 8, Regulation XVII of 1806, constituted a procedure for redemption and foreclosure of mortgages by conditional sale which has now been repealed, and in its place the procedure prescribed by the Transfer of Property Act has been substituted.

There is no vested right to have recourse to a particular procedure for enforcing a contract; such a right cannot be claimed by the parties to a mortgage, as being in any sense a right which [266] arises out of the legal relation of a mortgagor and mortgagee. To alter the procedure involves no breach of their contract.

Their rights and liabilities under their contract, and the relief they are entitled to in respect of such rights and liabilities, are different things from the procedure necessary to enforce such rights, liabilities and relief. And although the procedure for redemption and foreclosure of mortgage by conditional sale has been altered, it can scarcely be said that the mortgagor has been injuriously affected by the change. The Regulation prescribed certain ministerial proceedings to be taken, under which a year was allowed to the mortgagor to pay the debt, before a suit could be brought for possession, or to obtain a declaration of absolute title, whereas the present Act has done away with the preliminary proceedings, and allows the mortgagee to bring a suit for foreclosure, and if he succeeds, directs that the decree shall order an account to be taken or declare the amount due, and allow the mortgagor six months to pay the amount from the date of declaring in Court the amount due, and failing payment the mortgagor shall be absolutely debarred of all right to redeem the property, and a power is given to the Court to enlarge the time for payment on good cause being shown. Much stress has been laid upon the mortgagor's right to a year's time in which to pay the amount due under Regulation XVII of 1806 having been affected by the Act, but the mortgagor cannot be said to be injuriously affected on this score, when the Act allows the Court to extend the time for payment on cause being shown. Besides, the right given to the mortgagor of a year's grace, in which to redeem the mortgage, was conferred by the Legislature, and did not arise out of the legal relation of the parties—indeed, quite the reverse, for it was opposed to the terms of the contract, and modified the strict rights of the parties under the contract, and any right of the kind was dependent on the Regulation, and could only be enforced under it, and ceased to have effect upon its repeal.

The following passage from *Maxwell on the Interpretation of Statutes* may be cited as bearing on the case before us:—"It does not follow that because a suitor has a cause of action, he has also a vested right to enforce it by a course of procedure and practice [267] which was in force when he began his suit. He has only the right of prosecuting it in the manner prescribed for the time being by or for the Court in which he sues, and if an Act of Parliament alters that mode of procedure, he has no other right than to proceed according to the altered mode. The remedy does not alter the contract or tort, it

takes away no vested right, for the defaulter can have no vested right in a state of the law which left the injured party without or with only a defective remedy." And cases are cited, as when the Legislature gave a new remedy for enforcing rights in the Admiralty by the Admiralty Acts of 1840 and 1861, those Acts were held to extend to rights which had accrued before the new remedy had been provided.

It may be observed also that Regulation XVII of 1806 has been absolutely and without reservation repealed by s. 2 of the Transfer of Property Act; and it is difficult to see how the provisions of a repealed statute can be enforced for obtaining foreclosure, and the great inconvenience of giving effect to the provisions of the repealed Regulation in the case of old mortgages for the next sixty years or more is so obvious that it seems impossible to suppose it was intended to keep in force the Regulation, and it may be added that had there been such an intention, it is reasonable to suppose that it would have been expressed in distinct terms.

The answer to this reference therefore is, that the provisions of the Transfer of Property Act relating to suits for foreclosure of mortgage by conditional sale are applicable to this suit.

BRODHURST, J.—I concur.

TYRRELL, J.—I am entirely of opinion that my brother Oldfield's answer to this reference is not logically and legally sound, but also is strongly recommended by the argument *ab convenienti.*

STRAIGHT, J.—I concur with my hon'ble colleague Mr. Justice Oldfield. The provisions of s. 8 of Regulation XVII of 1806, declaring "how a mortgagee or holder of a deed of conditional sale is to proceed when desirous of foreclosing a mortgage or rendering a conditional sale conclusive" was one concerning the procedure to be followed by the mortgagee at the time of seeking to enforce the contract of mortgage or conditional sale, and it did not [268] operate to create any right in either of the parties to the contract, nor by reason thereof did any right arise to them out of the relation of mortgagee and mortgagor. Their respective rights and liabilities under the contract existed and were to be determined by the terms of the instrument, and all s. 8 of the Regulation did was to lay down the procedure to be followed by one of them, *viz.*, the mortgagee when seeking to foreclose. No right to twelve months' notice arose to the mortgagor out of the contract of mortgage itself, nor in respect of his relation with the mortgagee, but the latter was directed to follow a certain course of proceeding. "No suitor has any vested interest in the course of procedure," says MELLISH, L. J., in *Republic of Costa Rica* v. *Erlanger* (1). So again JAMES, L. J., in *Warner* v. *Murdoch* (2), remarks :—"No one has a vested right in any particular form of procedure ;" and an authoritative decision upon this point is the case of *Wright* v. *Hale* (3) : see also the judgment of Lord Wensleydale at p. 227 of 33 L. J., Exch. The principle thus enunciated in these cases may, I think, with propriety be adopted and acted upon in the Courts here except in so far as s. 6 of the General Clauses Act limits its application by saving proceedings commenced before a repealing Act has come into effect. As to the argument of hardship, it does not appear to me that a mortgagor is subject to any injustice by having applied to him the procedure laid down in the Transfer of Property Act, Chap. IV. Taking ss. 67-86 and 87 in

(1) L.R. 3 Ch. D. 69. (2) L.R. 4 Ch. D. 752. (3) 30 L.J. Exch. 40.

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conjunction with one another, it is obvious that if the Courts properly discharge the duties thereby imposed upon them, no room for grievance or complaint need be left to him, if he is honestly anxious to discharge the incumbrance on his property, the Courts having full discretion to afford him every reasonable opportunity to do so. As in my opinion cl. (*c*) of s. 2 of the "Transfer of Property Act" does not save the procedure provided in s. 8 of Regulation XVII of 1806, I would answer the question put by the reference in the affirmative.

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6 A. 269 (P.C.) = 11 I.A. 37 = 4 Sar. P.C.J. 489 = 8 Ind. Jur. 214.

[269] PRIVY COUNCIL.

PRESENT:

Lord Fitzgerald, Sir B. Peacock, Sir R. P. Collier, Sir R. Couch and Sir A. Hobhouse.

[*On appeal from the High Court for the North-Western Provinces.*]

RAM KIRPAL (*Petitioner*) *v.* RUP KUARI (*Objector*).
[8th November and 1st December, 1883.]

Construction of decree in order made in execution proceedings—Finality of such order.

A Court having jurisdiction decided in the course of execution proceedings (in an order which was not appealed) that the decree to be executed awarded mesne profits according to its true construction. *Held* that this decision had become final between the parties, not under s. 13 of Act X of 1877, but upon general principles of law, as an interlocutory order in the suit.

The order construing the decree having been made in the same suit in which the application was made, the question whether the law of "*res judicata*" applied was not relevant, that term referring to a matter decided in another suit.

[F., 7 A. 102 (106) (P.C.); 19 M. 54 (56); 12 C.L.J. 312 = 7 Ind. Cas. 55; 16 Ind. Cas. 238; 4 O.C. 329 (331, 332); Appl., 8 A. 492 (493); 13 A. 564 (567, 568); 14 A. 64 (66); R., 7 A. 564 (565); 12 A. 578 (579); 14 A. 348 (349); 15 A. 84 (96); 16 A. 443 (447); 16 A. 464 (471); 24 A. 138 (141) = A.W.N. (1897) 29; 24 A. 282 (286); 9 B. 328; 13 B. 567 (571); 18 B. 429 (432); 19 B. 821 (822); 32 B. 479 (496) = 10 Bom. L.R. 184; 23 C. 374 (392); 33 C. 927 (940) = 3 C.L.J. 67; 18 M. 13 (17); 22 M. 256 (258); 24 M. 683 (685) = 11 M.L.J. 432; 7 A.L.J. 861 = 7 Ind. Cas. 156; A.W.N. (1890) 9; A.W.N. (1908) 211 = 4 M.L.T. 172; 3 Bom. L.R. 416 (418); 14 Bur. L.R. 35 (36) = U.B.R. (1907), 1st Qr., C.P.C., S. 13; 3 C.L.J. 240 = 10 C.W.N. 209 (212); 6 C.L.J. 462 (470); 11 C.L.J. 357 (360) = 14 C.W.N. 433; 17 C.P.L.R. 178 (190); 5 Ind. Cas. 387 (388); 8 Ind. Cas. 22 (24); 14 Ind. Cas. 264; 3 L.B.R. 131; 10 M.L.T. 437 = 21 M.L.J. 1063; 2 O.C. 28 (30); 6 O.C. 44 (46) (F.B.); 39 P.R. 1903; 75 P.R. 1905 (F.B.) = 193 P.L.R. 1905; 90 P.R. 1902 = 20 P.L.R. 1903; 14 A.L.J. 1171 (1181); D., 10 B. 675 (678).]

APPEAL from a decree (10th August, 1880), reversing, after a reference to a Full Bench, a decree (26th July, 1879), of the Judge of the Gorakhpur district (1).

An order made by a competent Court in 1867, in execution of a decree relating to the possession of land, construed it to have awarded mesne profits. No appeal was preferred against that order. The question now raised was whether it was open to this respondent, by subsequent proceedings, to contest with the representative in estate of the party against whom the above order was made the right to such mesne profits.

On the 3rd May, 1861, Shambhu Prasad, the predecessor in estate of the appellant, sued the respondent, Rup Kuari, in the Court of the

(1) *See* 3 A. 141.

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Subordinate Judge of Gorakhpur, for "maintenance in possession" of half the shares in a village in that district under a deed of *sankalp*, or charitable gift, executed by the respondent in 1259 fasli. Besides other claims, on mortgage and for interest, not now material, he sued for mesne profits to the date of obtaining possession. These were decreed in favour of the plaintiff in the Court of the Principal Sadr Amin of Gorakhpur in 1862. This decree was reversed by the District Judge in the same year, but on appeal to the Sadr Diwani Adalat at Agra was restored by decree, dated 23rd June, 1864, which remained the substantive decree in the suit.

[270] After several applications for execution and petitions of objection, an order made by the Principal Sadr Amin to the effect that mesne profits had not been awarded, was reversed by the District Judge of Gorakhpur, on the 20th December, 1867, who thus stated his reasons:—"The claim before the Principal Sadr Amin was for possession of the eight annas share with future mesne profits. The decree was made in plaintiff's favour as claimed. This order was upheld by the Sadr Court. It is true that the decree did not enter into details regarding the future mesne profits; but, as it upheld the Principal Sadr Amin's order, and that, as above shown, was also for future mesne profits, I think that the Sadr Court's order must be ruled to include that item." The District Judge accordingly made the order which gave rise to the question in the present suit.

Proceedings with a view to obtaining execution having afterwards taken place, and the decree-holder having been succeeded by his widow, Rajbanshin, and after her death by Ram Kirpal, the present appellant, the latter now applied for mesne profits estimated at Rs. 15,062. The judgment-debtor objected that mesne profits were not claimable. Upon this the judgment of the Subordinate Judge of Gorakhpur, Hakim Rahat Ali, was that the decree of the original Court, as maintained in appeal, provided for mesne profits; and also that this objection could not now be urged, as the decision of 20th December, 1867, on this point was final. This judgment was upheld by Mr. R. G. Currie, the District Judge of Gorakhpur.

A Divisional Bench of the High Court (PEARSON, J., and OLDFIELD, J.) referred to a Full Bench the question whether the law of *res judicata* applied to proceedings in execution of decree. The judgment of PEARSON, J., in which the other Judges concurred, was as follows:—

"S. 13, Act X of 1877, embodies the law of *res judicata*, and declares that 'no Court shall try any suit or issue in which the matter directly and substantially in issue, having been directly and substantially in issue in a former suit, in a Court of competent jurisdiction between the same parties, or between parties under whom they are any of them claim, litigating under the same title, has been heard and finally decided by such Court.'

[271] "*Prima facie*, the law above quoted refers only to matters decided in suits. It was suggested that the word 'suit' might include all the proceedings in execution of the decree passed in the suit. But, even on such a construction, it could not be held that a matter decided in former execution proceedings had been decided in a former suit, unless each application for execution of decree were regarded as a separate suit. That an application is a distinct thing from a suit, in the language of Indian legislation, is, however, conclusively proved by the provisions of the Law of Limitation. Proceedings in execution of decrees are included in the

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category of miscellaneous proceedings, which are expressly distinguished from suits and appeals in s. 647 of the Procedure Code. That section enacts that the procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals. It was suggested that under the provisions of that section the law of *res judicata*, contained in s. 13, would apply to proceedings in execution of decrees, but I cannot hold the law of *res judicata* to be procedure.

"I would therefore reply in the negative to the question on which our opinion has been asked."

The judgment of the Divisional Bench was in the terms set forth in their Lordships' judgment.

On this appeal,

Mr. *Horace Davey*, Q. C., and Mr. *W. A. Raikes*, for the appellant.—The order made by the District Judge on the 20th December, 1867, was a regular proceeding of a Court having jurisdiction. The decree of the Sadr Court, dated the 23rd June, 1864, having been construed by a competent Court to include mesne profits, the amount of the latter became determinable only in execution; see s. 11, Act XXIII of 1867, and s. 244 of Act X of 1877. The High Court may have been right in the abstract as to the law of "*res judicata*" being inapplicable, but they were wrong in the application of the principle of their judgment to the case before them, the order of 20th December, 1867, having been made in the same and not in a former suit. The judgment is therefore erroneous. It cannot be held that, because that order was made in the same [272] suit, what it decided remained open to contest afterwards between the parties, although if it had been made in another suit that order would have been final. S. 13 of Act X of 1877 is not applicable to this case.

Reference was made to *Manjunath Badrabhat* v. *Venkatesh Govind Shanbhog* (1); *Mangul Pershad Dichit* v. *Grijakant Lahiri* (2); *Dheeraj Matab* v. *Balram Singh* (3); *Run Bahadoor Singh* v. *Lucho Koer* (4).

Where a question has been necessarily decided in effect, though not in express terms between parties to a suit, they cannot raise the same question as between themselves in another suit in any other form.—*Soorjomonee Dayee* v. *Suddanund Mohapatter* (5).

Mr. *T. H. Cowie*, Q. C., and Mr. *C. W. Arathoon*, for the respondent.

If the decree of 1862 did not, on its true construction, direct future mesne profits, it was not competent to the Court passing an order upon it in execution to direct that mesne profits should be paid. It is submitted that the District Judge, in the order of 1867, though he may have intended only to construe the decree of 1862, in effect made an addition to it, when he held that it granted mesne profits. In this he exceeded his powers. If the right to mesne profits was left undecided by the decree of 1862, an application for them made in execution could not be entertained. They could only be claimed in a separate suit; s. 244, Act X of 1877. Looking, then, at the decree of 1862, it is clear that the Sadr Court did not itself direct that future mesne profits should be calculated. It was only by reference to the decree of the lower Court, which itself had been reversed by the Court immediately superior to it, that the inference could be drawn that mesne profits were awarded by the Sadr Court. This was an

(1) 6 B. 54. (2) 8 C. 51 = 8 I.A. 123. (3) 13 M.I.A. 479.
(4) 6 C. 406. (5) 12 B.L.R. 304 = L.R. Supplemental Vol., 212.

inference which the Court executing the decree had no authority to draw. Accordingly, the judgment of the High Court is correct in result.

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Counsel for the appellant were not called upon to reply.

JUDGMENT.

[273] Their Lordships' judgment was delivered by

SIR B. PEACOCK.—This is an appeal from an order of a Divisional Bench of the High Court of Judicature for the North-Western Provinces of Bengal, dated the 10th of August, 1880, by which an order of the Subordinate Judge of Gorakhpur and an order of the Judge of the same district were reversed. The order of the Subordinate Judge was dated the 10th of May, 1879, and was made upon a claim by Ram Kirpal, the present appellant, for mesne profits in execution of a decree of the late Sadr Court, by which a decree of the Principal Sadr Amin of the district of Gorakhpur, dated the 12th June, 1862, in a suit in which Shambhu Prasad, under whom the appellant claims, was the plaintiff, and the present respondent was the defendant, was upheld upon appeal. Upon the claim for execution being made, a question arose whether or not the decree in execution awarded future mesne profits. That question had been determined in the affirmative on the 20th December, 1867, by Mr. Probyn, the Judge of Gorakhpur, in a previous stage of the proceedings for execution of the same decree by the widow of the said Shambhu Prasad, who, in consequence of his death, was the holder of the decree, and had been declared entitled against the present respondent to proceed with the execution. The Subordinate Judge considered himself bound by the decision of Mr. Probyn, and he held that the debtor's objection in respect of mesne profits and his prayer for the exclusion thereof should be disallowed, and that the officer should prepare a correct account of the mesne profits. He accordingly made the order of the 10th May, 1879, to that effect.

The order of the Subordinate Judge was affirmed on appeal by order of the Judge, dated the 26th July, 1879. The order of the Subordinate Judge, and that of the Judge affirming the same, were appealed to the High Court, and came on to be heard before a Divisional Bench, who referred to a Full Bench the question whether the law of *res judicata* applies in proceedings in execution of a decree. The Full Bench, after referring to s. 13, Act X of 1877, answered the question in the negative, whereupon the Divisional Bench, on the 10th of August, ordered that the appeal be decreed, and that the orders of the Judge and the Subordinate [274] Judge be reversed, and that the execution of the decree for mesne profits be disallowed.

The judgment of the Divisional Bench upon which the order was drawn up was in the following terms:—

"The Full Bench has expressed a unanimous opinion that the law of *res judicata* does not apply in proceedings in execution of decree. The question which the lower Courts held to be finally determined by Mr. Probyn's decision, dated 20th December, 1867, is therefore open to re-adjudication by us; and, on examining the terms of the late Sadr Court's decree, we are constrained to declare that mesne profits are not awarded by it. The execution of the decree for mesne profits must therefore be disallowed, and we need not consider any other matters. The appeal is decreed by reversal of the orders of the lower Courts; but under the circumstances we direct that the parties bear their own costs in all the Courts."

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It is unnecessary for their Lordships to express any opinion as to the answer of the High Court to the question propounded by the Divisional Bench, though they must not be understood as concurring in it. *See* Law Reports, 8 Indian Appeals, 123 (1). The question, if the term "*res judicata*" was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case. The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application, in which the orders reversed by the High Court were made, was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon s. 13, Act X of 1877, but upon general principles of law. If it were not binding, there would be no end to litigation. The judgment or order of Mr. Probyn was an interlocutory judgment. He merely held that, according to the proper construction of the decree of the Sadr Court, mesne profits were awarded [275] by it. He did not assess the amount. That had to be done in a subsequent stage of the proceedings in execution. The report of the muharrir of the 11th March, 1879, gives a detail of the proceedings by which the plaintiff in the suit, in which the Sadr Court gave judgment, and those claiming under him had been striving, without success, to obtain execution of the decrees of the Sadr Court from the time of Mr. Probyn's judgment of the 20th December, 1867, to the 11th September, 1878, when the application for execution upon which the orders under consideration were made was presented. In the course of those proceedings the case was, for various reasons, several times "struck off," that is to say, struck off the file of the business pending in the Court of the Subordinate Judge; but the application for execution, upon which Mr. Probyn's judgment was pronounced, was not dismissed or finally disposed of. Mr. Probyn's judgment and the order passed thereon was never reversed or set aside. It was said that a special appeal from that judgment did not lie to the High Court. If so, the judgment was final; if an appeal did lie and none was preferred, the judgment was equally final and binding upon the parties and those claiming under them. It would be a reproach upon the administration of justice if, after endeavouring for eleven years to obtain execution for mesne profits in accordance with a judgment of a Court of competent jurisdiction against which no appeal was preferred, the parties could now be told that that judgment was erroneous, and that they were not entitled to mesne profits. It was contended at the bar on behalf of the respondent that if the decree of the Sadr Court did not award mesne profits, Mr. Probyn had no jurisdiction to hold that it did, and consequently that in that case the subsequent orders, which were based upon Mr. Probyn's judgment, were properly reversed by the High Court, who were correct in putting their own construction upon the decree of the Sadr Court. Their Lordships cannot concur in that view. The decree of the Sadr Court was a written document. Mr. Probyn had jurisdiction to execute that decree, and it was consequently within his jurisdiction, and it was his duty to put a construction upon it. He had as much jurisdiction, upon examining the terms of the decree, to

(1) The judgment in *Mungul Pershad Dichit* v. *Grijakant Lahiri*, 8 C. 51 = 8 I. A. 123.

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decide that it did award mesne profits as he would have had to decide that it did not. The High Court assumed jurisdiction to [276] decide that the decree did not award mesne profits, but, whether their construction was right or wrong, they erred in deciding that it did not, because the parties were bound by the decision of Mr. Probyn, who, whether right or wrong, had decided that it did—a decision which, not having been appealed, was final and binding upon the parties and those claiming under them—Law Reports, 8 Indian Appeals, 123. It is not necessary, nor would it be correct, for their Lordships to put their construction upon the decree of the Sadr Court. If the Subordinate Judge and the Judge were bound by the order of Mr. Probyn in proceedings between the same parties on the same judgment, the High Court were bound by it, and so also are their Lordships in adjudicating between the same parties.

For the above reasons their Lordships are of opinion that the High Court was in error in putting a construction upon the decree at variance with that of Mr. Probyn, and reversing the orders of the Judge and Subordinate Judge. The High Court acted as if they had been sitting upon an appeal against the order of Mr. Probyn, but they were not so sitting.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the order of the High Court, and to order that the orders of the Judge and Subordinate Judge be affirmed, and that the respondent do pay the costs incurred in the High Court by the present appellant. The respondent must also pay the costs of this appeal.

Solicitors for the appellant: Messrs. *Oehme* and *Summerhays*.

Solicitor for the respondent: Mr. *T. L. Wilson*.

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6 A. 276 (F.B.) = 4 A.W.N. (1884) 82 = 8 Ind. Jur. 583.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

ATMA RAM (*Defendant*) v. MADHO RAO BY HIS NEXT FRIEND BALKISHEN (*Plaintiff*).* [24th March, 1884.]

Hindu Law—Dakhani Brahmans—Brother's son—Adoption—Ceremonies.

In the case of Dakhani Brahmans the "*datta homam*" or any other religious ceremony is not required to give validity to the adoption of a brother's son: the giving and taking of the child is sufficient for that purpose.

[Appr., 24 B. 218 (223); R., 24 B. 473 (480); 20 C.W.N. 19.]

[277] THE plaintiff in this suit claimed possession of an eight annas share of a mauza called Bilayan, in pargana Kunch, in the Jalaun District, as the adopted son of one Jai Ram. It appeared that Mauza Bilayan was granted by Government to Jai Ram and Atma Ram (the defendant in this suit), two of the sons of Kesho Rao, Rajah of Gursarai, in the Jalaun District, in consideration of good services rendered by the grantees to Government, and they were recorded as proprietors of eight annas each. Jai Ram died in 1870, and was succeeded by his widow,

* Second Appeal No. 461 of 1883, from a decree of W. Kaye, Esq., Commissioner of Jhansi, dated the 2nd January, 1883, confirming a decree of Major T. J. Quin, Deputy Commissioner of Jalaun, dated the 14th August, 1882.

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Anandi Bai. Anandi Bai died on the 16th February, 1879. The plaintiff alleged that on the day before her death Anandi Bai had adopted him. The defendant denied the fact of the adoption and its validity on several grounds. The parties were Dakhani Brahmans, whose family came from Poona about a hundred years ago into the Jalaun District. The Court of first instance held that the fact of the plaintiff's adoption was proved, and that the adoption was valid, and gave the plaintiff a decree. On appeal by the defendant it was contended, *inter alia*, that the adoption was invalid, the ceremonies prescribed by the Hindu Law not having been performed. The lower appellate Court held that, "although the ceremonies performed were scanty in the extreme," yet, as the giving and taking in adoption of the plaintiff was proved, that was sufficient, inasmuch as the parties, being Dakhani Brahmans, were governed by the law of adoption prevailing in the Mahratta States, and under that law the giving and taking in adoption of the child was sufficient, and the incomplete performance of the religious ceremonies prescribed would not affect the validity of the adoption.

The defendant appealed to the High Court, contending that the religious ceremonies prescribed by the Hindu Law for the act of adoption not having been performed in the case of the plaintiff, his adoption was invalid. The Divisional Bench (OLDFIELD and BRODHURST, JJ.), before which the appeal came for hearing, referred to the Full Bench the following question raised by the defendant's contention :—"Is the performance of certain religious ceremonies, and that of the '*datta homam*' in particular, essential to the validity of adoption among Brahmans, including Mahratta or Dakhani Brahmans, or is the giving and taking of the child in adoption all that is necessary?"

[278] Mr. *T. Conlan* and Pandit *Ajudhia Nath*, for the appellant.

Mr. *W. M. Colvin* and Babu *Jogindro Nath Chaudhri*, for the respondent.

For the appellant it was contended that the adopting of a son was a religious rite. The "*datta homam*," the "*putristu*," and the five prayers are essential ceremonies in performing that rite, and the giving and taking of the boy takes place in the course of those ceremonies. Without those ceremonies the filial relation is not created, and therefore if an adoption takes place without their use, it is invalid. Reference was made to Vyavahara Mayukha, ch. iv, s. 5, vv. 8 and 37 *et seq.* (Stokes' Hindu Law Books, pp. 60, 70) : Mitakshara, ch. i, s. 11, v. 13 *et seq.* (Stokes' H. L. B., pp. 416, 417, 418) : Dattaka Mimansa, s. 2, v. 51 ; s. 5, vv. 11, 21, 23, 31, 42, 47, 50 (Stokes' H. L. B., pp. 559, 589, 591, 592, 594, 595, 597) ; Dattaka Chandrika, s. 2, vv. 11, 16, 17 ; s. 6, v. 3 (Stokes' H. L. B., pp. 638, 639, 640, 662) : Stokes' H. L. B., pp. 667, 668. Also to *Luchmun* v. *Government* (1) ; *Thakoor Oomrao Singh* v. *Thakooranee Mehtab Koonwer* (2) ; *Alauk Manjari* v. *Fakir Chand Sarkar* (3) ; *Bullubakant* v. *Kishenprea Dassea* (4) ; *Luchmun Lall* v. *Mohun Lall* (5) ; *Bhairabnath Sye* v. *Moheshchandra Bhadury* (6) ; *Nittianand Ghose* v. *Krishna Dyal Ghose* (7). Also to Strange's H. L., vol, ii, pp. 130, 131 ; Colebrooke's Digest, vol. ii, p. 389.

For the respondent it was contended that the law cited by the appellant did not apply, as the parties to the suit were Dakhani Brahmans

(1) S.D.A.N.W.P. (1866) 112.
(2) N.W.P.H.C.R. (1868) 103*a*.
(3) 5 S. D. A. L. P. (Select Cases) 356.
(4) 6 S. D. A. L. P. (Select Cases) 219.
(5) 16 W. R. 179.
(6) 4 B.L.R.A.C. 162.
(7) 7 B.L.R. 1.

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from Poonah and governed by the Mayukha, which is the law prevailing in Western India. Even if that law is applicable, the "*datta homam*" or other ceremonies were not necessary in this case where the adopted son is a brother's son. The object of the "*datta homam*" is to remove the adopted son from the natural father's to adoptive father's *gotra*. Where, however, as here, the *gotra* is the same, the ceremony is not essential. This is the law in Western India as laid down by Yama, the authority on that side, and this was decided in *Huebut Rao Mankur* v. *Govindrao Bulwant Rao Mankur* (1). Reference was made to Cowell's Hindu Law (Tagore Lectures) and Mayne's Hindu Law.

[279] The Full Bench delivered the following opinions:—

OPINIONS.

STUART, C.J.—I have considered the argument addressed to us in this reference along with the authorities cited at the hearing, and on the larger or general question of adoption under the Hindu Law, without reference to special, local, or geographical custom, I consider that these authorities show that the forms and ceremonies contended for on behalf of the appellant, especially the *datta homam*, are generally essential to the validity of the act of adoption. There are no doubt some differences and discrepancies among these authorities, but, fairly considered, the weight of them is in favour of the conclusion I have stated. This is specially the case where the son selected for adoption and the adoptive father are of different *gotras*. There are, however, numerous texts and judgments, and *dicta* of the Indian Courts, which appear to me to throw doubt on the position that this must be taken to be the law in all cases, especially where the parties are of the same family or *gotra*.

The question, however, which I think we ought to consider as submitted to us by this reference, is not the large and general question of adoption under the Hindu Law, but whether that law, as applied and modified in the Mahratta States, is such as to require or to dispense with the religious or ritual ceremony of adoption other than the formal giving and taking. We are not, as it appears to me, to understand that the Division Bench has referred to us a general proposition of law outside the characteristic facts of the case which has given rise to this reference. Such a proposition would, in my opinion, not only be anomalous, but is beyond the competency and power of a Division Bench. Nor would it usefully serve the purpose of the referring Bench, whose object must be understood to be to obtain such an answer to their reference as would enable them to dispose of the appeal before them. The pleadings and judgments of the lower Courts are printed, and are now before us, and we must regard the reference as limited in its scope by these proceedings. It thus appears that the parties in the case are not bound by the law of adoption prevalent in Bengal, or any part of Bengal, but being Mahrattas, are entitled to have administered in their family relations and transactions the law of adoption as current and practised in the Mahratta States. So con-**[280]** sidered, it is perfectly clear to me that the *factum* of adoption, as evidenced by the form of giving and taking without any other ceremony, is all that is absolutely essential, and that therefore the Judge is right in upholding the adoption in the present case, in which the parties are of the same family or *gotra*. I may add that it appears from the authorities that a like practice of the law of adoption is generally prevalent,

(1) 2 Borr. 83.

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not only in the Mahratta States, but in Western India generally, and also in some parts of South India. This latter view appears somewhat remarkably in several judgments of the Madras Courts, especially that reported in 4 Mad. H.C. Rep. 165, where, on the authority of a judgment of Sir *T. Strange*, it is laid down that "the operative part of the ceremony appears to be the giving and receiving, the rest is a matter of customary solemnity, of decorum, of charity and conviviality, varying under different circumstances in different parts of India. * * * * * But one opinion is common to all, which is indeed frequently repeated in the late translated digest, *viz.*, that nothing of this kind is so essential to the act as, being mistaken or omitted, can have the effect of invalidating the adoption." And this ruling has been since followed in Madras. To that authority I may add a quotation from Mayne's Hindu Law (1878), p. 115:—"But when the *gotra* is the same, the performance of the *datta homam*, though proper, is not necessary for an adoption." In fact, where the child to be adopted and the adopting father are of the same *gotra* as in the present case, the law seems perfectly clear, and that law is that the *factum* of giving and taking is legally sufficient.

My answer to this reference is therefore that the giving and taking of the child is all that is essential in this case.

OLDFIELD, J.—It has not been contended before us that every ceremony prescribed for an adoption in the Dattaka Mimansa and Dattaka Chandrika is essential, but that the "*datta homam*," the "*putristu*" or sacrifice for male issue, and the repetition of the five prayers are so, and on that ground the affiliation of the adopted child can only be perfected through those ceremonies. There is no doubt that according to the text of the Dattaka Mimanasa and Dattaka Chandrika, the ceremonies they prescribe are held to be essential to render an adoption valid, but the authors of those [281] treatises make no exception in favour of any ceremony prescribed: all are alike necessary; whereas most of the ceremonies are now admitted to be of no essential importance, and this circumstance takes away from the authority of those books in favour of the necessity of the *datta homam* or other ceremony.

Nor are the grounds on which the necessity for the latter is based at all satisfactorily explained, and it is not very intelligible why the validity of an adoption for civil purposes should be dependent on ceremonies of a religious character, or why such ceremonies should be more necessary for that purpose for the higher castes than for the lower.

It is now settled law that for Sudras no ceremony, not even the *datta homam*, is required to make an adoption valid, and there seems to be no good ground for making a distinction in respect of Brahmans.

It has been alleged that the reasons why the *datta homam* and recitation of prayers are not required for Sudras is, that they are not competent to perform those ceremonies, but this can scarcely be a valid reason for dispensing with them, for those ceremonies can be performed for a Sudra by a Brahman, and indeed such a course is prescribed in Mayukha, ch. iv, s. v. 13 (*V. N. Mandlik's Translation*), p. 56:—"The *homam* with a recitation of the *mantras* is to be performed by him through a Brahman, because of the text of Parasara, *viz.*, 'He for whom a fast, a vow, a sacrifice, ablution at a holy place, silent meditation and the like are made by Brahmans, obtains their benefit."

The reason why ceremonies are not essential in the case of Sudras would seem more properly to be that they form part of the purely ceremonial law, and though their observance is prescribed on religious grounds, it is not essential for the validity of an adoption for civil purposes, and this ground would apply alike to all the castes.

Some doubt has also been thrown on the authority of the passages in Dattaka Mimansa and Dattaka Chandrika as to the essential character of the ritual, which will be seen by a reference to *Vishvanath Narayan Mandlik's* translation of the Vyavahara Mayukha, in Appendix IV, p. 509, where it is stated that the texts of *Manu*, on which the authors of Dattaka Mimansa and Dattaka Chandrika rely, for showing that a son adopted without the due performance of the [282] ritual is disqualified from inheritance, refer to the case of an adopted son who has got a legitimate brother subsequent to his adoption, and the conclusion arrived at by the authorities cited is that neither the *homam* nor any other ceremonies beyond giving and taking are essential for any of the four classes. This has been held by the Madras High Court in *Singamma* v. *Vinjamuri Venkatacharlu* (1).

The opinion of Sir *T. Strange* in the case of *Veeraperumal Pillay* v. *Naraina Pillay* is clearly stated, that "the operative part of the ceremony seems to be the giving and receiving, the rest is matter of customary solemnity, of decorum, of charity and conviviality, varying under different circumstances in different parts of India;" and the same opinion is expressed in his book on Hindu Law where he states that the sacrifice of fire is important only in a spiritual point of view with the Brahmans only; and even with regard to them, "admitting their conception in favour of its spiritual benefit, it by no means follows that it is essential to the efficacy of the rite for civil purposes; but the contrary is to be inferred; and the conclusion is, that its validity for these consists generally in the consent of the necessary parties.........the prescribed ceremonies not being essential."

In *Indromoni* v. *Behari Lal* (2) the Privy Council held that no ceremonies, not even *datta homam*, are necessary amongst Sudras, and their Lordships refer to the text of *Jaganatha* (3 Digest, 244) as laying down this broad proposition :—"The oblation to fire with holy words from the Veda is an unessential part of the ceremony: even though it be defective, the adoption is nevertheless valid;" and they observe :—"In arguing in support of this proposition he (*Jaganatha*) seems to make no distinction between Sudras and the superior castes," and they refer to the *dictum* of Lord *Wynford* in *Sootrugun Sutputty* v. *Sabitra Dye*, which was a case concerning Brahmans, that the performance of religious ceremonies is not essential to the validity of an adoption, as a statement of law in accordance with the law laid down by Sir *T. Strange* (vol. I, pp. 83, 84), and the authorities cited by him. In a more recent case—*Mahashoya Shosinath Ghose* v. *Srimati Krishna Soondari Dasi* (3)—there occurs a passage which has been referred to, to show that the due performance [283] of ceremonies is considered to be essential for the validity of an adoption among Brahmans. The case refers to the validity of an adoption by deed independently of the giving and taking the child, and their Lordships remark :—"It is perfectly clear that amongst the twice-born classes there could be no such adoption by deed, because certain religious ceremonies, the *datta homan* in particular, are in their case requisite ;" but it

(1) 4 M.H.C.R. 165. (2) 7 I.A. 24. (3) 7 I.A. 250.

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is doubtful if more was intended than to point out that such religious ceremonies are requisite as part of the purely ceremonial law, not that the validity of an adoption for civil purposes depends on their due observance.

In neither of these cases, however, was the question decided.

The case before us is one of adoption of a nephew (brother's son), and there is express authority for holding that in such a case neither the *datta homam* nor other ceremony is required in the text of *Yama*, translated in Appendix IV, p. 483, in *Mandlik's* Mayukha :—

"In the case of a daughter's son and a brother's son, the rule with regard to a sacrifice and the like does not prevail. The act of adoption is complete by a verbal gift alone. So says the holy Yama;" and if, as alleged, the object of the ceremony is to perfect affiliation of the child, it would not be needed in such a case when he is of the same *gotra* and regarded as a son (Mayukha, ch. iv, s. v). There is a decided case—*Huebut Rao Mankur* v. *Govindrao Bulwant Rao Mankur* (1)—to the effect that no ceremony is required in the adoption of a nephew.

I would reply to the reference that no ceremony is essential beyond the giving and taking of the child.

STRAIGHT, J.—With regard to the question put by this reference, I think it enough to say that I am not prepared to differ from my honorable colleague, Mr. Justice OLDFIELD'S answer thereto, in so far as it is limited to Dakhani Brahmans. There is, as he has pointed out, authority for the position that, in the case of an adoption of a nephew (brother's son) among Brahmans in that part of India, the giving and taking of the child is sufficient to perfect the adoption. Upon the larger question included in the reference, I prefer to refrain from expressing any opinion until it actually arises.

BRODHURST, J.—I concur in the above remarks of my learned colleague Mr. Justice STRAIGHT.

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6 A. 284 = 4 A.W.N. (1884) 76 = 8 Ind. Jur. 586.

[284] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

THE MUHAMMADAN ASSOCIATION OF MEERUT (*Plaintiffs*) *v.* BAKHSHI RAM AND OTHERS (*Defendants*).* [25th March, 1884.]

Parties to suit—Suit by "the Muhammadan Association of Meerut"—Civil Procedure Code, ss. 30, 535.

The "*Majlis Islamia*" or "Muhammadan Association" of Meerut instituted a suit in its own name by its secretary. *Held* that, as such Association had not *per se* any *status* in law so to sue, the suit was not maintainable.

Semble that had such Association empowered one or more of its number to act for it in the matter of the suit, in the manner provided by s. 30 of the Civil Procedure Code, the permission mentioned in that section might have been granted.

[R., 20 A. 167 (170); 14 B. 286 (287).]

THE plaintiffs in this suit were the "*Majlis Islamia*" or the "Muhammadan Association" of Meerut. They sued in the name of their secretary. This Association, as appears from its prospectus, is intended

* Second Appeal No. 1081 of 1883, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 25th April, 1883, affirming a decree of Munshi Baij Nath, Munsif of Meerut, dated the 23rd January, 1883.

(1) 2 Borr. 83.

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6 A 284 = 4 A.W N. (1884) 76 = 8 Ind. Jur. 586.

to watch the spiritual and temporal welfare of Muhammadans. One of its duties is to undertake the management of endowments the management of which the "*mutwalis*" or superintendents, may wish to transfer to the Association, to manage such endowments with special care, to realize and utilize the incomes of such endowments according to the wishes of the grantors, and to keep a vigilant and strict eye on such endowments as have not been transferred to its management. It appeared that Madara Shah was the superintendent of a mosque situate in Muhalla Shahgasa in Meerut, and he lived in a small house near the mosque. This house, together with the land in front of it, was attached in the execution of a decree for money as being the property of Madara Shah. The Muhammadan Association of Meerut sued the decree-holder and Madara Shah for a declaration that the attached property was not liable to attachment and sale in execution of a decree against Madara Shah, being property appurtenant to the mosque and granted as "*wakf*," or for religious purposes. The plaint in the suit alleged that as Madara Shah had failed to contest the attachment, and in so doing had acted in a manner inconsistent with his position as super-[285]intendent of the mosque, and every Muhammadan had an interest in *wakf* property belonging to a mosque, the plaintiffs had, at the request of the Muhammadan residents of Muhalla Shahgasa, taken the mosque and its appurtenances under their superintendence and care. Both the lower Courts dismissed the suit, the lower appellate Court holding that, if the plaintiffs were the superintendents of the mosque, the provisions of s. 539 of the Civil Procedure Code were applicable, and the sanction to sue mentioned therein not having been obtained by the plaintiffs, the suit was not maintainable, and if the plaintiffs were not such superintendents, and the suit was one under Act XX of 1863, it was not maintainable, no preliminary application having been made to institute it, as required by s. 18 of that Act.

In second appeal the plaintiffs contended that the suit was not governed by the provisions of s. 539 of the Civil Procedure Code, or of Act XX of 1863, and that in any case it should have been disposed on the merits as brought.

Shaik *Maula Bakhsh*, for the appellants.

Pandit *Nand Lal*, for the respondents.

The Court (STRAIGHT and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, J.—The pleas taken in appeal are of no value. The Muhammadan Association of Meerut has "*per se*" no *status* in law to warrant its instituting a suit in its own name by its secretary. Had its members empowered one or more of their number to act for them in the matter in the manner provided in s. 30 of the Procedure Code, it may be that the Court would have accorded the permission therein mentioned. As it is, the Association has no "*locus standi*" to maintain a suit, and that which is before us has been properly thrown out by the lower Courts. The appeal is dismissed with costs.

Appeal dismissed.

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6 A. 286 = 4 A.W.N. (1884) 77.

6 A. 286=4 A.W.N. (1884) 77.

[286] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

HARI DAS AND OTHERS (*Plaintiffs*) *v.* GHANSHAM NARAIN (*Defendant*).* [25th March, 1884.]

Act XVIII of 1873 (*N.-W.P. Rent Act*), ss. 3 (4) (*a*), 7—*Ex-proprietary tenant—Sir land—Burden of proof.*

Held that the question whether land held by a person, whose proprietary rights in a mahal had been sold in execution of a decree, while Act XVIII of 1873 was in force, was held by him as sir at the time of such sale, must be determined by that Act.

Land recorded as sir during the progress of a settlement of the district in which it is situate is not "sir land" as defined in s. 3 (4) (*a*) of Act XVIII of 1873 (N.-W.P. Rent Act). Such land does not become "sir land" within the meaning of that definition until the settlement is closed and confirmed.

Where a person, whose proprietary rights in a mahal have been sold in execution of a decree, alleges that land held by him at the time of such sale was held as sir, the burden of proof lies on him.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Mr. *T. Conlan*, the *Senior Government Pleader* (Lala *Juala Prasad*), and Munshi *Hanuman Prasad*, for the appellants.

Mr. *W. M. Colvin* and Pandit *Bishambhar Nath*, for the respondent.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment :—

JUDGMENT.

OLDFIELD, J.—The plaintiff sues to eject the defendants from 43 bighas 16 biswas and 13 dhurs of land in mauza Hasanpur, and 73 bighas 3 biswas and 10 dhurs in Nimdand, both in pargana Nathupur, on the ground that he purchased, on the 8th July, 1881, at execution sale, the proprietary right in the mauzas. The defence is that the lands were sir holding of the defendant, and he became ex-proprietary tenant of them. The first Court has held 35 bighas 5 biswas and 7 dhurs in mauza Hasanpur, and 41 bighas 3 biswas and 3 dhurs in mauza Nimdand to be sir, on the ground that it was recorded as sir at the settlement of 1873, and has since been so held; and 25 bighas 5 biswas and 15 dhurs in mauza Nimdand it considers to be sir, as the plaintiff has on former occasions admitted it to be so, and has dismissed the suit for the above [287] amounts of land in the two mauzas. The Judge in appeal affirmed the decree, and the plaintiff has appealed to this Court. We are of opinion that the grounds on which the Courts below have found that the lands in question are sir, and in consequence that the defendant became after sale an ex-proprietary tenant, are untenable. In regard to the bulk of the lands the decision rests on the fact that they were recorded as sir in the settlement of 1873. Now, the rights of the parties as to this land must be determined by Act XVIII of 1873, which was in force at the time of the execution sale. S. 3 of that Act defines sir land, and one definition is "land recorded as sir at the last settlement of the district in which it is situate and continuously

* Second Appeal No. 1034 of 1882, from a decree of H. D. Willock, Esq., District Judge of Azamgarh, dated the 19th June, 1882, affirming a decree of Rai Soti Bihari Lal, Subordinate Judge of Azamgarh, dated the 6th February, 1882.

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so recorded since;" but the settlement to which the Courts below refer was only in progress when the sale took place, its proceedings were not closed or confirmed, and any record which might have been made in 1873, prior to the sale, by the Settlement Officer cannot be considered a record of the last settlement in the meaning of the clause, but a record of a settlement then in progress, and which had not come into operation. Thus the ground on which the Courts below have held most of the land to be sir fails. It is also untenable in regard to 25 bighas 5 biswas and 15 dhurs in mauza Nimdand. We can find no admissions by the plaintiff of this land, or any other land being sir, which have the effect of estoppel, nor do we find that the plaintiff has by any conduct of his recognized the position of the defendant as a tenant of sir land.

We remand the case for a more careful decision on the question, whether the lands in dispute in this appeal were at the time of execution sale the sir holding of the judgment-debtor.

The Court will bear in mind that they can only be sir if they fall within the definition of sir land in s. 3, Act XVIII of 1873, and that the record of them as sir in the settlement proceedings in 1873 will not affect this case. Further, the Court will be good enough to inquire into each plot separately, and record separately and distinctly a finding in respect of each, instead of, as has been done, taking the lands together, and, without discrimination, making a general finding as to the whole; for the character of the holding of one plot may have no connection with that of another. It will also bear in mind that the burden of proof that the lands [288] were sir lands at the time of the execution sale rests on the defendants.

The Court will further determine the amount of mesne profits recoverable from such lands as it may hold not to be sir.

We remand the case accordingly for a decision on the issues indicated, and allow ten days for objections to be preferred to the finding on its return to this Court.

Case remanded.

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6 A. 288 = 4 A.W.N. (1884) 81 = 8 Ind. Jur. 587.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

MADAN MOHAN AND ANOTHER (*Defendants*) v. PURAN MAL AND OTHERS (*Plaintiffs*).* [8th April, 1884.]

Hindu Law—Hindu widow—Alienation with the consent of next reversioner—Right of alienees—Remoter reversioners.

An alienation by a Hindu widow of her husband's estate does not, because it is made with the consent of her daughter, the next reversioner, and in favour of the daughter's sons, the heirs presumptive, so far as remoter reversioners are concerned, pass anything more than the widow's interest in such estate. *Ramphal Rai* v. *Tula Kuari* (1), followed.

[D., 9 A. 441 (444).]

THE plaintiffs in this suit were the sons of Udaiti Kuar, who was the daughter of Sita who was the widow of Jaisuk Rai, deceased. On her

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* First Appeal No. 5 of 1883, from a decree of Maulvi Muhammad Abdul Qayam Khan, Subordinate Judge of Bareilly, dated the 13th September, 1882.

(1) 6 A. 116.

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husband's death, Sita, obtained possession of two villages left by him. With the consent of her daughter she made a gift of these villages to her daughter's sons, the plaintiffs. On application being made for mutation of names, the defendants, who alleged that the villages were not the separate property of Jaisuk Rai, and Sita was in possession of them, not as his heir, but by way of maintenance, and claimed to be entitled to possession on Sita's death as the heirs to Jaisuk Rai, objected, and their objections were allowed, and mutation of names was refused. Thereupon the plaintiffs brought the present suit to establish their proprietary right to the villages, and for possession thereof, by virtue of the deed of gift. The main defence to the suit was, that Sita had acquired possession of the villages by way of maintenance only and had not acquired them by right of inheritance to the separate property of her deceased husband, and therefore she had no power [289] to alienate them. The Court of first instance held that the villages had formed the separate property of Jaisuk Rai, and Sita had acquired them by right of inheritance, and not by way of maintenance, and gave the plaintiffs a decree as claimed. The defendants appealed, contending *inter alia*, that if the plaintiffs were entitled to a decree, they were not entitled to one establishing their absolute proprietary title to the villages.

Mr. *C. H. Hill*, Mr. *T. Conlan*, and Pandit *Sundar Lal*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondents.

The judgment of the Court (OLDFIELD and BRODHURST, JJ.), so far as it related to this contention, was as follows :—

JUDGMENT.

OLDFIELD, J.—This contention is valid. Sita could only give her life-interest as a Hindu widow in the estates, and the circumstance that her daughter, the next reversioner, did not object to the gift, or that the gift was made in favour of the presumptive heirs, her daughter's sons, will not enlarge the title she could confer to the prejudice of the defendants, the remoter reversioners—*Ramphal Rai* v. *Tula Kuari* (1). The decree will be so far modified as to declare that the gift only passed the donor's life-interest without prejudice to any reversionary rights which the defendants may make good.

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6 A. 289 = 4 A.W.N. (1884) 86 = 8 Ind. Jur. 588.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

MAKHAN LAL (*Petitioner*) *v.* GULZARI MAL AND OTHERS (*Opposite parties*).* [9th April, 1884.]

Insolvent judgment-debtor—Civil Procedure Code, s. 344—Application to be declared an insolvent—Application not in accordance with law—Rejection of application.

When an application to be declared an insolvent, under s. 344 of the Civil Procedure Code, was preferred, the requirements of that section had not been fulfilled, as the applicant had not been arrested or imprisoned in execution of a

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* First Appeal No 156 of 1883, from an order of C. J. Daniell, Esq., District Judge of Moradabad, dated the 22nd September, 1883.

(1) 6 A. 116.

decree for money, nor had his property been attached in execution of such a decree. Eleven days after the application had been preferred the applicant's property was attached in execution of such a decree. One of the creditors subse-[290] quently objected to the application on the ground that when it was preferred the requirements of s. 344 had not been fulfilled. *Held* that the application should not on that ground have been dismissed.

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APPELLATE CIVIL.

6 A. 289 = 4 A W N. (1884) 86 = 8 Ind Jur. 588.

THIS was an appeal from an order rejecting an application under s. 344 of the Civil Procedure Code to be declared an insolvent. It appeared that Bittan Das, one of the creditors of the applicant, Makhan Lal, had brought a suit against Makhan Lal, in the course of which he applied under Chap. XXXIV of the Civil Procedure Code, for the attachment of property belonging to Makhan Lal, and property belonging to the latter was attached. On the 14th June, 1883, Makhan Lal made the application under s. 344 of the Code, to be declared an insolvent, out of which this appeal arose. On the 25th June an order was made in execution of the decree which Bittan Das had obtained against Makhan Lal, in the suit mentioned above, for the attachment of the property which had been attached before judgment, and had remained under attachment. The District Court, after hearing the application of Makhan Lal to be declared an insolvent, on the 22nd September rejected it, on the ground, amongst others, that when it was made the applicant had not been arrested in execution of a decree, nor had his property been attached in execution of a decree, and the application was therefore not made according to the provisions of s. 344 of the Code. This objection to the application was raised by one of the 38 creditors who opposed the application.

The applicant appealed to the High Court, contending, *inter alia*, that the District Court had improperly refused to summon his witnesses and allow the production of his documentary evidence.

Munshi *Hanuman Prasad* and Munshi *Kashi Prasad*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), Pandit *Bishambar Nath*, Pandit *Nand Lal*, Babu *Jogendro Nath Chaudhri*, and Mir *Zahur Hussain*, for the respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgments :—

JUDGMENTS.

OLDFIELD, J.—It is not at this stage of the case a sufficient ground for dismissing the application that it was not at the time it was filed properly admissible under s. 344, Civil Procedure Code.

[291] It is true that on the 14th June, 1883, when the application was filed, the requirements of s. 344 were not fulfilled, since the petitioner had not been arrested or imprisoned in execution of a decree for money, nor had an order of attachment against his property been made in execution of such a decree ; but it appears that his property had been attached under Chap. XXXIV before judgment, at the instance of one Bittan Das, and continued under attachment after Bittan Das obtained a decree, and was under attachment when the application was made, and subsequently an order for attachment of his property in execution of the decree was made on the 25th June, 1883. So that eleven days after the application had been filed, there was an attachment of property in execution of a decree, and any defect under s. 344 existing when petitioner applied had been cured, and further no such defect was existent when objection was taken by the creditor on that ground. It had become a purely technical objection when the Judge disposed of the application in September, 1883, and should

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have been no ground for dismissal, particularly as the Judge had inquired into the merits of the application. In the same way it should not be made a ground for dismissing the application summarily in appeal, after the Judge had dealt with the application under Chap. XX on the merits. As, however, the inquiry has been defective and the Judge has not allowed the applicant any proper opportunity for establishing his case, I would reverse his order and remand the case for proper inquiry and disposal: costs to be costs in the cause.

BRODHURST, J.—On the 14th June, 1883, Makhan Lal, the present appellant, applied under s. 344 of the Civil Procedure Code to be declared an insolvent. His application was opposed by thirty-eight creditors, and on the 22nd September the Judge disposed of the case and concluded his judgment as follows:—"As I am of opinion that the applicant has shown himself to have contracted debts recklessly; to have disposed of some of his property to the advantage of some of his creditors; and as on the point of law urged by one creditor I am of opinion that this application is not made according to the provisions of s. 344, Act XIV of 1882, I refuse the application with costs."

If the application had, immediately on its being filed, been rejected by the Judge, on the ground that the applicant had not [292] been arrested or imprisoned in execution of a decree for money, nor had an order of attachment against his property in execution of such a decree been made, the Judge's order would, I consider, in that case have been both legal and unobjectionable; but under the circumstances stated by my learned colleague, I agree with him in thinking that this preliminary objection that was taken by one only of the numerous creditors was not a good ground for refusing the application more than three months after it had been filed; and as the inquiry on the merits has been defective, I concur in reversing the Judge's order, and in remanding the case for redisposal after further and sufficient inquiry.

Case remanded.

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6 A. 292 = 4 A.W.N. (1884) 89 = 8 Ind. Jur. 589.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

AMRIT LAL AND ANOTHER (*Defendants*) *v.* MADHO DAS AND OTHERS (*Plaintiffs*).* [17th April, 1884.]

Civil Procedure Code, s. 623—Review of judgment—Grounds of admission—Alteration of law.

A lower Court admitted a review of judgment on the ground that the decision of a Divisional Bench of the High Court, which it had followed in that judgment, had subsequently been overruled by the Full Bench. *Held* that the lower Court was not authorized to admit a review of judgment on such ground.

[F., U.B.R. Civil (1892–1896) 153; R., 13 K.L.R. 133; D., 11 C.P.L.R. 41 (42); 124 P.R. 1906 = 97 P.L.R. 1907.]

THIS was an appeal from an appellate decree made on a review of judgment. The question raised by the appeal was whether the application for review had been properly admitted. The plaintiffs in the suit were

* Second Appeal No. 1173 of 1883, from a decree of G. E. Knox, Esq., District Judge of Mirzapur, dated the 30th May, 1883, affirming a decree of Munshi Madho Lal, Munsif of Mirzapur, dated the 30th June, 1882.

1884 APRIL 17. — APPELLATE CIVIL. — 6 A 292 = 4 A.W.N. (1884) 89 = 8 Ind. Jur. 589.

the proprietors of certain fields, of which the defendant, Sheojatan was the tenant. On the 11th March, 1881, the defendant Sheojatan gave the defendant Sheopal a usufructuary mortgage of the fields. The plaintiffs sued the defendants to set aside this mortgage on the ground that the defendant, Sheojatan, held the fields as an occupancy-tenant, and as such was not competent to transfer them. The defence to the suit was, that the fields were held by the defendant Sheojatan as a tenant at fixed rates, and as such he was legally entitled to transfer them; and that, even if he were only an occupancy-tenant of the fields, he was entitled by virtue of local custom to mortgage them. The Court of first instance (Munsif) found, as regards the nature of the defendant Sheo-[293]jatan's tenure of the fields, that he held some of them as a tenant at fixed rates, and the rest as an occupancy-tenant. As regards the power of an an occupancy-tenant of land situated in the locality of the land in suit to mortgage, the Court of first instance found that the custom set up was not proved. With reference to these findings, the Court of first instance gave the plaintiffs a decree in respect of the fields held by the defendant Sheojatan as an occupancy-tenant, and dismissed the suit in respect of the rest of the fields.

The plaintiffs appealed, and the defendant Sheopal also appealed. The lower appellate Court (District Judge), on the 5th March, 1883, dismissed the appeal of the plaintiffs, and decreed that of the defendant, and dismissed the suit of the plaintiffs, having regard to the ruling of the High Court in S.A. No. 174 of 1882, decided the 3rd July, 1882 (1), that a usufructuary mortgage by an occupancy-tenant of his holding was not a "transfer" thereof within the meaning of s. 9 of the N.-W.P. Rent Act, 1873. It did not determine in either of the appeals whether the fields, in respect of which the appeals were respectively preferred, were held by Sheojatan as an occupancy tenant or a tenant at fixed rates, such determination being unnecessary in its opinion in view of the ruling cited above. On the 15th May, 1883, the plaintiffs applied for a review of judgment in both cases on the following grounds:—"It has been ruled on the 21st March, 1883, in *Ganga Din* v. *Dhurandhar Singh* (2) that a usufructuary mortgage made by an occupancy-tenant is a transfer prohibited by s. 9 of the Rent Act, and the decision on which the judgment of this Court in the present case proceeded has thereby become void. The said ruling was published in the *Weekly Notes* on the 2nd April, 1883. The applicants had no knowledge thereof till then, and they came to know of it after the case had been disposed of. As this is a new discovery contemplated by s. 623, cl. (*c*) of Act XIV of 1882, the applicants hereby pray judgment." The District Judge admitted a review of judgment in both cases, relying on *Allad Monee Dossia* v. *Joy Sankur Roy* (3). Finding that the fields which the Munsif had decided were held by the defendant Sheojatan as a tenant at fixed rates were not so held by him, but, on the contrary, [294] were held by him as an occupancy-tenant, it decreed the appeal of the plaintiffs; and finding that the fields which the Munsif had decided were held by that defendant as an occupancy-tenant were so held by him, dismissed the defendant Sheopal's appeal.

Sheopal appealed to the High Court, contending, *inter alia*, that "the order admitting the review is bad in law, as no subsequent ruling can be made a ground for reviewing a prior decision: the party against

(1) Weekly Notes (1882) 138. (2) 5 A. 495. (3) 7 W.R. 408.

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whom the decision was passed was at liberty to appeal to a higher tribunal." During the pendency of the appeal Sheopal died, and his sons were substituted as appellants.

Pandit *Ajudhia Nath* and Munshi *Kasi Prasad*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment :—

JUDGMENT.

OLDFIELD, J.—The Judge was not authorized to admit a review of judgment on the ground that a subsequent Full Bench ruling of the High Court contained an exposition of the law contrary to that which prevailed at the time when the decision sought to be reviewed was passed ; and on a reference to the case decided by the Calcutta High Court to which he refers, we do not find that it supports him.

In that case—*Allad Monee Dossia* v. *Joy Sunkur Roy* (1), the review of judgment was admitted on the ground of the discovery of new evidence, and in the *interim* the decision of the Full Bench on the point of law had been passed, and it was held that it governed the decision of the case on review.

That is very different to admitting a review of judgment on the ground that it was made on a view of the law which the Full Bench of the Court may have since declared to be erroneous.

We set aside the Judge's decree, and restore his original decree with costs.

Appeal allowed.

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6 A. 295 = 4 A.W.N. (1884) 90.

[295] APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

LODHI SINGH AND ANOTHER (*Plaintiffs*) *v.* ISHRI SINGH (*Defendant*).* [21st April, 1884.]

Jurisdiction—Act XII of 1881 *(N.-W. P. Rent Act), ss.* 36, 40, 95 *(f)*, 206, 207, 208—*Transfer of appeal to Subordinate Judge — Civil Procedure Code*, s. 13—Res judicata.

A Subordinate Judge, to whom an appeal is transferred under the Bengal Civil Courts Act (VI of 1871), has not the power to dispose of it in the manner provided by ss. 206, 207 and 208 of the N.-W.P. Rent Act, 1881 : the District Judge alone has the power to dispose of appeals in that manner. *Ram Prasad* v. *Rai Kishen* (2), followed.

The plaintiffs, who claimed to be tenants of certain land under a lease from the zamindar, alleging that the defendant was their sub-tenant, under s. 36 of the N.-W.P. Rent Act, 1881, caused a notice of ejectment to be served upon the latter under the provisions of that Act. The defendant did not make an application under that Act contesting his liability to be ejected, and the plaintiffs applied under ss. 40 and 95 *(f)* of that Act for assistance to eject him. The Revenue Court trying this application rejected it on the ground that the defendant was not a sub tenant of the plaintiffs, but a co-sharer in their tenancy. The

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* Second Appeal No. 1350 of 1883, from a decree of Babu Ram Kali Chaudhari, Subordinate Judge of Allahabad, dated the 20th July, 1883, reversing a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 10th February, 1883.

(1) 7 W. R. 408. (2) 6 A. 36.

plaintiffs thereupon sued the defendant in the Civil Court for a declaration that the latter was not a partner with them in the lease, and for possession of the land by his ejectment therefrom.

Held, that the relief sought in the suit by the plaintiffs was not one which a Revenue Court could give under any of the clauses of s. 95 of the Rent Act, which presupposes an admitted relation of landholder and tenant: and therefore the determination by the Revenue Court of the plaintiffs' application for ejectment of the defendant was not the decision of a Court competent to try the suit, and was no bar to its maintenance in a Civil Court, within the principle of s. 13 of the Civil Procedure Code.

THE plaintiffs in the suit in which this second appeal arose alleged that they were the tenants of certain land in a certain village under a lease granted to them by the zamindars of the village ; that for some years the defendant had been their sub-tenant in respect of a portion of the land : and that the defendant had denied that he was their sub-tenant, and alleged that he was holding jointly with them under the lease. Upon these allegations the plaintiffs brought the suit in the Civil Court for a declaration that the defendant was not a co-sharer with them in the lease and for possession of the land.

It appeared that before bringing the suit the plaintiffs had, under s. 36 of the N.-W.P. Rent Act, 1881, caused a notice of [296] ejectment to be served on the defendant under the provisions of that Act. The defendant did not make an application under that Act contesting his liability to be ejected ; and the plaintiffs applied, under s. 40 and s. 95 (*f*) of the same Act, for assistance to eject him.

The Revenue Court trying this application, on the 12th June, 1882, rejected it on the ground that the defendant was not a sub-tenant of the plaintiffs, but a co-sharer in their tenancy.

The defendant set up as a defence to the suit, *inter alia*, that it was not cognizable in the Civil Courts, and that he was a co-sharer with the plaintiffs in the tenancy of the land, and not their sub-tenant. The Court of first instance (Munsif) found that the defendant was a sub-tenant of the plaintiffs, and gave them a declaratory decree to that effect, dismissing the suit as regards the claim for possession on the ground that a claim for the ejectment of a tenant was cognizable only in the Revenue Courts.

The defendant appealed to the District Judge on the ground, among others, that the suit was not cognizable in the Civil Courts. The appeal was transferred for disposal to the Subordinate Judge, under the Bengal Civil Courts Act (VI of 1871). The Subordinate Judge disallowed the ground of appeal mentioned above, observing that it was not necessary to consider it, " for it having been taken in the lower Court, this Court is required by the provisions of s. 207 of the Rent Act to dispose of the appeal, as if the suit had been instituted in the right Court." It was further contended on behalf of the defendant that the question whether the defendant was a sub-tenant of the land or a co-sharer in the tenancy-in-chief was *res judicata*, the Revenue Court having already decided that question, and being competent to decide it. The Subordinate Judge allowed this contention, and holding that the determination of the suit was barred by s. 13 of the Civil Procedure Code, set aside the decree of the Munsif, and dismissed the whole suit of the plaintiffs. The plaintiffs appealed to the High Court.

Mr. *J. Simeon* and Munshi *Hanuman Prasad*, for the appellants.

Mr. *Shivanath Sinha*, for the respondent.

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APRIL 21.

APPELLATE CIVIL.

6 A. 295 = 4 A.W.N. (1884) 90.

[297] The Court (STRAIGHT, Offg. C. J. and MAHMOOD, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—The decision of the Subordinate Judge cannot be sustained. In the first place he was in error in thinking that, assuming the suit to be exclusively cognizable by a Revenue Court, it was competent for him as Subordinate Judge to hear it in appeal, because the objection to the jurisdiction had been taken in the Court of first instance. As was pointed out in *Ram Prasad* v. *Rai Kishen* (1), the District Judge alone has the power to dispose of appeals in the manner provided by ss. 206, 207 and 208 of the Rent Act. The Subordinate Judge, however, does not appear to have committed himself to any definitive opinion upon the question as to whether the suit was one for the Revenue or the Civil Court, and we therefore treat his judgment as passed in appeal in a civil suit, and deal with it upon that basis. The Subordinate Judge was wrong in holding that the decision in the former proceeding between the plaintiffs and the defendant in the Revenue Court for the ejectment of the latter from the land to which the present suit relates, made the claim now put forward by the plaintiffs *res judicata*. The relief sought by them in this litigation virtually is to have it declared that the defendant is not a partner with them in the lease they hold from the Zamindar, and for possession of the land by his ejectment therefrom. It was not a relief a Revenue Court could give under any of the clauses of s. 95 of the Rent Act, which presupposes an admitted relation of landholder and tenant. The determination by the Revenue Court, therefore, of the plaintiff's application for ejectment of the defendant in June 1882 was not the decision of a Court competent to try the present suit, and is no bar to its maintenance in a Civil Court, within the principle of s. 13 of the Civil Procedure Code. The appeal is decreed, and the case remanded to the lower appellate Court for disposal on the merits under s. 562 of the Code.

Appeal allowed.

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6 A. 298 = 4 A.W.N. (1884) 97.

[298] APPELLATE CIVIL.

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

JHABBU' RAM AND OTHERS (*Plaintiffs*) *v.* GIRDHARI SINGH AND ANOTHER (*Defendants*).* [24th April, 1884.]

Mortgage—Usufructuary mortgage—Right of mortgagee to sue for mortgage money—Act IV of 1882 (Transfer of Property Act), s. 68 (b) and (c).

A usufructuary mortgagee, to whom possession of the mortgaged property had been delivered, sued the mortgagor for the mortgage-money on the ground that the mortgagor had sold a part of the mortgaged property, and the purchaser had deprived him of possession of such part. One of the conditions inserted in the deed of mortgage was that if "on the part of the mortgagor, or other persons any kind of dispute or any interference or obstruction took place in obtaining of possession by the mortgagee of the mortgaged property," the mortgagee should be entitled to sue for the mortgage-money.

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* Second Appeal No. 1358 of 1883, from a decree of Shah Rahat Ali, Additional Subordinate Judge of Ghazipur, dated the 26th June, 1883, affirming a decree of Maulvi Muhammad Aziz ul-Rahman, Munsif of Sayyidpur, dated the 3rd March, 1883.

(1) 6 A. 36.

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Held, that such condition contemplated the case of the mortgagor in the first instance, in breach of the conditions of the mortgage, failing to deliver possession to the mortgagee, or to secure his possession from any obstruction or disturbance by other persons, but not the case of the mortgagee being deprived of possession after it had been once obtained and secured, and therefore the mortgagee was not entitled by virtue of such condition to sue for the mortgage-money.

Held, further, that the mortgagee's case being that he had been deprived of possession of a part of the mortgaged property, he would be entitled to sue for the mortgage-money only if he had been deprived thereof by or in consequence of the wrongful act or default of the mortgagor, and not if he had been deprived thereof by or in consequence of the wrongful act or default of other persons; that the sale by the mortgagor was not a wrongful act, there being no condition against alienation, and the sale by a mortgagor of his equity of redemption not being rendered wrongful or unlawful by any rule of law, nor being in itself a wrongful act; that a wrongful act by the purchaser, though committed under colour of the purchase, could not be said to have taken place "in consequence of the wrongful act or default of the mortgagor;" and that therefore the mortgagee had no cause of action.

[R., 11 A. 367 (371); A.W N. (1892) 66; 6 Bom. L.R. 288 (289); D., 16 A. 318 (323) (F.B.); A.W.N. (1901) 52.]

THIS was a suit by usufructuary mortgagees for the mortgage-money. The mortgage was dated the 15th January, 1875, and by its terms the defendants mortgaged to the plaintiffs their zamindari share in a certain village, with possession, for a term of fifteen years, under the express stipulation that the principal and interest of the mortgage was to be paid off from the usufruct of the mortgaged property, and that the mortgage would thus be extinguished at the end of Jeth 1297 fasli (1890), without the necessity of any [299] account of interest or mesne profits being taken between the parties. It was admitted that the plaintiffs were duly placed in possession under the mortgage. The present suit was commenced by them on the 9th January, 1883, on the allegation that a *bagh* (grove), forming part of the mortgaged property, had been sold by the defendants to Bhajan Singh and others, who at the beginning of 1879 wrongfully obtained possession of the same; that in November, 1882, the defendants wrongfully ousted the plaintiffs from the whole share; that these acts, being in breach of the terms of the mortgage, entitled the plaintiffs, under a clause in the mortgage-deed, to sue for the money due on the mortgage by enforcement of lien against the mortgaged property. This clause will be found stated in the judgment of the High Court.

The defendants resisted the suit on the ground that the *bagh* in question was not included in the mortgage; that the sale thereof did not therefore afford a cause of action to the plaintiffs; that the allegation of the plaintiffs as to their ouster by the defendants from the mortgaged zamindari share was untrue; and that the suit was therefore not maintainable.

Both the lower Courts concurred in dismissing the suit on the ground that the mortgage did not cover the *bagh* in question, as the mortgage-deed was silent about it, and it could not be regarded as included in the zamindari rights mortgaged to the plaintiffs; that the sale of the *bagh* therefore did not contravene the terms of the mortgage; and that the defendants had not dispossessed the plaintiffs from the mortgaged zamindari share.

In second appeal the plaintiffs contended that the lower Courts had misconstrued the terms of the mortgage-deed in holding that the *bagh* was not included in the mortgage, since a *bagh* situate within the area of

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a village ordinarily appertains to the zamindari; that the lower appellate Court should therefore have gone into the question whether the plaintiffs had been wrongfully ousted from the *bagh* by Bhajan Singh and others, purchasers from the defendants; and that under the terms of the mortgage-deed the plaintiffs were entitled to the relief which they prayed for.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellants.

[300] Babu *Jogindro Nath Chaudhri*, for the respondents.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

JUDGMENT.

MAHMOOD, J.—The clause in the mortgage-deed, whereon prayer for relief is based, may be thus literally translated:—"If on the part of us, executants, or other persons, any kind of dispute, or any interference or obstruction, takes place in the obtaining of possession by the mortgagees over the mortgaged property, then in that case the bankers (mortgagees) will, at all events, have the power, without waiting for (the expiry of) the term of the mortgage, to realize from our persons and moveable and immoveable property, and also from our mortgaged property, the principal money, together with interest at Re. 1-8-0 per cent. per mensem, by instituting a suit, or by any other means possible, and then neither we nor our heirs shall have any objection."

The mortgage-deed does not expressly refer to *baghs*, though it mentions zamindari rights in general, and there is room for doubt whether its terms were intended to apply to the *bagh* in question. But in view of the terms of the above-quoted clause, which we have examined in the original Hindustani, it is unnecessary for us to determine the question. The expression *dakhalyabi*, دخليابي (which is a compound of an Arabic word *dakhal* دخل which means possession, and a Persian word *yabi* يابي which is equivalent to obtaining) cannot be taken to mean *continuance of possession*, as the proper word for that in Hindustani would be *mudakhilat* مداخلت or perhaps *dakhl* دخل, and the context shows that the clause only aimed at providing for the not uncommon contingency of the mortgagor not placing the mortgagee in possession, notwithstanding the usufructuary nature of the mortgage. Now, it is admitted by the plaintiffs themselves that, in accordance with the terms of the mortgage, the defendants did place them in possession of the property, and that they continued in such possession undisturbed up to 1879, when the *bagh* is said to have been sold. The question then is whether, by reason of such sale and the alleged dispossession of the plaintiffs, they are entitled by virtue of the covenant to sue for the mortgage-money.

[301] We are of opinion that the question must be answered in the negative. Not only is this conclusion justified by the precise meaning of the words of the deed, but also by the circumstance that the terms of the mortgage were such as would render accounts unnecessary; and it is improbable that the parties contemplated that disturbance of possession long after the mortgage, and after the mortgagees had for some years been taking the entire usufruct, should render the mortgage-money with

interest recoverable. The reference in the covenant to "other persons" also confirms this view, for while the mortgagors could undertake to *deliver* possession to the mortgagees, and to *secure* them in such possession when the mortgage was effected, they could not undertake to make themselves responsible for subsequent disturbance of possession by strangers. In other words, we hold that the clause contemplated such conditions as are described in cl. (*c*) of s. 68 of the Transfer of Property Act—conditions which, under the long-established rule of mortgages in India, render the mortgage-money recoverable when, in the *first instance*, the mortgagor, in breach of the conditions of the mortgage, fails to deliver possession to the mortgagee, or to secure his possession from any obstruction or disturbance even by "*any other person*"—an expression the use of which both in the covenant of the mortgage-deed and in the clause of the section is noticeable. The circumstances which the plaintiffs allege in this case as their cause of action constitute neither failure to *deliver* possession nor failure to *secure* the mortgagee in possession, but *subsequent deprivation* of possession after it has been once obtained and secured; in other words, the circumstances mentioned in cl. (*b*) of s. 68 of the Transfer of Property Act, from which clause the phrase "or any *other person*" is significantly absent.

The appellants' case, therefore, being one in which the cause of action alleged is *deprivation* of possession, they would, under the rule formulated by the Legislature in the clause just referred to, have the right to sue for the mortgage-money, only if they could show that they have been "*deprived* of the whole or part of their security by, or in consequence of, the wrongful act or default of the *mortgagors*, and, for the reasons already given, the "wrongful act or default" of "any other person" would not entitle them to such remedy when the nature of the mortgage is such as in this case.

[302] Now, the wrongful act of the defendants-mortgagors alleged in this case is, that in contravention of the terms of the mortgage they sold their rights in the *bagh* to Bhajan Singh and others, and that in consequence of such sale the purchasers have ousted the plaintiffs from the *bagh*. There is no covenant against alienation in the mortgage-deed, and there is no rule of law which would render wrongful or unlawful the sale of such rights as the plaintiffs had in the *bagh*, even if the *bagh* be taken as included in the plaintiffs' mortgage. If the *bagh* was included in the mortgage, the rights conveyed by the defendants to Bhajan Singh and others would, of course, be subject to the conditions of the plaintiffs' mortgage, and if the purchasers under such conveyance took upon themselves to disturb the plaintiffs' possession, the remedy of the latter lay against the purchasers; but the plaintiffs cannot hold the defendants-mortgagors responsible for the wrongful act of third persons. We cannot hold that when a mortgagor, whose property is subject to a usufructuary mortgage, sells his equity of redemption, he can be considered, in the eye of the law, to have done a wrongful act; nor can we hold that any wrongful act of such purchaser against the mortgagee, even though committed under colour of the purchase, can be said to have taken place "in consequence of the wrongful act or default of the mortgagor." For these reasons we hold that the circumstances alleged by the plaintiffs in connection with the *bagh* do not constitute a cause of action, such as would entitle them to the relief they pray for, their allegation that the defendants-mortgagors had ousted them from the mortgaged *share* having been found by the lower Courts to have been untrue.

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In order to guard against being misunderstood, we wish to add that we have not referred to the Transfer of Property Act, as if, oblivious of s. 2 of that Act, we regarded the enactment as governing the present case; but because we hold that the rules referred to by us were well recognized long before 1882 when the Act was passed, and the Act formulates these rules in precise and convenient language. We dismiss the appeal with costs.

Appeal dismissed.

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6 A. 303 = 4 A.W.N. (1884) 92.

[303] APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

JAIJIT RAI, BY HIS GUARDIAN PARBATI KUAR (*Plaintiff*) *v.* GOBIND TIWARI AND ANOTHER (*Defendants*).* [24th April, 1884.]

Mortgage—Redemption — Usufructuary mortgage—Accounts — Government revenue—Mode of taking accounts—Annual rests—Surplus receipts—Wrongful payments by mortgagee—Act IV of 1882 (*Transfer of Property Act*), *s.* 76 (*c*) *and* (*h*).

By the terms of a usufructuary mortgage, it was provided that the annual profits of the mortgaged property should be taken to be a certain amount; that out of this amount the revenue should be paid annually by the mortgagee; that the balance should be taken by the mortgagee as representing interest on the principal amount of the mortgage-money; and that the mortgage should be redeemed on payment of the principal of the mortgage-money in a lump sum. It was further provided that the mortgagor should not be entitled to claim mesne profits nor the mortgagee to claim interest.

J, alleging that he had purchased the equity of redemption of the mortgaged property in 1869; that since the purchase the mortgagee had not paid any revenue and therefore he, *J*, had been compelled to pay it; and that consequently the mortgage-money had been paid out of the profits of the mortgaged property and a surplus was due, sued the original mortgagor and the mortgagee for possession by redemption of the mortgaged property, and for surplus profits, or for possession of the mortgaged property on payment of any sum which might be found due. One of the defences to the suit was that the mortgage had already been redeemed in 1877 by the original mortgagor, and the suit was therefore not maintainable.

Held (i) that, assuming that such redemption had taken place, that fact could not prejudice the plaintiff's rights arising out of the mortgage, whatever the effect of such redemption might be as between the original mortgagor and the mortgagee, and such redemption was therefore not a bar to the suit; (ii) that the plaintiff was entitled to take into account the amount of revenue which he had been compelled to pay by reason of the mortgagee's default; (iii) that in the accounting the plaintiff was entitled to avail himself of annual rests; and (iv) that the mortgagee, having had notice of the plaintiff's purchase, any payments which he might have made to the original mortgagor on account of revenue after the purchase were improperly made, and could not be taken into account against the plaintiff.

[F., 6 Ind. Cas. 503 (504); R., 7 A.L.J. 787 (789); 7 Ind. Cas. 293 (294).]

THIS was a suit for redemption of a mortgage of certain land in a village called Lachminpur. This land was mortgaged by Bhagwan Singh, through whom the plaintiff claimed, on Katik Sudi 9th, 1272 fasli (6th November, 1864), to Gobind Tiwari, one of the defendants in the suit. Under the terms of the mortgage the annual profits of the land were

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* Second Appeal No. 1311 of 1883, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 26th May, 1883, affirming a decree of Maulvi Saiyid Asghar Ali, Munsif of Deoriya, dated the 21st December, 1882.

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estimated to be Rs. 65-10-6, out of which the mortgagee was to appropriate Rs. 42-6-6 as interest at 12 per cent. per annum on the mortgage-money, and to pay [304] Rs. 23-3 as the amount of *jama* payable as Government revenue for the land. The mortgage was to be redeemed on payment of the principal mortgage-money at the end of the month of Baisakh of any year. Under the terms of the mortgage Gobind Tiwari was placed in possession.

Out of the 1-anna share of Bhagwan Singh in Lachminpur in which the land in suit was included, a 6-pie share was sold on the 20th February, 1868, in execution of a decree held against him by one Nanhar Rai, and was purchased by the latter. The sale was confirmed on the 16th April, 1868, and a certificate of sale granted to the purchaser on the 8th July, 1868.

On Phagun Sudi 13th, 1276 fasli (24th February, 1869), Nanhar Rai, auction-purchaser, executed a deed of sale, whereby he conveyed the 6-pie share purchased by him to Bharat Rai, father of the plaintiff. Similarly Bhagwan Singh sold his remaining 6-pie share to Bharat Rai, under a deed of sale, dated Chait Sudi 14th, 1276 fasli (27th March, 1869). Bharat Rai thus became the owner of the rights of Bhagwan Singh, *i.e.*, of his equity of redemption in the entire 1-anna share, and he was represented in this suit by his son, the plaintiff.

The suit from which this appeal arose was instituted originally against Gobind Tiwari alone, on the allegation that ever since the purchase of the rights of Bhagwan Singh by the plaintiff's father, the defendant-mortgagee, whilst continuing to remain in possession of the mortgaged land, had never paid the annual sum of Rs. 23-3 *jama* either to Government or to the plaintiff's father; that on account of such default, the latter, and after his death the plaintiff, had had to pay the *jama* to Government; that the defendant had therefore appropriated the entire profits of the mortgaged land; that the money due on the mortgage was thus paid off, leaving a surplus of Rs. 308-4 due to the plaintiff. On these allegations the plaintiff prayed for possession of the mortgaged land by redemption of the mortgage, and for Rs. 308-4, together with future interest and mesne profits, and as an alternative prayer, he offered to pay to the mortgagee such sum as might still be found due on the mortgage.

[305] The suit was resisted by Gobind Tiwari, mortgagee, on the ground that the purchase of Bhagwan Singh's rights, whereon the plaintiff relied, was fictitious; that neither the plaintiff nor his father ever obtained possession of those rights; that Bhagwan Singh, notwithstanding the sale of his rights, continued to remain in possession; that the plaintiff's title had therefore expired by lapse of the period of limitation; that the terms of the mortgage did not entitle the plaintiff to set off the annual sum of Rs. 23-3-0 against the mortgage-debt; that the claim for Rs. 308-4-0 surplus was therefore untenable, and moreover barred by three years' limitation; that, as a matter of fact, the Rs. 23-3-0 *jama* was regularly paid by the defendant-mortgagee to Bhagwan Singh, the original mortgagor; that in Jaith 1284 fasli (1877) the said mortgagor having redeemed the mortgage on payment of Rs. 354 (principal mortgage-money), obtained possession of the mortgaged land and was still in possession; that the defendant-mortgagee therefore had no concern with the present dispute, and the suit could not be disposed of without impleading Bhagwan Singh, the original mortgagor, in actual possession of the land.

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Upon these pleas being considered, the Court of first instance, proceeding under s. 32 of the Civil Procedure Code, added Bhagwan Singh as a defendant to the suit. The defence set up by Bhagwan Singh supported the defence set up by Gobind Tiwari, mortgagee, so far as that defence related to the want of title in the plaintiff by reason of the fictitious nature of the purchase, the continuance of Bhagwan Singh's possession, and the redemption by him in Jaith 1284 fasli (1877).

The Court of first instance held that the purchase by the plaintiff's father of the rights of Bhagwan Singh was neither fraudulent nor fictitious; that under that purchase the plaintiff's father, and after him the plaintiff, held proprietary possession of those rights; that the allegation as to the continuance of Bhagwan Singh's possession was not true; that the statement as to the redemption by him of the mortgage in 1877 on payment of the mortgage-money was totally untrue and made in collusion with Gobind Tiwari, the mortgagee; that even if the defendant-mortgagee's statement as to the regular payment by him of the annual sum of Rs. 23-3-0 to Bhagwan Singh be accepted, such payment must be regarded **[306]** as improperly made; that from the time of his purchase the plaintiff's father (and after him the plaintiff) continued to pay Government revenue, and therefore he, and not Bhagwan Singh, was entitled to the sum. But whilst determining these points in favour of the plaintiff, the Court of first instance held that the terms of the mortgage did not permit repayment of the mortgage-debt from the usufruct of the mortgaged property; that the annual sum of Rs. 23-3-0 *jama* could not therefore be set off against the money due on the mortgage; that the plaintiff's proper remedy was to have sued for that sum annually in the Revenue Court; that he having failed to do so, and the time for such remedy having expired, the sum could not be taken into account in a redemption suit like the present. As a result of these findings the Court dismissed the suit on the ground that "when the mortgagee himself admits the receipt of the mortgage-money, and that he allowed the property to be redeemed from mortgage, the plaintiff's claim for possession by redemption of mortgage cannot stand, and if the mortgagor (Bhagwan Singh) interferes with the plaintiff's possession in future, plaintiff may seek relief for it separately."

On appeal by the plaintiff the lower appellate Court (Subordinate Judge), having found, *inter alia*, that the mortgage had been redeemed by the mortgagor, Bhagwan Singh, held that the plaintiff's claim was not maintainable in the shape in which it was preferred by him.

On second appeal by the plaintiff it was contended on his behalf that both the lower Courts having found that the appellant had, by reason of his father's purchase, acquired the ownership of the mortgaged land, and both the mortgagee and the original owner Bhagwan Singh being parties to the suit, there was no legal bar to the dispute being finally determined in the form in which the suit had been brought.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the respondents.

The Court (STRAIGHT, Offg. C.J., and MAHMOOD, J.) delivered the following judgment:—

JUDGMENT.

MAHMOOD, J.—We are of opinion that this contention is perfectly sound. The plaintiff having been found to be the owner, by **[307]** reason of the purchase in 1869, of the land held in mortgage by the defendant

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Gobind Tiwari, he has a right to sue for possession of the land by redemption of the mortgage of 1864. And since both the original mortgagor, Bhagwan Singh, and the mortgagee, Gobind Tiwari, are defendants to the suit, and neither of them has succeeded in impugning the plaintiff's title, full remedy can be granted to the plaintiff in the present litigation, if he can substantiate the allegations on which his claim is based. And bearing in mind the alternative prayer in the plaint, the plaintiff would at all events be entitled to possession of the land in suit by redemption on payment of such sum as may be found due on the mortgage, and by ejectment of Bhagwan Singh if he is in possession.

But the case cannot be finally decided without determination of some questions of fact which the lower appellate Court has not gone into by reason of its erroneous view that the form of the suit rendered it unmaintainable. We cannot in second appeal enter upon the merits of the case to arrive at definite conclusions on pure questions of fact; but we have no hesitation in saying that we cannot regard the Subordinate Judge's casual observation as to the redemption of the land by Bhagwan Singh and his possession thereon to be findings of fact such as the law contemplates, and such as we can accept in second appeal. It is clear from the wording of the third issue framed by the Subordinate Judge, that he treated the question as an undisputed fact in the case. But the Munsif had distinctly found the point against the defendants; no objection to that finding appears to have been taken by them before the Subordinate Judge; and the manner in which he dealt with the question is, therefore, unaccountable except on the hypothesis that he did not duly consider the judgment under appeal before him. Therefore, regarding the Subordinate Judge's observation upon this point as far too casual and inconclusive, we proceed to consider the questions of law which, arising on the pleadings of the parties, appear to be these:—(i) whether the plaintiff is entitled in this suit to take into account the annual *jama* of Rs. 23-3-0 against the principal due on the mortgage of 1864; (ii) if so, whether he can in making up accounts claim annual rests so as to calculate the sum towards diminution of the principal mortgage-money; (iii) whether he can by such calculation claim the surplus profits reali-[308]zed by the defendant-mortgagee over and above the amount due as principal of the mortgage-money; (iv) whether such claim is barred by limitation; and (v) whether any payment of the annual *jama* which the defendant-mortgagee, Gobind Tiwari, may have made to the original mortgagor, Bhagwan Singh, subsequent to the purchase of the latter's rights by the plaintiff's father can be regarded as valid so as to defeat the plaintiff's right to receive that sum from the defendant-mortgagee. In connection with the first of these points, it is important to consider the exact terms of the mortgage-deed of Katik Sudi 9th, 1272 fasli (6th November, 1864). The deed clearly lays down that as between the parties the annual profits of the mortgaged land shall be taken to be Rs. 65-10-6; that out of this sum Rs. 23-3-0 shall be annually paid by the mortgagee as the amount of Government revenue for the land; that the balance shall be taken by the mortgagee as interest at 12 per cent. per annum on the principal mortgage-money; and that the mortgage shall be redeemable on payment of the principal mortgage-money (Rs. 354) in a lump sum. The deed, after specifying the mortgaged fields, goes on to say that, on the one hand, the mortgagor shall have no right to claim mesne profits, and, on the other hand, the mortgagee shall have no right to claim interest on the mortgage-debt.

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Now, it is clear that, if these conditions had been duly observed, the plaintiff, representing as he does the interests of the mortgagor, could not redeem the mortgage without payment of the principal mortgage-money in a lump sum. But in this case it is, on the one hand, clear that the defendant-mortgagee had full notice of the acquisition of the mortgagor's rights by the plaintiff's father; and on the other hand, it is not denied that the plaintiff's father, and after him the plaintiff, had to pay the annual *jama* to Government for the mortgaged land. This being so, we are of opinion that the plaintiff is entitled in equity, while suing for redemption, to take into account the amount of the annual *jama* which, by reason of the mortgagee's default, he had to pay to Government for the mortgaged land, and to calculate it against the principal sum due on the mortgage. By long course of decision it has been settled in India that even a special agreement to the effect that the mortgagee shall remain in possession until payment of the debt [309] is made in one sum, does not prevent the mortgage from being at an end whenever the mortgagee has realized both principal and interest from the usufruct (*Macpherson on Mortgages*, 5th ed., 129). This rule, though it probably originated in the express provisions of the old regulations, is so consonant with equity that it deserves recognition by the Courts, even irrespective of statutory provisions.

In the case of *Nilkant Sein* v. *Sheikh Jaenooddeen* (1) a Bench of the Calcutta High Court, consisting of LOCH, J., and MACPHERSON, J. (the learned author of the work on Indian Mortgages), applied this equitable doctrine, even in a more extended form, by holding that the mortgagee "is bound to give an account of the profits realized by him from the mortgaged property so long as it was in his possession, whether he took possession with consent of the mortgagors or without; . . . though the mortgage was not an usufructuary mortgage." The case is a strong one, because the mortgagor's only alternative remedy, namely, a suit for mesne profits, appears from the report to have been previously disallowed on some technical ground, and an account, such as the Court allowed, was the only means whereby the mortgagor could recover the profits, which had been taken by the mortgagee in contravention of the terms of the mortgage. In the present case, however, the question does not arise in such an extended form, for here, under the express terms of the mortgage itself, the mortgagee was placed in possession with the right of taking the usufruct in lieu of interest, subject to the liability of paying out of such usufruct the amount due as Government revenue for the mortgaged land. This liability, though here expressly provided by the contract, would, even in the absence of such agreement, arise from the rule of law which, being well recognized by the Courts, has now been formulated by the Legislature in cl. (*c*) of s. 76 of the Transfer of Property Act (IV of 1882). That section also formulates other well-recognized rules governing the duties and liabilities of the mortgagee in possession, and cl. (*h*) of the section, based as it is on previous rulings, lays down the rule that "his receipts from the mortgaged property . . . . shall after deducting the expenses . . . be debited against him in reduction of the amount (if any) from time to time due to him on ac-[310] count of interest on the mortgage-money, and so far as such receipts exceed any interest due in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor." The last paragraph of

(1) 7 W.R. 30.

1884
APRIL 24.
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CIVIL.
6 A. 303=
4 A.W.N.
(1884) 92.

the section lays down that "if the mortgagee fail to perform any of the duties imposed upon him by the section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure." The decree contemplated by this clause includes a decree for redemption (under s. 92 of the Act), and the rule, which is based on considerations not dissimilar to those on which Courts of Equity administer the doctrine of compensation or set-off, furnishes a complete answer to the first question formulated by us. Upon this question the Court of first instance held that "if the plaintiff had any claim to the annual *jama*, he ought to have preferred it separately in the Revenue Court, and hence it is idle for him now to make such a prayer." And similarly, the lower appellate Court expressed the view that "the plaintiff could have realized the *jama* properly as a fresh cause of action accrued to him every year, but no attention can now be paid to it in this case." It is clear from what we have said that, for the purposes of this case, both these views are equally unsound. It may be that the plaintiff could have sued the mortgagee every year to force him to make regular payments of the annual *jama* according to the terms of the mortgage, but it is more than doubtful that such a suit could be cognizable by the Revenue Court, and it is clear from what we have already said that he was not bound to adopt such a remedy, even if it be taken to have been available to him.

These observations in a great measure furnish an answer also to the second point of law in this case. The plaintiff's right to take into account the sum of the annual *jama* being ascertained in his favour, the only question is whether he is entitled to avail himself of annual rests in making up accounts. The question relates to the mode of taking accounts against a mortgagee in possession, and the Indian law on the subject has been well summarized by Mr. *Rashbehary Ghose* (Tagore Law Professor for 1875) in these words :—" The gross collections are ascertained at the end of each year, and after deducting the necessary outlay on account of re-[311] venue, expenses of collection, and preservation of the estate, the balance goes to reduce, either in whole or in part, the interest, and if there is a surplus over, it goes to the reduction of the principal, the account being closed at the end of each year. In England it is not of course to direct annual rests against the mortgagee in possession, but a different rule obtains in this country" (*Tagore Law Lectures*, 1875-76, p. 254). The difference between the incidents of mortgages in England and in this country would amply account for the distinction thus pointed out; but even in England "where no arrears of interest are due at the time when the mortgagee enters into possession, or any agreement exists between the parties by which the interest in arrears is converted into principal, there, and in such cases, annual rests will be made." (Story's Eq. Juris., s. 1016*a*). In the present case, therefore, the annual rest would be the time when the Government revenue for each year was payable by the mortgagee.

Our finding on the 3rd point follows from what we have already said, and we hold that the plaintiff is entitled by such calculation to claim from the defendant-mortgagee any sum which may be found due to him as surplus profits.

The question of limitation applicable to such a claim was a matter of some doubt under the old law (Act XIV of 1859) till it was settled by the Full Bench ruling of the Calcutta High Court in *Baboo Lall Das*

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APPELLATE CIVIL.

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v. *Zamal Ali* (1) in which PEACOCK, C.J., pointed out that the position of a mortgagee after the mortgage-debt has been liquidated by the usufruct, was not that of a trustee, and this view was subsequently adopted by the Legislature in s. 3 of the Limitation Act of 1871, and retained in the corresponding section of the present Limitation Act (XV of 1877). Art. 105, sch. ii of the Limitation Act of 1871, rendered such claims subject to the limitation of three years, calculated from the date of the *receipt* of the surplus profits; but in the present Act the corresponding clause, whilst retaining the period, has introduced an important alteration by rendering the period of limitation computable from the date "when the mortgagor re-enters on the mortgaged property." It is therefore clear that in the present case the plaintiff's claim for surplus profits cannot be barred.

[312] The 5th question of law involved in this case is not one of any difficulty, and does not demand much consideration. It is shown in this case, indeed, from the nature of the defence set up by Gobind Tiwari, defendant-mortgagee himself, that he had notice of the transfer of Bhagwan Singh's rights to the plaintiff's father before he made the alleged payments of the *jama* to Bhagwan Singh, the original mortgagor. There is no definite finding in the judgments of either of the Courts below as to whether such payments were actually made, but under the view which we have taken of the case, such a finding is not necessary. For it is one of the incidents of the contract of usufructuary mortgage that the mortgagee is accountable to the mortgagor for the due appropriation of the usufruct of the mortgaged property. From the date of the acquisition of the mortgagor's rights by the plaintiff's father he, and not Bhagwan Singh, stood in the relation of mortgagor to the defendant, Gobind Tiwari, and therefore any payments which the latter may have made to Bhagwan Singh, subsequent to the purchase, were improperly made and cannot be taken into account against the plaintiff in the present case. Nor was any issue raised by the defendants as to the plaintiff's allegation that he had, ever since his father's purchase, paid the Government revenue for the mortgaged land. Indeed, whilst Gobind Tiwari pleaded that he paid the *jama* to Bhagwan Singh, this latter, in his written defence, admitted that the Government revenue had been paid by the plaintiff's father, though, in admitting this fact, he qualified the statement by the explanation that the plaintiff's father was only a *benamidar* acting on his (Bhagwan Singh's) behalf—an explanation which both the lower Courts have found to be entirely untrue. We therefore take the question of payment of Government revenue by the plaintiff's father, and after him by the plaintiff, to be an admitted fact in the case, as it has been presented to us. Nor need we call upon the Subordinate Judge to record a distinct finding as to the defendant's allegation that in Jaith 1284 fasli (1877) the defendant, Bhagwan Singh, having paid off the principal sum (Rs. 354) due on the mortgage, obtained possession of the land by redemption.

The Munsif distinctly found this statement to be "totally wrong and made owing to the concert and conclusion between the **[313]** (original) mortgagor and mortgagee." There is every circumstance in the case to justify this conclusion; but even if the alleged redemption by Bhagwan Singh had taken place, it could not prejudice the plaintiff's

(1) 9 W.R. 187.

1884 APRIL 24.

APPEL-LATE CIVIL.

6 A. 303 = 4 A.W.N. (1884) 92.

rights arising out of the mortgage, whatever the effect of the alleged transaction may be as between the two defendants.

For these reasons we decree the appeal, and setting aside the decree of the lower appellate Court, remand the case to that Court for disposal on the merits, with reference to the reliefs prayed for by the plaintiff in the plaint. The costs in all Courts will abide the result.

Appeal allowed.

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6 A. 313 (P.C.) = 11 I.A. 44 = 4 Sar. P.C.J. 493 = 8 Ind. Jur. 160.

PRIVY COUNCIL.

PRESENT:

Lord Fitzgerald, Sir B. Peacock, Sir R. P. Collier, Sir R. Couch and Sir A. Hobhouse.

[*On appeal from the High Court for the North-Western Provinces.*]

RAM SARUP AND ANOTHER (*Plaintiffs*) v. BELA AND OTHERS (*Defendants*).

THE SAME (*Plaintiffs*) v. THE SAME (*Defendants*).

[13th and 14th November, 1883.]

Gift—Condition subsequent—Void condition.

To a gift divesting the donor of all his interest in certain property, a condition cannot afterwards be attached.

Where a gift completed by transfer rested on a valid consideration at the time when it was made: *Held* that even assuming that a condition could be afterwards imported into the transaction, and that condition an immoral one, this would not invalidate the gift, the general rule of law being that a gift to which such a condition is attached remains a good gift while the condition is void.

A gift of villages was complete, being followed by transfer of possession. Afterwards, in a petition to the Collector for "*dakhil kharij*" between the parties, the donor, stating the gift, added that it was on certain conditions. *Held*, that the petition must be treated as ineffective for the purpose of adding any condition.

TWO appeals, consolidated and heard as one, from a decree (27th August, 1879) of the High Court affirming a decree (13th September, 1878) of the Subordinate Judge of the Bareilly district.

The suits out of which this appeal arose were brought by Lachmi Narain of Bareilly, represented on this appeal by his heirs, against Musammat Bela (otherwise known as Wilaiti Begam), her children, and Captain W. M. Hearsey. The plaintiff in 1877 had obtained decrees against Captain Hearsey, having before judgment attached certain villages, formerly belonging to him, in the districts of Bareilly and Budaun, and now sought to have declared [314] the right, title, and interest of Captain Hearsey therein, with the consequent liability to sale in execution of the decrees.

The defence was that in 1870 these properties had been given to Bela and her children, absolutely, three years before the plaintiff became a creditor of Captain Hearsey, and that the latter had ceased to have any interest in them. Captain Hearsey made a statement to the same effect.

The facts are stated in their Lordships' judgment. Captain Hearsey's petitions for "*dakhil kharij*," relating to all the villages, were in the same terms as the following one, which related to mauza Kareli in the Bareilly district:—"Mauza Kareli Khas, pargana Karor, zilla Bareilly, is my zamindari, and I have made over possession thereof, in equal shares, to Bela *alias* Wilaiti Begam, my second wife, on condition of her continuing to be my wife and remaining obedient to me, her husband; and to

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Haidar Young Hearsey, my son, and Sarah Pauline Hearsey and Margaret Eveline Hearsey, minor daughters, on condition of their adhering to their religion. According to the conditions mentioned above, the said Musammat, being my wife, is in possession of the mauza. I therefore pray that, by expunging my name, the names of each of the four persons, in equal shares, be entered, and the Government (demand) revenue be taken from them."

The suit was dismissed in the Court of first instance.

The Subordinate Judge found that a gift of the villages had been made orally by Captain Hearsey in 1870, in consideration of his affection for the donees, and that it was carried out by transfer of possession. That there was no fraud on the plaintiff, Hearsey being at the time in good circumstances, and his debts to the plaintiff having been incurred after the date of the gift. It having been argued for the plaintiff that the condition in the petition for "*dakhil kharij*" was really one for continuance of concubinage and immoral, so that the gift was invalid, the Subordinate Judge rejected this contention, remarking as follows :—

"The Begam is at least the mother of Mr. Hearsey's children, and lives with him as his wife. Under these circumstances he made the gift of the property, having considered it his duty to [316] support and provide for them; but, as she was of a different religion, and the children were minors, he introduced conditions calculated to invalidate the title of the transferees in case of their deviation."

On appeal to the High Court (1), a Divisional Bench [SPANKIE and OLDFIELD, JJ.] stated the points for decision as follows :—

"The questions which we have to determine in appeal are :—

1. Whether there was an actual gift which took effect and became operative by transfer of possession?

2. Its nature, what interest the transferees took under it, and whether anything remained to Captain Hearsey which can be taken in execution of plaintiff's decree?

3. Whether the gift to Wilaiti Begam can be set aside in this suit as illegal and immoral?"

Their decision, upon the first, was that the gift took effect and was followed by transfer of possession; upon the second, that the transferees took an absolute interest; and upon the third, they remarked :—"The imputation of an immoral object is based solely on some words which appear in Hearsey's applications for mutation of names, *viz.*, the words "on condition of her continuing to be my wife and remaining obedient to me, her husband. But there is nothing in these words, by themselves, to support the imputation. But it is sought to attach an immoral object to them on the ground that, though she is referred to as his wife, she was his mistress; but, when explained by all the circumstances, the object implied in the words does not necessarily appear to have been such as is imputed."

In reference to the donee having taken possession under the gift many years before, the Court referred to *Ayerst* v. *Jenkins* (2).

The appeal was dismissed.

On this appeal—

Mr. *J. F. Leith*, Q.C., and Mr. *C. W. Arathoon* appeared for the appellants.

Mr. *R. V. Doyne*, for the respondents.

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(1) See 2 A. 433

(2) L.R. 16 Equity Ca. 275.

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[316] For the appellant it was argued that although two Courts had found that Captain Hearsey had divested himself of all his estate and interest in the villages, the subject of gift, yet it was more consistent with the evidence that the gift was only for the lives of the donees, the reversionary interest remaining in him: for no words of inheritance had been used at the making of the gift. But the entire gift was void; being coupled with an immoral condition. Hearsey was not married to Bela, and the condition, stated in the petition for "*dakhil kharij*," *viz.*, that she should continue to act as his wife, was to secure cohabitation, and was immoral. Hearsey, being a Christian East Indian, it followed, by reason of his descent and religion, that he was, in virtue of the rule of justice, equity, and good conscience (which applied to him under s. 24 of Act VI of 1871), subject to the English law in the matter of gifts upon immoral conditions. It mattered not that Bela was under the Muhammadan law.

By the English law, which governed the case, the gift was inoperative; the gift to Bela, and that to the children, forming one inseparable transaction.

Reference was made to *Ayerst* v. *Jenkins* (1); *Coulson* v. *Allison* (2); *Abraham* v. *Abraham* (3); *Gardner* v. *Fell* (4); *Spirit* v. *Williams* (5); *Watkins* v. *Williams* (6).

For the respondent it was argued that the finding of two Courts, as to the absolute nature of the gift, was correct. As to the other point, the invalidity of the gift on account of the alleged condition, the suit had been brought against a Muhammadan, who for eight years had been in possession of the property under the gift. Captain Hearsey's intention being to act in conformity with Muhammadan law, he had made a valid *hibba*. Also, according to the rules of English law, if they could have been applied, this gift would be valid. But, in fact, no condition had been imposed at the time of the gift. Captain Hearsey's petition for *dakhil kharij* was in compliance with the law *rei sitæ*, under the revenue law now consolidated in the Land-Revenue Act, XIX of 1873. Reference was [317] made to the judgment in *Freeman* v. *Fairlie* (7) distinguishing documents of title. "*Dakhil kharij*," at most, only showed who was in possession for the time being. Moreover, if the words of the condition were considered, they only bore the construction which had been given to them by the High Court.

Reference was made to the Indian Contract Act, IX of 1872, ss. 23, 24.

Mr. *J. F. Leith*, Q.C., replied.

JUDGMENT.

At the conclusion of the arguments their Lordships' judgment was delivered by—

SIR A. HOBHOUSE.—These appeals are presented by the heirs of Lachmi Narain in two suits instituted by him for the purpose of enforcing certain judgments obtained by him against the defendant Hearsey, and making them available against property, partly in Bareilly and partly in Budaun, which formerly belonged to Hearsey.

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(1) L.R. 16 Equity Ca. 275.
(2) 2 De. Gex, Fisher and Jones 521.
(3) 9 M.I.A. 387 (395).
(4) 1 Jacob and Walker 22 = 1 M.I.A. 299.
(5) 3 De. Gex, Jones and Smith 293.
(6) 3 Macnaghten and Gordon 622.
(7) 1 M.I.A. 305.

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44 = 4
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160.

In the first suit the plaintiff states that Hearsey was the owner of the property in question at the time when he gave a bond to Lachmi Narain, dated 3rd February, 1873. It then states that Hearsey, in 1870, filed a petition in the Settlement Department alleging that the defendant, who is generally called Wilaiti Begam, his second wife, and her three children, had been put in possession, in equal shares, on condition of the wife obeying her husband and the children remaining faithful to their religion, and that a mutation of names might take place. Then it prays relief against all the defendants; it seeks to have the property sold to the entire displacement of the Begam, and to the displacement of the children excepting as regards their interest for life.

The real questions in the case are resolved into two, the first being whether Hearsey had, at any time prior to the acquisition by the plaintiff of the interest on which he now sues, intended to divest himself of all interest in this property in favour of the defendants, and had done acts sufficient to carry his intention into effect; and secondly, whether that transaction was invalidated by the immorality of the consideration or motive for it?

[318] On the first question, as to the transfer, several witnesses have been examined, and they all tell substantially the same story. The story is this: That early in 1870 Hearsey convened a large meeting of his neighbours and acquaintances (40 or 50 are said to have been present), that at that meeting he stated that he had been very ill, that he felt the precariousness of life; that he desired to avoid disputes among the branches of his family (for besides the Begam he had other wives so-called, and other children); and that on that account he intended to give, and did thereby give, to the Begam and her children, who were very young at that time, his property, in the zillas of Bareilly and Budaun. He said that the servants were to consider themselves not his servants but hers, and that he was to be no longer the owner of the property. And a formal ceremony took place, consisting of a gift of some rupees to the Begam by the Mukaddams of the villages in question, no doubt symbolical of her assuming the ownership of the villages.

It is true that the witnesses, according to the translations that we have before us, differ in the expressions used as to the gifts to the children. They talk of a gift to the Begam and her sons,— a gift to her and her descendants,—to her and her issue, and so forth. How far those different expressions may be due to different translations of the same word, and how far they may represent different words, is not told us; but their Lordships do not doubt that the substantial meaning of the witnesses was that the gift was intended by Hearsey for the Begam, whom he calls his second wife, who was acting as a wife to him, and those children whom she had borne to him, and whose interest he intended to protect against disputes.

From that day to this the possession has been enjoyed by the Begam, and there is evidence of many acts of ownership which she has exercised over the property. On that evidence both the Courts below have found that the whole of Hearsey's interest was divested from him and vested in the other defendants. It is not necessary to refer to the passage in which their opinions are embodied, but the ultimate result may be stated in the finding on the 4th issue by the Subordinate Court:—"That defendant No. 5"—that is Hearsey—"had no transferable right in the [319] disputed property at the time the plaintiff lent money to him," that finding is sustained by the High Court.

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This case is one to which the general rule of this Board, to the effect that they will not disturb concurrent findings of the Courts below on questions of fact, is eminently applicable. The evidence is oral. It is given in a language which we have not before us, and which we should not understand if we had it. The Judge of the Subordinate Court had the witnesses before him, and the High Court, which consisted of civilian Judges, must have understood the language in which the witnesses spoke. If, therefore, there was any argument to be founded upon little discrepancies in the story told by the witnesses, those Courts were thoroughly competent to deal with such a question; and their Lordships would be exceedingly reluctant, even if they thought that there was any doubt about the propriety of their judgment, to disturb it. In fact, Mr. *Leith* in his opening said that having regard to the evidence given in the suit he could not dispute but that there was an actual transfer of property of the time in question; that the transfer was perfectly *bona fide*; and that Hearsey was a solvent man at that time, so that no fraud upon creditors could be alleged.

The question argued upon that transaction independently of the immorality of it, was whether or no the absolute interest passed from Hearsey to the Begam and her children, or whether they were entitled for life only. The same reason which excludes contention as to the actual transfer taking place appears to exclude contention also as to the amount of interest passed. The question of intention depends upon the oral evidence. The overt acts are the same whether a life interest was to pass or whether an absolute interest was to pass, and we must look to what the witnesses tell us as to the intention expressed at the time. Both Courts agree that the whole interest passed and that expressions were used by Hearsey which are inconsistent with the notion that he did not intend to pass the entire ownership to the Begam and to her children.

The evidence relied upon by the appellant is contained in the petition for mutation of names that is mentioned in the plaint. It is true that that petition and the subsequent mutation of names [320] are of no great value for the defendant's purpose, because the Collector had only jurisdiction with respect to the possession or that evidence of possession which the register affords, and that is the only matter which is dealt with on the mutation of names. The defendants would be equally entitled to possession whether they were owners of the life interest or owners of the absolute interest. Therefore the petition and the mutation of names only forward the case of the defendants to the extent of proving a real *bona fide* transfer of some kind at the time, but they afford no evidence as to the extent of interest conferred by the transfer. So we must see what the witnesses say upon that subject; and they are all in accord that expressions were used which are inconsistent with the notion that any less interest than the absolute ownership was transferred. What the exact nature of the interest of the defendants *inter se* may be is a question with which the plaintiff has no concern. If it be the case that for some interest or other the whole ownership passed away from Hearsey at this time and passed into the defendants, that is sufficient to exclude the plaintiff from relief.

Now their Lordships pass to the next question that was raised, which depends on the immorality of the transaction. To impeach it on that ground the appellants' counsel argue as follows: that by reason of Hearsey's descent and religion the case is to be governed by rules of English law; that the Begam could not be his lawful wife; that the

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stipulation as to her continuing to act as his wife is immoral, though she is under the Muhammadan law, which allows sexual relations forbidden to Christians; and that the gift is so thoroughly vitiated as to leave Hearsey, the grantor, still the owner of the property in such a sense that the plaintiff could treat it as his right, title, and interest liable to be sold under an attachment.

On those questions their Lordships desire to pronounce no opinion, and for this reason: They think there is no evidence that there was an immoral consideration to vitiate the transaction. In that they concur with the two Courts below. This gift was one entire transaction; there was a single gift to the wife and the children, and a single consideration for that gift. How does the [321] case stand with regard to the children? So far as the oral evidence goes, it is clear that no condition was imposed at the time of the verbal transfer. The only evidence of immorality is contained in the application for the mutation of names. That application states that the gift was made to the children on condition of their adhering to their religion. It is impossible to suppose that there was a consideration given by the children or any contract entered into with them at that time. They were very young infants, They could not agree to remain Christians; and although on making a gift to them, the donor might attach or purport to attach such a condition, it would be a condition only and subject to the law of conditions. The transaction being an entire one, it is very difficult to treat the gift to the wife differently from the gift to the children. Their Lordships think that the Courts below were right in treating the gift to her as resting on the valid and moral considerations on which it was stated to rest at the time when it took place.

Their Lordships are of opinion that the gift is, in fact, unconditional, because, as it was complete at the time when the actual transfer took place, the parties could not afterwards import a condition; and the petition must be treated as inefficacious for that purpose. But even if it were otherwise—assuming a condition, and an immoral condition—it would be the condition that is immoral and not the consideration; and then the case would fall under the general rule of law that a gift to which an immoral condition is attached remains a good gift, while the condition is void.

On these grounds their Lordships think that the appeal fails. As regards the second suit, the particulars of it have not been stated to their Lordships, but they understand from the counsel that the issues are exactly the same as in the first suit. Their Lordships think that the decrees of the High Court of Allahabad should be affirmed, and these appeals dismissed with costs.

Their Lordships will humbly advise Her Majesty to this effect.

Solicitor for the appellants : Mr. *T. L. Wilson.*

Solicitor for the respondents (except Captain W. M. Hearsey): Messrs. *Barrow* and *Rogers*.

6 A. 322 (P.C.) = 11 I.A. 20 = 4 Sar. P.C.J. 491.

1883 DEC. 1.

PRIVY COUNCIL.

6 A. 322 (P.C.) = 11 I.A. 20 = 4 Sar. P.C.J. 491.

[322] PRIVY COUNCIL.

PRESENT:

Lord Fitzgerald, Sir B. Peacock, Sir R. P. Collier, Sir R. Couch and Sir A. Hobhouse.

[*On appeal from the High Court for the North-Western Provinces.*]

HIRA SINGH (*Plaintiff*) *v.* GANGA SAHAI AND ANOTHER (*Defendants*). [9th November and 1st December, 1883.]

Arbitration—Submission—Reciprocity of obligation of parties to award.

An arbitrator's award declared the right of a member of a Hindu family jointly possessed of village houses and property, such member being deaf and dumb, and not a party to the arbitration and award. He afterwards sued for separate possession as against the others, who in their defence denied his title to inherit by Hindu Law on account of his physical infirmity, which was from birth. The award having being produced at the hearing, *held* that this member of the family, being a stranger to the submission to arbitration, was under no obligation to abide by the award; and that he, consequently, could not avail himself of what the award contained in his favour.

[R., 12 A. 1 (8) (F.B.); 25 B. 122 (141).]

APPEAL from a decree of the High Court (12th April, 1882), which reversed the decree of the Judge of the Meerut district (9th May, 1879), and restored that of the Subordinate Judge of Meerut (24th December, 1877).

The suit out of which this appeal arose was brought in 1876 to obtain separate possession of a share in six houses and a tank, built out of family resources, on the joint zamindari land of village Asaura in the Meerut district. The parties were in the relation of first cousins once removed. The property was in their joint possession; and the plaintiff alleged himself to be a co-sharer to the extent of two-thirds of it.

The defence was that the plaintiff was not entitled to have separate possession of the share claimed; the property being ancestral and joint, and the plaintiff being excluded from inheriting by reason of his having been deaf and dumb from birth; so that he was only entitled to maintenance. Also, that he could not claim partition of part only of the family property.

The facts are stated in their Lordships' judgment.

At the hearing, before the Subordinate Judge of the Meerut district, Kashi Nath Biswas, an arbitration award, given by Zalim Singh, arbitrator, on the 5th January, 1875, was produced by one of the witnesses for the plaintiff. This awarded that Hira Singh, his only brother, Debi Singh, having been adopted into another family, was the sole heir, exclusively entitled to the possession of the pro-[323]perty left by his father, Har Dial. This covered the property claimed; but the Subordinate Judge held that "it would be contrary to all rules of equity to give the plaintiff the advantage of the award when he would not have been bound by it if it had been unfavourable to him." He dismissed the suit on the ground of Hira Singh's disqualification.

The Judge of the Meerut district allowed an appeal preferred by the plaintiff, sending the case back for another decision. But, as it was for him to deal with the questions at issue, the High Court, on appeal, remanded it to him for disposal according to law; whereupon he decreed in favour of the plaintiff. On an appeal again to the High Court, the Judges of a Divisional Bench (SPANKIE and PEARSON, JJ.) were divided

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in opinion as to the effect of the award. On a reference to the Full Bench, a majority of the Judges concurred in the following judgment, which was delivered by PEARSON, J.:—

"The plaintiff in this suit claimed to obtain separate possession, by partition, of a share which he alleged to belong to him, by right, in certain houses, being ancestral property. The exact nature of his right he did not define. But it is not disputed, and is not open to dispute, that he is not entitled to the share or any share in the property in question by right of inheritance, inasmuch as he was admittedly born deaf and dumb, and is incapable of inheriting property under the Hindu law. The ground on which the lower appellate Court has allowed his claim is, that his right as heir to his father's estate was declared by an award dated 4th January, 1875, to which the defendants in the present suit assented. The plaintiff was not himself a party to the agreement to refer to arbitration the question, who was Har Dial's heir, and the Judge is wrong in supposing that Debi Singh, the plaintiff's natural brother, agreed to the arbitration as his guardian, and represented him before the arbitrator. The award could only bind the parties to the arbitration, and the plaintiff, not being a party thereto, is not bound by it, and, not being bound by it, cannot claim to take any advantage from it. It could not confer on him, who was not a party to the arbitration, a right which he did not possess by law, nor can it constitute evidence of a right [324] which the law disallows. The award does not profess to be based on the Hindu law, but rather seems to have been wilfully made in contravention thereof. Nor could the defendants assent to the award conveying to him a right of inheritance which did not devolve on him by law. The lower appellate Court is mistaken, I conceive, in holding that either they or the arbitrator could by anything done by them in the arbitration proceedings, bestow on the plaintiff, who was not a party to them, a right which the law has refused to him, the law notwithstanding, and could cure the legal defect in his title. It has been urged, and may be granted, that a person who was not originally a party to arbitration proceedings may subsequently become a party to them, but it does not appear that the plaintiff ever became a party to the proceedings which terminated in the award, dated 4th January, 1875. Had the award recognized the defendants' right to the inheritance, they might, doubtless, have made a gift of the property or any portion of it to him; but it seems impossible to contend that they could make a gift of what was adjudged not to belong to them. The circumstance that he may have been allowed to continue, as before, in joint possession of the property, is explained by the consideration that he is, under the Hindu law, though excluded from inheritance, entitled to maintenance. It has been suggested that the defendants, by their assent to the award, are estopped from questioning the plaintiff's right of inheritance in this suit by the provisions of s. 115 of the Indian Evidence Act; but that section, which is understood to embody the rule of the English law, seems to me to be inapplicable.

'The doctrine of estoppel' (says Mr. Justice Story) 'is based on a fraudulent purpose and a fraudulent result. If, therefore, the element of fraud be wanting, there is no estoppel; there must be deception and change of conduct in consequence.' Now it can hardly be contended that the defendants, in expressing their acquiescence in the award, intended to deceive the plaintiff, or that he was deceived thereby, and led to take any action which has put him in a different position from that which he occupied before in respect of the property in suit. The plaintiff then

having no right in him either by the law of inheritance or under the award, or by reason of any conveyance made in his favour by the defendants, [325] cannot possibly succeed, if they be not estopped from calling his right in question.

"I conclude, therefore, that the Court of first instance rightly decided the first three of the issues laid down by it for trial and rightly dismissed the suit.

"I must add that the Zilla Judge failed to apprehend rightly this Court's order of the 17th January last, which directed him to dispose of the case according to law. The law by which his procedure should have been regulated is contained in ss. 565, 566, 567, Act X of 1877.

"I would decree the appeal with costs, reversing the lower appellate Court's decree, and restoring that of the Court of first instance" (1).

On this appeal—

Mr. *T. H. Cowie*, Q.C., and Mr. *C. W. Arathoon*, for the appellant, contended that the award, having been accepted by the defendants, gave, under the circumstances of the case, the right which the arbitrator intended should be conferred on the plaintiff. Hira Singh, though deaf and dumb from his birth, was not disqualified to acquire by gift, at all events; and the evidence did not show that he was unable to contract. He was already in possession of one of the houses on the common land of the village; and was entitled to possess his own divided share, by way of separate holding, proportionate to his interest as determined by ancestral right, and as awarded.

Mr. *J. F. Leith*, Q.C., and Mr. *R. V. Doyne*, for the respondents, argued that as Hira Singh, not having been a party to the award, was not bound by it, he could not claim the benefit of it. As a suit for partition, this claim could not be brought by a party having only a limited estate in the property which he sought to divide; nor was division of the whole property claimed, as it should have been if the suit had been maintainable.

In reply, Mr. *T. H. Cowie*, Q.C., urged that Hira Singh had in effect been sufficiently represented at the arbitration; and relied on the acts of the defendants as showing an intention to compromise the claim disputed in the family.

JUDGMENT.

[326] Their Lordships' judgment was delivered by—

SIR R. COUCH.—This is an appeal in a suit brought by the appellant against the respondents for complete possession after partition of two-thirds of six houses and a tank in mauza Asaura, in zilla Meerut, the plaintiff being alleged to be a co-sharer and possessor of two-thirds and the defendants of one-third thereof.

The plaintiff is the son of Har Dial Singh, who had two sons, the plaintiff and Debi Singh. The defendants are the sons of Gulab Singh, the uncle of Har Dial. The plaintiff's grandfather, Dharam Singh, and Gulab Singh were the sons of Baji Rai, whose brother, Bhore Singh, had a son, Hulas Rai. Har Dial died in 1871. It did not appear when Hulas Rai died. After his death his widow, Rup Kuar, adopted Debi Singh. It was admitted that the plaintiff was born deaf and dumb, and was consequently, by Hindu law, incapable of inheriting. But it appeared, by a proceeding of the Revenue Court, on the 24th of April, 1872,

(1) See 2 A. 809.

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and an order of the Collector on the 6th of May, 1872, that on the death of Zalim Singh, the lambardar of mauza Asaura, Hira Singh was appointed lambardar under the management of Debi Singh, with the consent of the respondents, and an issue in this suit whether Debi Singh was in possession on behalf of the plaintiff (the appellant), of any property belonging jointly to the plaintiff and the defendants (the respondents), was found for the plaintiff by the District Judge.

On the death of Rup Kuar, the date of which did not appear in the proceedings, disputes arose in the family as to the succession to her property, and to the property of Har Dial, and, on the 26th of December, 1874, an agreement for arbitration was made between Amin Singh and Ganga Sahai (the respondents), Ram Bakhsh, son of Phul Singh (a brother of Gulab Singh), Jawahir Singh and Nawab Singh, sons of Ram Dial Singh, another brother of Gulab, and Shadi Ram and Khasi Ram, sons of Shankar Singh, the first party, and Debi Singh, the second party, whereby after stating that there was dispute between them "in respect to three matters, (1) as regards the legal heir to the property left by Rup Kuar, deceased; (2) as regards the heir now and hereafter to the property left by Chaudhri Har Dial Singh; and (3) as regards property and documents which stand recorded '*ismfarzi*' between the first and the second parties," they appointed Chaudhri Zalim [327] Singh as arbitrator to decide all the aforesaid matters, and declared that, if any other matter besides those in dispute should be submitted to the arbitrator, he should have power to decide the same. The submission was signed by Debi solely on his own behalf. Zalim Singh, by his award, found, as to the first point, that Rup Kuar had adopted Debi Singh, and that he was the lawful heir to the entire property left by Hulas Rai and Rup Kuar. "As regards the second point," he said, "I am of opinion that Chaudhri Har Dial Singh has two sons, Hira Singh and Debi Singh. Chaudhri Har Dial Singh died in 1871, and then the name of Hira Singh alone (Debi Singh having been adopted by Chaudhrain Rup Kuar), who, though dumb, was the sole heir, was entered in the column of proprietorship, and he is in proprietary possession of the property, and enjoys the profits thereof. And the parties admit that Hira Singh is the heir and exclusive possessor of the property left by Chaudhri Har Dial Singh, therefore Hira Singh should, in my opinion, continue to be the owner and possessor of the entire property, as he is, and that after him his male issues will become owners; that if (God forbid) he may have no such issue, the said property also will devolve on Debi Singh, and his descendants will have no right whatsoever to the property left by Chaudhri Har Dial Singh, moveable or immoveable."

On the 3rd point the arbitrator decided as to some parts of the property which was the subject of it in favour of Ganga Sahai and Amin Singh. He then stated that the first party had requested that as they had no property near Asaura, their place of residence, they should have a portion of Debi Singh's property by purchase, which appeared to him to be reasonable; that Debi Singh reluctantly and coercively agreed to give certain property mentioned on receipt of consideration; and he, the arbitrator, by agreement of the parties, had fixed the price at Rs. 30,000, which was paid in his presence. All the parties to the arbitration signed the award in token of their consent to it, and the parties of the first part, on the same day, executed a *razi-nama*, relinquishing all claim to the inheritance and the property. Hira Singh did not sign, nor did Debi Singh do so on his behalf.

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The question in this appeal is, what was the effect of the arbitration and award and *razi-nama* as regards Hira Singh, it being [328] contended before their Lordships that he acquired an interest under the award, and had a right to insist upon it. The case first came before two of the Judges of the High Court for the North-Western Provinces at Allahabad, who referred it to a Full Bench. Of the five Judges by whom it was then heard, four were of opinion that the award could only bind the parties to the arbitration, and the plaintiff not being a party thereto was not bound by it, and not being bound by it could not claim to take any advantage from it, and that it could not confer on him, who was not a party to the arbitration, a right which he did not possess by law. The remaining Judge was of opinion that the award might be evidence of a family arrangement or cession of claim by the defendants which might be enforced as against them. Accordingly the suit was dismissed.

Their Lordships are of opinion that the decree of the High Court should be affirmed. It did not appear that Hira Singh or any one having authority to act for him in that behalf had consented to be bound by the terms of the award. He was in possession before the arbitration, and continued in possession, and he made that possession and not the award the foundation of his claim to a partition. The award was produced by Debi Singh, who was indeed his witness, but who proved that it was signed by Amin Singh and Ganga Sahai, in answer to a question by the pleader for the defendants. Hira Singh was a stranger to the submission, and was under no obligation to abide by the award, and consequently he could not avail himself of it. Their Lordships will, therefore, humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss the appeal, and the costs thereof will be paid by the appellant.

Solicitor for the appellant: Mr. *T. L. Wilson.*

Solicitors for the respondents: Messrs. *W.* and *A. Ranken Ford.*

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[329] APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

HARGOBIND KUARI (*Defendant*) v. DHARAM SINGH AND OTHERS (*Plaintiffs*).* [30th April, 1884.]

Hindu Law—Illegitimate son—Maintenance.

According to Hindu law and usage, illegitimate sons are entitled to maintenance from their father, and his estate is liable for its payment. *Raja Parichat* v. *Zalim Singh* (1) and *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn* (2), followed. *Nurbibi* v. *Husen Lal* (3), referred to.

It is immaterial whether the illegitimate sons have been begotten on a female slave or on a concubine. *Sarasuti* v. *Mannu* (4), followed.

The test by which the continuance of the right to receive maintenance must be decided, is not the age of the illegitimate descendant, or his capacity to earn his own livelihood, but obedience to the head of the family. This test cannot be

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* Second Appeal No. 1195 of 1883, from a decree of F. E. Elliot, Esq., District Judge of Mainpuri, dated the 9th May, 1883, modifying a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 23rd January, 1883.

(1) 4 I.A. 159 (165).
(2) 7 M.I.A. 18.
(3) 7 B. 537 (538).
(4) 2 A. 134.

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applied till he has reached full age. By docility or obedience, in the sense of the texts, is meant the rendering to the head of the family such reasonable service as is ordinarily rendered by cadets of a family in that station of life to which the parties belong.

[N.F., 28 C. 194 (203); R., 30 A. 508 (509) = 5 A.L.J. 629 = A.W.N. (1908) 229; 17 M. 160 (161); 5 Ind. Cas. 919 (920) = 7 M.L.T. 161 (162) = 20 M.L.J. 350 = (1910) M.W.N. 138; Expl., 12 C. 91 (104, 105).]

THE facts of this case are stated in the judgment of the Court.

Pandit *Nand Lal*, for the appellant.

Babu *Baroda Prasad*, for the respondents.

The Court (STRAIGHT, Offg. C.J., and DUTHOIT, J.) delivered the following judgment:—

JUDGMENT.

DUTHOIT, J.—This is a suit for maintenance. It was instituted in the Court of the Subordinate Judge of Mainpuri, on the 29th July, 1882, by (1) Rukmini, age 40, and (2) Dharam Singh, age 17; (3) Har Prasad, age 12, and (4) Manohar Lal, age 10, under the guardianship of their mother, plaintiff No. 1, against Kanhai Lal, *Brahman*, son of Mauji Lal.

The allegations of the plaint are, that Rukmini, plaintiff No. 1, lived with Mauji Lal, as his concubine, for some twenty-five years, and by him had issue, plaintiffs 2, 3 and 4, and a daughter who is married and provided for; that Mauji Lal provided suitably for Rukmini till 1873, when she was compelled to apply to the Criminal Court for a maintenance order; that such order, to the extent [330] of Rs. 10 per mensem, was granted on the 1st November, 1873; that Mauji Lal paid this allowance until his death on the 24th June, 1881; that although the defendant has taken his father's estate (in which is included considerable landed property), as heir, he has discontinued payment of the allowance; and that, under Hindu Law and custom, and upon principles of equity, the plaintiffs, who are otherwise destitute, are entitled to be maintained out of Mauji Lal's estate.

The relief sought was the following:—(1) that Rs. 10 per mensem, on account of the maintenance of the plaintiffs, be declared to be a perpetual charge upon Mauji Lal's landed estate; (2) that Rs. 100, on account of arrears of maintenance and the costs of the suit, be awarded to the plaintiffs against the defendant.

For the defence, it was pleaded that Rukmini was a common prostitute; that the male plaintiffs were not begotten upon her by Mauji Lal; that as the property is ancestral, Mauji Lal's interest in it ceased at his death, and the interests of the plaintiffs ceased also; that the order of the Criminal Court could afford no basis for this suit; that a Criminal Court could not pass a maintenance order in favour of the female plaintiff; that Dharam Singh was of full age; and that as Rukmini and Dharam Singh could in no case obtain the relief sought, the utmost that could be decreed would be Rs. 10 per mensem.

The lower Courts have found the facts to be as stated in the plaint. The Subordinate Judge decreed in the plaintiffs' favour, jointly, for Rs. 100 (arrears) and cost of the suit, and severally for the recovery by each of them, as a charge upon Mauji Lal's real estate, of Rs. 2-8-0 per mensem in perpetuity.

The District Judge varied this decree, by declaring Rukmini to have no right to maintenance, and by reducing proportionately the sum decreed by the Subordinate Judge.

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The defendant Kanhai Lal appealed to this Court; but he died before the appeal came on for hearing, and the estate of Mauji Lal is now represented by Kanhai Lal's widow, Hargobind Kuari.

It is contended on behalf of the appellant (Hargobind Kuari) that she is under no legal obligation to maintain the illegitimate [331] sons of her father-in-law; that in no case could such maintenance be rightly made a charge upon the property; and that, at any rate, the charge should cease upon the illegitimate children reaching an age when they are able to maintain themselves.

It must at once be conceded to the appellant that unless the right claimed by the illegitimate children of Mauji Lal can be supported by Hindu Law and usage, it cannot be affirmed.

"The obligation of a father to support his children is," to use the words of Mr. Justice WEST in *Nurbibi* v. *Husen Lal* (1), "one imposed on him by the law of the family in some form or other, either of civil or criminal liability, under every civilized system," but it is not a proposition of a natural law that the obligation devolves upon the father's heirs, or is a charge on his estate.

It is, however, clear that Hindu Law favours to an extraordinary degree the claims of illegitimate children upon the paternal estate. "Amongst Hindus," writes Mr. Herbert Cowell (*Tagore Law Lectures*, 1870, vol. 1, p. 170), "illegitimacy does not confer disgrace. Sonship confers so great advantages upon fathers, that the question of legitimacy is one which originally had no effect even in excluding from inheritance ....The *paunerbhava* or illegitimate offspring were entitled to inherit on failure of legitimate or other preferable issue, or to an inferior portion, if there were a legitimate son........................The distinction availed at first to give to legitimate issue merely a preferable right of inheritance over illegitimate. All the analogies of Hindu Law are against the view of a bastard taken by the law of England, which law in that respect is founded upon the doctrine of Christianity. The right of inheritance to their father's estate, which formerly belonged to illegitimate sons in the Sudra caste, is still retained to them............But in the three superior castes an illegitimate son has long ceased to possess a right to inherit. Nevertheless, he is not, as in English law, *quasi nullius filius*, but his *status* as a son in the family, and his right to maintenance, are secured to him." And at p. 936 of the *Tagore Law Lectures* for 1880, Pandit Rajkumar Sarvadhikari writes thus *:—"The general result of the [332] examination of the authorities, both juridical and forensic, is that among the three regenerate classes of Hindus, (Brahmans, Kshatriyas, and Vaisyas), illegitimate children are entitled to maintenance." So also a *Vaivashta* cited in Book I, ch. VI, s. 2, quest. 1, West and Bühler, ed. of 1878, p. 275:—"An illegitimate son of a Brahman, a Kshatriya, or a Vaisya, cannot be a legal heir of his father. He and his mother, if well behaved, can claim a maintenance only from the property of the deceased." So also Mr. J. D. Mayne, in his *Treatise on Hindu Law and Usage*, s. 374 (ed. 1878, p. 366), writes:—"Those who would be entitled to share in the bulk of the property are entitled to have all their necessary expenses paid out of its income. But

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* The learned pandit would seem to be here quoting from the head-note to *Rahi's case* (1 B. 97).

(1) 7 B. 537 (538).

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the right of maintenance goes further than this. Those who would be sharers, but for some personal disqualification, are also similarly entitled ....as for instance...............illegitimate sons when not entitled as heirs."

The doctrines thus stated are, in our opinion, fully borne out by the texts.

Thus *Baudhayana*, *Pr.* 1, *Ka.* 2, v. 23 (West and Bühler, ed. 1878, p. 537):—"They call the legitimate son, the son of an appointed daughter, the son begotten on a wife, the adopted son, the son made, the son born secretly, and the son cast off, entitled to share the inheritance. The spinster's son, the son taken with a bride, the son bought, the son of a twice-married woman, the self-given son, and the Nishada,* these they call members of their father's family."

So the Institutes of Law ascribed to *Vishnu*, ch. xv, vv. 27 to 30 (West and Bühler, ed. 1878, p. 549):—"The son born by any woman whatever (*yatra kvachanotpadita* †) is the twelfth. Amongst these sons each preceding one is preferable to the next mentioned. And the first mentioned inherits before the next mentioned. And let him (the heir) maintain the rest."

[333] Both these authorities are of the *Sutra* period. Turning to the texts of the *Smriti* period, we find, in the authorities to which most respect is paid on this side of India, the following:—

A *placitum* of *Yajnavalkya* runs thus:—"Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But if the father be dead, the brother should make him partaker of the moiety of a share: and one who has no brother may inherit the whole property, in default of daughter's sons." The interpretation of the author of the Mitakshara (*Vijnanesvara*) is—that portion only is quoted with which our present purpose is concerned—"From the mention of a Sudra in this place, it follows that the son begotten by a man of a regenerate tribe on a female slave does not obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile he receives a simple maintenance" (Mitakshara, chapter i, section 12). And *Mitra Misra* in the Viramitrodaya (chap. ii, pt. ii, v. 23, ed. Calcutta, 1879, p. 130) interprets thus:—"From the use of the term 'a person of the servile class,' it appears that one begotten by a twice-born person on a female slave cannot, notwithstanding the desire of the father, get a share or a half-share after his death; the taking of his entire property is out of the question: but he is entitled only to maintenance, provided he be not disobedient."

The learned pleader for the appellant admits the force of these texts, but pleads that they refer to the case of a son begotten on a *female slave* (*dasi*), whereas in this suit there is no pretence of Rukmini having been a female slave, and she is alleged, and found by the Courts below, to have been a respectable woman of the Brahman caste, and that the texts cited are therefore inapplicable.

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* "He who is begotten by a twice-born man on a woman of the Sudra class is called a *Nishada*." *Ibid*, v. 21.

† Messrs. West and Bühler's note regarding the term "*yatra kvachanotpadita*, lit. "born wherever," that it seems intended to include the son born by a Sudra woman, the Nishada and Parasava of other lawyers. *Nishada* has been already explained. Baudhayana *loc. cit.*, v. 22, explains *Parasava* to mean a son begotten through lust, *i.e.*, on a concubine.

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There is, we are of opinion, no force in this contention; for if Mayr,* following Colebrooke and Bühler, rightly interprets the definition in a text of *Vasistha* of the term *punarbhu*, the effect of the contention would be to raise, not to depress, the respondents (who would be *paunarbhavas*, not *dasiputras*) in the scale of illegitimate sons; and it has been held by a Division Bench of this [334] Court, in *Sarasuti* v. *Mannu* (1), that "there is no such distinction as is contended for between a son born of a female slave and of a concubine." The case of *Sarasuti* v. *Mannu* is a Sudra case; but the interpretation of the word "*dasiputra*" therein stated is not affected by that fact. We see no reason to doubt the justice of the *dictum* of Messrs. West and Bühler in their remarks on *Vaivashta* 5, book I, chapter iv (ed. 1878, p. 223), *viz.*, that "according to Hindu Law the woman who commits herself into the keeping of a man becomes his slave." And in a recent case—*Raja Parichat* v. *Zalim Singh* (2)—their Lordships of the Privy Council have laid down the broad principle of Mitakshara Law on this subject in these terms:—"It appears to be unquestionably the law that the illegitimate son of a person belonging to one of the twice-born classes has a right to maintenance."

We must hold, therefore, that the respondents are entitled to maintenance; and if this conclusion be correct, it cannot, we think be doubted that, in making the estate of their father liable for its payment, the Courts below have acted rightly.

In *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn* (3) their Lordships of the Privy Council delivered judgment thus:—"The right of an illegitimate child of one of the three regenerate classes to maintenance out of the estate of his father is recognized by all the authorities on Hindu Law relative to this subject.........Their Lordships are of opinion that although the appellant is shown to have no right to the inheritance, either as the legitimate or illegitimate son, he is still entitled to maintenance out of the estate of his deceased father. Their Lordships therefore will humbly recommend to Her Majesty......to declare that the appellant, as the illegitimate son of the late Rajah Umur Purtab Syn, was and is entitled to maintenance out of his estate at the rate fixed (4)."

The fairness of the rate at which, in this case, the maintenance has been fixed by the Courts below is not challenged in the appeal to this Court. The only point remaining for our consideration is that of the period for which the maintenance should continue to be paid. Upon equitable grounds there is undoubtedly much force [335] in the contention of the learned pleader for the appellant, that it is unjust to saddle the estate of Mauji Lal with the burden of maintaining young men who will soon be of age to earn their own living. But it is undeniable that the criterion which the learned pleader asks us to fix is not that which has been fixed by the Hindu sages. "If he be docile," says *Vijnanesvara*; "provided he be not disobedient," says *Mitra Misra*. Obedience to the head of the family, not the age of the illegitimate descendant, or his capacity to earn his own livelihood, is the test by which, under Hindu Law, the continuance of the right to receive maintenance must be decided. Till the illegitimate sons reach full age, this test cannot be applied; but thereafter it cannot be ignored. What

* "But she also (is called twice married), who formerly belonged to another (and has been taken by another man) without being married again."—*Das Indische Erbrecht* (Vienna, 1873), p. 111.

(1) 2 A. 134. (2) 4 I.A. 159 (165).
(3) 7 M.I.A. 18. (4) pp. 52, 53.

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constitutes docility or disobedience, in the sense of the texts, is a question the answer of which is not easy; but we think that the true answer is indicated in a *Vaivashta* translated as No. 2, Book 1, chapter vi, section 2 of Messrs. West and Bühler's collection (ed. 1878, p. 276), and we think that, on attaining full age, the respondents must, as a condition of receiving maintenance from the estate of Mauji Lal, render to the head of the family such reasonable service as is ordinarily rendered by cadets of a family in that station of life to which the parties belong.

A decree, varying the decree of the lower appellate Court, will be made in the above terms. The costs of this appeal will be borne by Mauji Lal's estate.

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6 A. 335 = 4 A.W.N. (1884) 107 = 8 Ind. Jur. 631.

APPELLATE CIVIL.

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

IMDAD HUSAIN AND OTHERS (*Defendants*) *v.* TASADDUK HOSAIN (*Plaintiff*).* [6th May, 1884.]

Mortgage—Receipt for payment of mortgage-money—Registration—Act VIII of 1871 (*Registration Act*), s. 17.

The payment of money by a mortgagor to a mortgagee in satisfaction of the mortgage-debt is a payment of consideration on account of the extinction of the mortgagee's right within the meaning of cl. (c), s. 17 of Act VIII of 1871 (Registration Act). A receipt for such payment is therefore a document of **[336]** which the registration is compulsory, and which if unregistered is inadmissible in evidence under s. 49.

Dalip Singh v. *Durga Prasad* (1); *Basawa* v. *Kalkapa* (2); *Mahadaji* v. *Vyankaji Gobind* (3); and *Ramapa* v. *Umanna* (4), followed. *Shidlingapa* v. *Chenbasapa* (5), dissented from.

Mallongeney Dossee v. *Ramnarain Sadkhan* (6), referred to.

[R., 24 B. 609 (614); 103 P.L.R. 1905; **D.**, 9 A. 108 (113).**]**

THE plaintiff in this suit claimed to recover the money due on a simple mortgage, dated the 16th September, 1870, by the sale of the mortgaged property. The defendants pleaded payment of the mortgage-money, and in support of the plea produced two unregistered receipts, one for Rs. 120, dated the 26th January, 1872, and the other for Rs. 298-12, bearing date the 1st January, 1874. The Court of first instance, accepting the former receipt, allowed the defence to that extent, and decreed the rest of the claim. Both parties having appealed, the lower appellate Court held that neither of the payments to which the receipts related were proved, and on this ground gave the plaintiff a decree for the full amount claimed by him.

In second appeal by the defendants it was contended on their behalf that the lower appellate Court was bound to record a clear finding whether the receipts were genuine or not; that it had not done so; and that therefore its decision was defective. For the respondent it was

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* Second Appeal No. 1453 of 1883, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Allahabad, dated the 30th June, 1883, modifying a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 5th December, 1882.

(1) 4 A. 442. (2) 2 B. 489. (3) 1 B. 197.
(4) 7 B. 123. (5) 4 B. 235. (6) 4 C. 83.

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contended that any finding whether the receipts were genuine or not was not necessary, as in any case, being documents of which the registration was compulsory under s. 17 of the Registration Act, 1871, and not being registered, they were not admissible in evidence.

Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellants.

Mr. *J. Simeon*, Munshi *Ram Prasad*, and Lala *Jokhu Lal*, for the respondent.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgments:—

JUDGMENTS.

MAHMOOD, J.—For the purposes of this case it is not necessary to determine whether the receipts in question (which clearly relate [337] to payment of money due on the hypothecation-bond, and expressly state that such payments extinguish the mortgage) could have been produced in evidence to prove payments in answer to a suit wherein the remedy sought for was recovery of a personal debt. Doubts have been thrown upon this point by the ruling of GARTH, C.J., in the case *Mattongeney Dossee* v. *Ramnarain Sadkhan* (1); but even conceding the point in favour of the appellants' contention, it is clear that, even though the mere fact of the payments might be proved by the receipts, those documents could not be employed to connect such payments with the mortgage-debt so as to operate as an extinction of the mortgage. In the present case, the prayer in the plaint does not seek a personal decree against the defendants; but, on the contrary, the scope of the suit is limited to enforcement of the lien created by the hypothecation-deed of 16th September, 1870; in other words, recovery of money due on the deed by sale of the immoveable property therein comprised. The only object, therefore, with which the receipts have been produced is to prove that the incumbrance created by the bond has been extinguished by payment of the sums mentioned in the receipts. The point, therefore, upon which much stress was laid by the learned pleader for the appellants, does not arise at all. The only question is whether, considering the terms of the receipts and the object with which they have been produced, the registration of those documents was compulsory under s. 17 of the Registration Act; and if so, whether they fall under the prohibition contained in s. 49 of the Act. The question has not arisen in this Court for the first time. In the case of *Dalip Singh* v. *Durga Prasad* (2), which is directly in point, PEARSON and TURNER, JJ., held that a receipt for sums paid in part liquidation of a bond hypothecating immoveable property must be registered under the provisions of s. 17 of Act VIII of 1871, to render it admissible as evidence under s. 49 of that Act. The correctness of this ruling was expressly questioned by SARGENT, C.J., with the concurrence of MELVILL, J., in *Shidlingapa* v. *Chenbasapa* (3); and the learned Judges, in dissenting from the ruling of this Court, made certain observations (with reference to the clauses of Registration Act now [338] in question) which may be quoted here:—"It was contended before us that the exhibits were inadmissible, as being documents requiring to be registered under both cls. (*b*) and (*c*) of s. 17 of the Act of 1877. With respect to cl. (*c*), we think it would be impossible, without straining the language, to say that the sum paid on account of a mortgage-debt is the consideration for the limitation or extinction of so much of the interest in the land created by the mortgage-bond. The use of the technical term 'consideration'

(1) 4 C. 83. (2) 1 A. 442. (3) 4 B. 235.

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implies that the person himself to whom the money is paid limits or extinguishes his interest in the land in consideration of such payment, whereas such limitation or extinction (if there can be said to be any) as results from the payment on account of the mortgage-debt, is the legal consequence of such payment, and not the act of the mortgagee. It was said, however, that, at any rate, a recepit operates to limit the mortgagee's interest in the land as contemplated by cl. (*b*). Undoubtedly the payment reduces the sum due at the time on the mortgage, and thus modifies the account between the mortgagor and the mortgagee; but it does not operate to limit or confine within narrower limits the right or interest of the mortgagee in the land, which is simply to have the payment of the principal and interest secured on the mortgaged premises by some one or other of the remedies available for that purpose."

After making these observations, the learned Judges distinguished the case before them from a previous ruling of their Court in *Basawa* v. *Kalkapa* (1), remarking that in that case it appeared "to have been assumed that a simple receipt for payment in respect of a mortgage-debt would not require registration;" and that, therefore, the question had never been directly decided by their Court. There is, however, a distinct ruling of the Bombay High Court in *Mahadaji* v. *Vyankaji Govind* (2), in which WESTROPP, C.J., having fully considered the previous rulings of the Court brought to his notice, came to the conclusion that a document intended to be a receipt for payment of money due on a mortgage and purporting to extinguish the same, fell within cls. (2) and (3) of the old Registration Act, XX of 1866, which [339] for the purposes of the present question have practically reappeared in the present Registration Act as cls. (*b*) and (*c*) of s. 17 of the Act. The latest case, however, in which the question was discussed by the Bombay High Court is that of *Ramapa* v. *Umanna* (3), in which the defendant tendered in evidence a receipt to show that the interest of his co-mortgagee in the mortgage had been extinguished; and the receipt being objected to on the ground of its being unregistered, SARGENT, C.J., with the concurrence of KEMBALL, J., held that the receipt having been tendered to prove that the interest in the mortgage had been extinguished, required registration, and was therefore inadmissible. The learned Chief Justice distinguished the case from his own ruling in *Shidlingapa*, and adopted the rule laid down in the case of *Mahadaji* and in that of *Basawa*, both of which have already been referred to.

With due deference to the ruling of the learned Chief Justice of the Bombay High Court in the case of *Shidlingapa*, I am unable to agree in the propositions of law laid down in the passage which I have already quoted. I agree in the view taken in that passage of the meaning of the expression "consideration," but I am unable to hold that the acceptance of money by the mortgagee in satisfaction of the mortgage-debt does not amount to an act which operates to extinguish the mortgage. Payment necessarily implies the correlative act of receiving, and the two constitute an act of the parties from which legal consequences flow, as they do from other similar transactions. And it seems to me that a receipt given by a mortgagee to a mortgagor for money paid in satisfaction of the mortgage amounts to a "non-testamentary instrument which acknowledges the receipt or payment of......consideration on account of the......extinction of such right, title, or interest" as the mortgagee possesses in the

(1) 2 B. 489. (2) 1 B. 197. (3) 7 B. 123.

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mortgaged property. The holder of a simple mortgage-deed possesses rights which jurisprudence recognizes as one of the various species of *jura in re aliena*, or estates carved out of the full ownership of property; such rights subsist in that property so long as the mortgage-debt remains unpaid, and on payment of such debt by the mortgagor, and acceptance of such payment by the mortgagee, the rights are extinguished. The payment, therefore, can be treated as "payment of **[340]** consideration on account of the extinction" of the mortgagee's right within the meaning of cl. (*c*) of s. 17 of the Registration Act. It appears to me that the judgment of WESTROPP, C.J., in the case of *Mahadaji*, proceeds upon a reasoning not dissimilar to the proposition which I have endeavoured to enunciate, and I confess I am unable to perceive how the question which arose in the case of *Shidlingapa* could be distinguished in principle from the point decided in the former case; nor can I see the exact reasons why the ruling of WEST, J., in the case of *Basawa*, was not taken to rule that "a document called a receipt, but intended to be used to prove the release of a claim secured by mortgage, required registration under s. 49 of Act VIII of 1871, inasmuch as it affected immoveable property." Indeed, such is the head-note of the case in the report, and is thus consistent with the view taken by a Division Bench of this Court in the case of *Dalip Singh*, which SARGENT, C.J., declined to follow in the case of *Shidlingapa*.

It seems to me that the laws enforcing registration must be so interpreted as to promote the policy and the objects for which they have been promulgated. WEST, J., called them a "bulwark against fraud;" and WESTROPP, C.J., in holding that a receipt acknowledging payment of the mortgage-money could not be admitted without registration, added the observation that "any other decision would, in our opinion, defeat the manifest intention of the Legislature." Looking at the question from this point of view, it seems to me that the admission of an unregistered receipt, which operates to extinguish a mortgage, would go far to render nugatory the security which registration affords to the holder of a mortgage, the value of which exceeds Rs. 100. It is true, as was held in the case of *Mahadaji* by the Bombay High Court, and by this Court in the case of *Dalip Singh*, that, notwithstanding the inadmissibility of a receipt, the fact of the extinction of the mortgagee's lien may be proved by other evidence. But the cogency of a receipt purporting to acknowledge a payment which extinguishes the mortgage is as great on the one side as the existence of a mortgage-deed itself on the other; and it seems clear to my mind that when the law requires the *written* terms of a mortgage to be registered, it should require the *written* terms of its extinction to be registered also.

[341] For these reasons I am of opinion that the two receipts in question in this case, even if genuine, could not be admitted as evidence in defence of the suit, and there is therefore no necessity for remanding the case for a clear finding as to their genuineness or forgery.

The rest of the evidence in regard to the payment of the mortgaged debt has been duly considered by the lower appellate Court which has arrived at conclusions wholly adverse to the case set up by the defendants-appellants, and has found that the mortgage-money has not been paid. This finding cannot be disturbed in second appeal, and I would therefore dismiss the appeal with costs.

DUTHOIT, J.—I concur in the order proposed by my brother MAHMOOD.

Appeal dismissed.

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Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

FATIMA BEGAM AND OTHERS (*Plaintiffs*) *v.* SUKH RAM (*Defendant*).*
[6th May, 1884.]

Suit to establish right—Suit to set aside summary decision—Act VII of 1870 (*Court Fees Act*), *sch. ii, No.* 17 (i).

The plaintiffs alleged in their plaint as follows:—Certain property having been attached in execution of a decree, their mother, the wife of the judgment-debtor, objected to the attachment on the ground that the property had previously come into her possession under a transfer by sale in lieu of her dower-debt. The plaintiffs' mother died pending the determination of the objection, having devised her property to the plaintiffs. They succeeded to the same, and certain other property, which also had been transferred to their mother in lieu of her dower-debt, having been also attached in execution of the same decree, the plaintiffs objected to the attachment. The Court executing the decree passed orders disallowing both objections. Upon these allegations the plaintiffs claimed to set aside both orders. They paid, with reference to cl. i., art. 17, sch. ii of the Court Fees Act. 1870, a court-fee of Rs. 20 on their plaint, but the Court of first instance held that this was not sufficient, and that the court-fee should be calculated on the amount of the decree in execution of which the property had been attached.

Held that, looking at the nature of the reliefs sought, cl. i, art. 17, sch. ii of the Court Fees Act, 1870, was applicable, and that a ten-rupee stamp in respect of each order sought to be set aside was payable. *Dayachand Nemchand* v. *Hemchand Dharamchand* (1) and *Gulzari Mal* v. *Jadaun Rai* (2), followed.

[N.F., 13 C. 162 (164); F., 6 A. 466; R., 31 C. 511 (512).]

THIS was an appeal from an order rejecting a plaint under s. 54 (*b*) of the Civil Procedure Code. The plaint stated as [342] follows:—

"That the property detailed below came into the proprietary possession of the plaintiffs' mother, Sakina Begam, before the attachment made in execution of the defendant's decree, under a registered sale-deed executed on 8th July, 1880, in lieu of the dower-debt due by Khwaja Muhammad Husain, her husband.

"(2) That the defendant, representing the said property to be the property of Khwaja Muhammad Husain, debtor, contrary to fact, caused the 'Saunders' Kothi' the house in Sarai Sultani, and the indigo concern, to be attached on the 19th July, 1880, in execution of a decree passed by the Subordinate Judge of Aligarh. Sakina Bibi presented a petition of objection for removal of attachment. During the pendency of the objection case, the plaintiffs' mother, owing to her illness, made a will, under a registered document, dated the 1st January, 1881, that after her, her three daughters should have equal rights in the aforesaid properties belonging to her. Afterwards, on the 1st February, 1881, the plaintiffs' mother breathed her last, and the property in dispute, as well as other property left by the plaintiffs' mother, came to their possession and became their property under her will. The plaintiffs, on their objection, succeeded to the estate as heirs to their mother. After the first attachment mauza Kukri Nagla, known as Naurangabad, was attached in execution of the same decree; accordingly, the plaintiffs took objection to the attachment

* First Appeal No. 11 of 1884, from a decree of Maulvi Muhammad Samiulla Khan, Subordinate Judge of Aligarh, dated the 30th January, 1883.

(1) 4 B. 515.
(2) 2 A 63.

of the mauza, and for removal of the attachment by right of succession to, and under the will of, their mother. In spite of investigation in proof of the objectors' property and possession, the Court, contrary to fact, disallowed both the objections (1st and 2nd) on 3rd August, 1881, on the ground of separate possession.

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"(3) That before the attachment in the execution of decree, the property in dispute having been transferred to the plaintiffs' mother in payment of a lawful and *bona fide* debt, came into her possession and became her property. Since her death the plaintiffs, by virtue of inheritance to her and under her will, have been in proprietary possession and enjoyment thereof. The decisions in the objection cases are contrary to fact. The plaintiffs, therefore, seek the following reliefs:—

(*a*) That the decision in the objection case passed on the 3rd August, 1881, by the Subordinate Judge of Aligarh, disallowing **[343]** the objection praying to have attachment removed from the 'Saunders' Kothi,' the house in Sarai Sultani in Koel, and the indigo factory in Maheshpur, be set aside.

(*b*) That the decision of the objection case passed by the Subordinate Judge of Aligarh on 3rd August, 1881, disallowing objection as to removal of attachment from mauza Kukri Nagla, known as Naurangabad, be set aside.

(*c*) That the costs in the cause and future interest be charged to the defendant.

"The suit for the purpose of jurisdiction is laid at Rs. 12,529-0-5, the amount of the judgment-debt."

The plaintiffs paid on their plaint a court-fee of Rs. 20. The Subordinate Judge trying the suit held that the court-fee payable on the plaint should be calculated on the amount of the decree in execution of which the property in suit had been attached, *viz.*, Rs. 12,529-0-5, and ordered the plaintiffs to make up the deficiency within a certain time. On the plaintiffs failing to obey this order, the Subordinate Judge rejected the plaint under s. 54 (*b*) of the Civil Procedure Code.

The plaintiffs appealed to the High Court, contending that the suit was one under s. 283 of the Civil Procedure Code for establishment of right, and the plaint had been written on sufficiently stamped paper.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellants.

Mr. *A. H. Reid*, for the respondent.

The Court (STRAIGHT, Offg. C.J. and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—We are of opinion that the learned Subordinate Judge's view as to the amount of court-fee payable on the plaint in this case was erroneous. Looking at the nature of the reliefs prayed therein, we think cl. i, art. 17, sch. ii of Act VII of 1870 is applicable, and that a ten-rupee stamp in respect of each order sought to be set aside is payable. This view is fortified by a ruling of Sir MICHAEL WESTROPP in *Dayachand Nem-***[344]***chand* v. *Hemchand Dharamchand* (1), and by another of this Court in *Gulzari Mal* v. *Jadan Rai* (2). We therefore decree the appeal, and, reversing the Subordinate Judge's decree, direct him to receive and restore the plaint to his file, and then to dispose of the suit according to law.

Appeal allowed.

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(1) 4 B. 515. (2) 2 A. 63.

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6 A. 344 = 4 A.W.N. (1884) 110.

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Before Mr. Justice Mahmood and Mr. Justice Duthoit.

TAWAKKUL RAI AND ANOTHER (*Defendants*) *v.* LACHMAN RAI AND OTHERS (*Plaintiffs*).*

TAWAKKUL RAI AND ANOTHER (*Defendants*) *v.* SHEO GHULAM RAI (*Plaintiff*).† [7th May, 1884.]

Mortgage—Mortgage by conditional sale—Regulation XVII of 1806, *s.* 8—*Foreclosure—Title of mortgagee when absolute—Pre-emption—Purchase-money—Burden of proof.*

Held that a proceeding under Regulation XVII of 1806 foreclosing a mortgage by conditional sale was not conclusive as to the amount of the mortgage-money against persons subsequently claiming to enforce a right of pre-emption and raising the question as to the amount of the purchase-money. *Forbes* v. *Ameroonnissa Begum* (1), referred to.

Also that, on general principles, a decree in a suit to foreclose a mortgage by conditional sale cannot bind a person not a party to the suit claiming to enforce right of pre-emption and raising a similar question.

Held also that a person claiming a right of pre-emption in respect of a mortgage by conditional sale was bound to pay as the price of the property the entire amount due on such mortgage at the time it became absolute. Also that on the expiration of the year of grace allowed by Regulation XVII of 1806 the ownership of the mortgaged property vested absolutely in the mortgagee, even though he might not have obtained a decree establishing or declaring his right.

Forbes v. *Ameeroonnissa Begum* (1), referred to. *Ashik Ali* v. *Mathura Kandu* (2); *Khoob Chund* v. *Leela Dhur* (3); *Jeorakhan Singh* v. *Hookum Singh* (4); *Suroop Chunder Roy* v. *Mohender Chunder Roy* (5) and *Luft Hossein* v. *Abdool Ali* (6), followed.

[345] *Bhagwan Singh* v. *Mahabir Singh* (7), followed as to the rule of *onus probandi*, where the plaintiff in a suit to enforce a right of pre-emption impugns the correctness of the price stated in the instrument of sale. In determining the amount of the price which a pre-emptor has to pay, the Court is not called upon to assess the amount which would be a fair and reasonable price for the property, but to ascertain what amount actually changed hands as consideration for the sale.

[Appr., 14 A. 405 (412) (**F.B.**); **F.**, 6 A. 551 (558); 121 P.R. 1894; **D.**, 11 A. 164 (175).**]**

THESE appeals arose out of two suits to enforce a right of pre-emption. It appeared that on the 31st March, 1870, the owners of certain lands in mauzas called Thaini and Ahrauli, in the Azamgarh district and of certain shares in mouzas called Jhuria Khurd and Alampur, in the same district, gave a mortgage by conditional sale (*bybilwafa*) of the lands and shares for Rs. 1,498 to persons called Harihar Rai and Ishri Rai. The instrument of mortgage provided that, if the mortgage-money were not paid on a certain date, the mortgagees would be entitled to foreclose.

The mortgage-money not having been duly paid, the mortgagees applied to the District Judge, on the 30th March, 1874, for issue of the

* Second Appeal No. 1146 of 1883, from a decree of H. D. Willock, Esq., District Judge of Azamgarh, dated the 12th April, 1883, affirming a decree of Maulvi Muhammad Amin-ud-din, Munsif of Muhammadabad Gohna, dated the 30th September, 1882.

† Second Appeal No. 1147 of 1883, from a decree of H. D. Willock, Esq., District Judge of Azamgarh, dated the 13th April, 1883, affirming a decree of Maulvi Muhammad Amin-ud-din, Munsif of Muhammadabad Gohna, dated the 30th September, 1882.

(1) 10 M.I.A. 340. (2) 5 A. 187. (3) N.W.P.H.C.R. (1868) 103.
(4) N.W.P.H.C.R. (1868) 358. (5) 22 W.R. 539.
(6) 8 W.R. 476. (7) 5 A. 184.

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ordinary notice of foreclosure under s. 8 of Regulation XVII of 1806, and the notice was issued on the 18th April, 1874, and served upon the mortgagors on the 21st of that month, the case being struck off on the 23rd May, 1874. Subsequently the mortgagees applied to the District Judge again for a declaration that the additional sale had become absolute, and on the 27th August, 1875, the District Judge recorded a proceeding in which after stating that the notice had been issued fixing the mortgage demand at Rs. 2,619-1-6, he went on to say :—"It appears that one year's time has expired from the date of issue of notification to that of the application, and from the papers on record it does not appear that the mortgage-money has been paid. The period having expired and the mortgage not having been paid, it is necessary to record a foreclosure proceeding."

On the 4th July, 1879, Harihar Rai and Ishri Rai sold their rights and interests under the mortgage to the appellants in these appeals, Tawakkul Rai and Rangu Rai, the deed of sale stating that the consideration-money was Rs. 2,999. The purchasers brought a suit to foreclose the mortgage, and on the 18th February, **[346]** 1880, obtained a decree for proprietary possession of the mortgaged property.

On the 29th November, 1880, the co-sharers of the mortgagors in mauzas Thaini and Ahrauli instituted in the Court of the Munsif of Muhammadabad Gohna, in the Azamgarh district, the suit out of which appeal numbered 1146 arose. In this suit they claimed the right of pre-emption in respect of the lands in those villages which, under the mortgage, the sale-deed of the 4th July, 1879, and the decree of the 18th February, 1880, had come into the possession of Tawakkul Rai and Rangu Rai. The plaintiffs in this suit alleged that the sum actually paid for the lands was Rs. 560. Sheo Ghulam Rai, a co-sharer of the mortgagors in mauza Jhuria Khurd, instituted a similar suit in the same Court in respect of the share in that village. He alleged that the sum actually paid for the share was Rs. 115. This was the suit out of which appeal numbered 1147 arose.

The Munsif decreed both claims, deciding that the actual purchase-money in the one case was Rs. 560 and in the other Rs. 115.

On appeal by the defendants, Tawakkul Rai and Rangu Rai, the District Judge affirmed the Munsif's decrees.

The defendants appealed to the High Court from the decrees of the District Judge, the appeals being numbered 1146 and 1147 respectively. The grounds of appeal were the same in each case; the third being that "the order of the Judge in the foreclosure proceedings, dated the 27th August, 1875, is final as to the amount then due on the mortgage, *viz.*, Rs. 2,619." The appeals were heard and disposed of together.

Mr. *T. Conlan* and Mr. *C. Dillon*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the respondents in appeal No. 1146 and the respondent in appeal No. 1147.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment in appeal No. 1146, governing both cases :—

JUDGMENT.

MAHMOOD, J.—The learned counsel who appeared in support of the appeals does not press the first two grounds of appeal, and has confined his argument to the contention involved in the third **[347]** ground of

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appeal, in which it is urged that "the order of the Judge in the foreclosure proceedings, dated 27th August, 1875, is final as to the amount then due on the mortgage, *viz.*, Rs. 2,619." The ground so urged appears to be very narrow and untenable, but we have allowed the learned counsel for the appellants to expatiate upon it, and he contends that the lower Courts, in determining the actual price of the property in dispute, should have ascertained whether the *bybilwafa* deed of the 31st March, 1870, which describes the consideration to be Rs. 1,498, was a *bona fide* transaction, and whether the proceedings of the 27th August, 1875, and the foreclosure decree of the 18th February, 1880, had been obtained in good faith. He further contends, on the authority of the ruling of this Court in *Ashik Ali* v. *Mathura Kandu* (1), that, under the circumstances of this case, the proper way to determine the amount of the price was to ascertain how much money was due on the *bybilwafa* mortgage of the 31st March, 1870, at the time when, by foreclosure, the defendants-appellants obtained possession of the property; and the concluding part of the argument on behalf of the appellants is, that the lower appellate Court was wrong in law in presuming fraud against the documentary evidence, consisting of sale and mortgage-deeds produced by the appellants, to prove the market-value of the property in suit, in order to show that the price claimed by them and entered in their sale-deed was neither excessive nor fraudulent.

We proceed to deal with this contention in the order in which it has been urged before us.

In regard to the proceeding of the 27th August, 1875, for which the learned counsel for the appellants claims the effect of conclusiveness as to the amount then due on the *bybilwafa* mortgage, we may use the language of the Lords of the Privy Council in *Forbes* v. *Ammeeroonnissa Begum* (2) by saying that "the functions of the Judge under Regulation XVII of 1806, s. 8, are purely ministerial, and that a mortgagee, after having done all that this Regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, to obtain a declaration of his absolute title if he is in possession. In that suit the mortgagor may contest on any sufficient grounds the validity of the [348] conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is due, or that the deposit (if any) which he has made is sufficient to cover what is due; but the issue, in so far as the right of redemption is concerned, will be whether anything at the end of the year of grace remained due to the mortgagee, and if so, whether the necessary deposit had been then made." These observations leave no doubt that a ministerial proceeding, such as that of 27th August, 1875, far from binding third persons, cannot even conclude the mortgagor, on whom the notice of foreclosure is served. Nor, on general principles, have we any hesitation in holding that the foreclosure decree of 18th February, 1880, is not conclusive against the present plaintiffs, who were no parties to the suit in which it was passed.

The next step in the contention urged on behalf of the appellants raises a question of some nicety. In the case of *Ashik Ali*, already referred to, a Division Bench of this Court laid down the rule that the pre-emptor, in the case of a mortgage by conditional sale which has

(1) 5 A. 187.
(2) 10 M.I.A. 340.

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become absolute, is bound to pay, as the price of the property, the entire amount due on such mortgage at the time it became absolute. The rule thus laid down raises, in the present case, a further question which did not arise in the ruling cited. It may be laid down as a general rule that every sale of property subject to pre-emption, when made in favour of a stranger, renders the right enforceable when under such sale the seller is divested of, and the buyer invested with, the ownership of such property; and applying this rule to the present case, the question arises whether such change of ownership took place upon the expiry of the year of grace, or on the 4th July, 1879, when the deed of sale was executed in favour of the appellants, or on the 18th February, 1880, when they obtained the foreclosure decree. The determination of this point is of consequence in this case, because the fixation of the price which the plaintiffs are bound to pay before obtaining possession must be regulated accordingly. In the case of *Forbes* already cited, the Lords of the Privy Council, referring to the Regulations relative to foreclosure, observed:—"The general effect of these Regulations is, that if anything be due on the mortgage and the mortgagor makes an insufficient deposit, **[349]** and, *a fortiori*, if he make no deposit at all, the right of redemption is gone at the expiration of the year of grace. *The title of the mortgagee, however, is not even then complete*: and a mortgagee, after having done all that this Regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession, or to obtain a declaration of his absolute title if he is in possession." These observations and specially the words which we have emphasized, by reason of the high authority from which they proceed, are liable to raise a serious doubt whether a foreclosure decree is a condition precedent to the investiture of absolute ownership in the *bybilwafa* mortgagee. The question has been dealt with in some of the reported cases. In *Khub Chand* v. *Lila Dhar* (1) it was held by a Division Bench of this Court that it is not necessary for a conditional mortgagee, if he were in possession at the expiry of the year of grace, to bring a suit to complete his title; and in a later case—*Jeerakhun Singh* v. *Hukum Singh* (2)—PEARSON and TURNER, JJ., having fully considered the *dictum* of the Lords of the Privy Council, came to the conclusion that "the right of a conditional purchaser, who has duly taken the proceedings directed by the Regulation, becomes absolute on the termination of those proceedings; and this notwithstanding he may not proceed by suit to vindicate his right until a later period." The learned Judges in the same case summarized their conclusions in the following words:—"While, therefore, we hold it to be well settled law that a conditional purchaser, if out of possession, can obtain possession if he is resisted only by regular suit, and that if in possession he can vindicate his title (if impugned) only by regular suit, we at the same time hold that in any such suit his right, if established by proof, must be referred to the period at which the proceedings under the Regulation came to an end, and must be held to have become absolute at that date." The judgment of the Calcutta High Court in *Sarup Chunder Roy* v. *Mohendar Chunder Roy* (3) and in *Luft Hossein* v. *Abdul Ali* (4), appear impliedly to proceed upon a similar view. It may therefore be taken, though the rule at first

(1) N.W.P.H.C.R. (1863), 103.
(2) N.W.P.H.C.R. (1868), 358.
(3) 22 W.R. 539.
(4) 8 W.R. 476.

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sight has the appearance of clashing with the *dictum* of the Privy [350] Council that at the termination of the year of grace the ownership of property, subject to a *bybilwafa* mortgage, vests absolutely in the mortgagee, even though he may not have obtained a decree establishing or declaring his proprietary right. In the present case, therefore, the ownership of the mortgaged property passed to Harihar and Ishri, original mortgagees, upon the expiry of the year of grace, whenever that event occurred, thus giving rise to the plaintiff's claim for pre-emption; and indeed, if they have sought to enforce their pre-emptive right in respect of such foreclosure, the fixation of the price payable by them would, under the rule laid down in the case of *Ashik Ali*, be regulated by the amount due on the *bybilwafa* of the 31st March, 1870, at the expiry of the year of grace. In the present case, however, the plaint leaves no doubt that the right of pre-emption is sought to be enforced, not in respect of the foreclosure, whereby Harihar and Ishri acquired ownership on the expiry of the year of grace, but in respect of the sale which these latter persons made in favour of Tawakkul and Rangu (defendants-appellants) on the 4th July, 1879. That sale, therefore, is the plaintiff's cause of action in this suit; it is in respect of that transfer that they have preferred their pre-emptive claim; and it is by the terms of that sale that the price payable by them must be regulated.

This brings us to the last part of the argument on behalf of the appellants, and so far as that part of the argument is concerned, we are of opinion that the appeal has force. (After giving his reasons for this opinion, the learned Judge continued :)

The rule of the *onus probandi* in such cases was laid down by this Court in the case of *Bhagwan Singh* v. *Mahabir Singh* (1), and such question must accordingly be decided. In the present case the oral evidence produced by the defendants should have been taken into consideration with the documentary evidence, and definite conclusions should have been arrived at as to the actual price paid by the vendees under the sale-deed of the 4th July, 1879; and in such inquiry much help no doubt could be derived by investigating whether the consideration mentioned in the *bybilwafa* deed of the 31st March, 1870, had been entered in good faith, and [351] also how much was actually due on that mortgage at the time of foreclosure on the expiry of the year of grace consequent upon the issue of notice by Harihar and Ishri, the original mortgagees or conditional purchasers. In determining the amount of the price which a pre-emptor has to pay, the Court is not called upon to assess the amount which would be a fair and reasonable price for the property, but to ascertain what amount actually changed hands as consideration for the sale. In the present case the points which called for investigation were :—(i) what was the actual amount of the consideration for the *bybilwafa* of the 31st March, 1870; (ii) what was actually due on that mortgage at the expiry of the year of grace; (iii) what was the amount of the consideration actually paid by Tawakkul and Rangu, defendants-purchasers, as consideration of the deed of sale dated the 4th July, 1879; and as the property in suit is only a part of the property included in the *bybilwafa* of the 31st March, 1870, and the sale-deed of 4th July, 1879, it would be necessary also to determine; (iv) what is the proportionate amount paid by the defendants-purchasers as price of the property in suit under the sale-deed of the 4th July, 1879.

(1) 5 A. 184.

As these questions have not been duly considered, and we cannot in second appeal go into the merits of the evidence, and also because the conclusions of the lower appellate Court have been arrived at by a view of the evidence based upon wrong presumptions, we decree this appeal, and setting aside the decree of the lower appellate Court, remand the case to the Court under s. 562 of the Civil Procedure Code for disposal, with reference to the observations which we have made. The costs of the appeal will abide the result.

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Case remanded.

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Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

ISHRI (*Decree-holder*) v. GOPAL SARAN AND ANOTHER (*Judgment-debtors*).* [19th May, 1884.]

Pre-emption—Conditional decree—Purchase-money—Costs — Set-off—Civil Procedure Code, ss. 214, 221, 247.

The decree in a suit to enforce a right of pre-emption directed in accordance with the provisions of s. 214 of the Civil Procedure Code, that the plaintiff should obtain [352] possession of the property and recover costs of the suit from the defendants (vendor and vendee), on payment of the purchase-money within a fixed time, but that on default of such payment the suit should stand dismissed. The plaintiff deposited within time the purchase-money with the exception of a sum less than the amount of costs awarded to him. He subsequently applied for delivery of possession of the property in execution of the decree and for the recovery of the costs awarded to him, deducting from such costs the unpaid portion of the purchase-money.

Held, applying, by analogy of ss. 221 and 247 of the Civil Procedure Code, the equitable doctrine of set-off, that the plaintiff was entitled, when depositing the purchase-money under the decree, to deduct therefrom the sum the decree awarded to him as costs, and that therefore the decree did not become null and void by reason that he had not deposited the full amount of the purchase-money within time.

Degumburee Dabee v. *Eshan Chunder Sein* (1); *Jugo Mohun Bukshee* v. *Soorendro Nath Roy Chowdhry* (2) and *Brijnath Dass* v. *Juggarnath Dass* (3), referred to.

[F., 28 A. 676 (677) = 3 A.L.J. 804 = A.W.N. (1906) 198; 10 Ind. Cas. 454; 3 O.C. 323 (324); 6 O.C. 23 (24); Appr., 23 M. 121 (123); R., 10 A. 389 (394); 10 C.P. L.R. 83 (85); 16 C.P.L.R. 73 (75); 8 O.C. 57 (58).]

ON the 16th May, 1882, the appellant, the plaintiff in a suit to enforce a right of pre-emption, obtained a decree directing that he should obtain possession of the property sold, and recover costs, on payment of the purchase-money, *viz.*, Rs. 399-15-0, within fifteen days, but that on default of such payment the suit was to stand dismissed with costs. The appellant deposited the purchase-money, excepting fifteen annas, within time. On the 17th July he applied for delivery of possession and for recovery, out of the Rs. 399 deposited by him, of the costs awarded to him, allowing a set-off of fifteen annas, the unpaid balance of the

* Second Appeal No. 76 of 1883, from an order of T. R. Redfern, Esq., District Judge of Ghazipur, dated the 9th June, 1883, affirming an order of Munshi Kulwant Prasad, Munsif of Balia, dated the 17th February, 1883.

(1) 9 W.R. 230. (2) 13 W.R. 106. (3) 4 C. 742.

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purchase-money. The judgment-debtors objected that the decree had become null and void by reason of the full amount of the purchase-money not having been deposited within time, and that the appellant was not entitled to deduct from the purchase-money to be deposited, such sum as has been awarded to him as costs in the suit. The Court of first instance (Munsif) took the same view, and on the 17th February, 1883, passed an order dismissing the appellant's application for delivery of possession, with costs. On appeal, the District Judge confirmed this decision, observing:—"The fact that the appellant was provisionally entitled to costs, from which fifteen annas might be set-off, is irrelevant; for only by depositing the purchase-money could be claimed to execute the decree for costs." For the [353] appellant it was contended that, under ss. 221 and 247 of the Civil Procedure Code, the sum awarded to him as costs might lawfully be deducted from the purchase-money, and that as such sum exceeded fifteen annas, the decree had not become null and void.

Lala *Lalta Prasad*, for the appellant.

Munshi *Sukh Ram*, for the respondents.

The Court (STRAIGHT, Offg. C.J., and MAHMOOD, J.) delivered the following judgment:—

JUDGMENT.

MAHMOOD, J.—S. 214 of the Civil Procedure Code provides that in decreeing a suit for pre-emption, "if the amount of purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, *together with the costs* (if any) *decreed against him*, the plaintiff shall obtain possession of the property; but that if such money and costs are not so paid, the suit shall stand dismissed with costs." Again, under s. 219 the Court is bound to "direct by whom the costs of each party are to be paid, whether by himself or by any other party to the suit, and whether in whole or in what part or proportion." The question, then, before us is whether, when a decree for pre-emption is duly passed in accordance with the provisions of s. 214, and under s. 219 costs are awarded to the plaintiff-pre-emptor, he is entitled to deduct from the purchase-money to be deposited by him such sum as has been awarded to him as costs of the suit. In other words, can a pre-emptor in depositing the purchase-money set-off the amount due to him as costs of the suit under the decree? Under s. 214 the pre-emptor cannot enforce his decree without depositing not only the purchase-money, but also "the *costs* (if any) decreed *against* him." The section, however, makes no provision to meet cases where costs, instead of being awarded against the pre-emptor, are awarded in his favour by the decree. Nor is there anything in that section which specifically authorizes the pre-emptor-decree-holder in depositing the purchase-money to set-off the amount due to him from the judgment-debtor for the costs.

Section 221, indeed, authorizes the Court to "direct that the costs payable to one party by another shall be set-off against a sum which is admitted or is found in the suit to be due from the former [354] to the latter;" and s. 247, which is one of the rules connected with the mode of executing decrees, lays down that "when two parties are entitled under the same decree to recover from each other sums of different amounts, the party entitled to the smaller sum shall not take out execution against the other party, but satisfaction for the smaller amount shall be entered on the decree;" and "when the amounts are

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equal neither party shall take out execution, but satisfaction for each sum shall be entered on the decree."

Such being the provisions of the Code, we have to determine whether the question before us falls under the purview of s. 221 or s. 247; and if the case does not fall under either of these sections, what rule should govern our decision in this case. We are of opinion that the case before us falls under neither of these clauses of the Code. The decree in the present case did not direct that the costs payable to the pre-emptor-decree-holder, were to be set-off against the purchase-money to be deposited by him, nor could the purchase-money be regarded as "a sum which is admitted or is found in the suit to be due" from the plaintiff-pre-emptor to the defendant-vendor or defendant-vendee. The appellant before us cannot therefore claim the benefit of the former section. Nor does his case fall under s. 247, because that section clearly refers to counter-claims in suits for recovery of money, and it would be stretching the language of that section to an unjustifiable extent to hold that the purchase-money which a pre-emptor-decree-holder has to deposit, as a condition precedent to obtaining possession under his decree, is a sum which the (vendor or vendee) judgment-debtors "are entitled under the same decree to *recover*," or for which they could, in any case, "*take out execution*." The question then arises, whether there is any other provision in the Code to meet exactly the exigencies of the present case.

We are of opinion that the question must be answered in the negative. Rules in regard to decrees in pre-emption suits were formulated by the Legislature, as a general law of Civil Procedure, for the first time in s. 214 of the Code of 1877, and it is conceivable that in introducing these new rules the form which they took fell short of comprehending all the various cases that might arise in consequence; and the case before us is one which is not provided for by any specific rule in the Code. Such being the case, we follow [355] the example of an eminent authority, PEACOCK, C.J. (in *Dejumburee Dabee* v. *Eshan Chunder Sein* (1)), in holding that we are necessarily called upon, under s. 24 of the Civil Courts Act (VI of 1871), which took the place of the old Regulation (III of 1793), to import the principles of equity in administering the rules of the Civil Procedure Code. The rule of compensation or set-off is a doctrine so consonant with the principles of justice, equity and good conscience, that it governs alike the rules of substantive and adjective law. Indeed, the principle has already been expressly adopted by the Legislature in the Civil Procedure Code itself. S. 111 provides for set-off to be pleaded as answer to a suit; s. 216 lays down the form and effect of the decree when set-off is allowed against a sum found to be due on a substantive claim; s. 221 permits that costs may be set-off against the sum found to be due in the suit; s. 246 authorizes the mutual set-off of cross-decrees; and s. 247 follows the same principle, in more general terms, in regard to cross-claims under the same decree.

Is there, then, anything in the Code, or any equitable consideration which would prohibit a pre-emptor-decree-holder from availing himself of the doctrine of set-off by deducting the costs allowed to him from the purchase-money which he has to deposit under the very decree which awards him costs? The Civil Procedure Code, as we have pointed out, falls short of providing any specific rule to meet exactly the case before

(1) 9 W.R. 230.

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us. The doctrine of set-off, which owes its original to Roman Jurisprudence, was well known to the Civil law under the more comprehensive title of compensation, which, in the words of STORY, J., may be defined to be the reciprocal acquittal of debts between two persons who are indebted, the one to the other; or, as it is perhaps better stated by Pothier, compensation is the extinction of debts, of which two persons are reciprocally debtors to one another, by the credits of which they are reciprocally creditors to one another. The Civil law itself expressed it in a still more concise form—*compensatio est debiti et crediti inter se contributio.* The Civil law treated compensation as founded upon a natural equity, and upon the mutual interest of each party to have the benefit of the set-off, rather than to pay what he owed, and then to have an action for what was due [356] to himself—(Story's *Eq. Juris.*, ss. 1438-39). The doctrine of compensation in the Civil law, of course, has never been fully adopted either in England or in this country, probably for reasons based upon the inconvenience and delay which would arise in the trial of suits. But in the case before us, there can be no such inconvenience or delay; the decree which declares the plaintiff-pre-emptor entitled to obtain possession of the property in suit on payment of the purchase-money declares him, in the same breath, entitled to recover costs from those against whom the decree has to be enforced.

In a pre-emption suit the purchase-money has to be deposited into the Court under the express provisions of s. 214, and it is for the Court to determine to whom such money is to be paid, whether to the defendant-vendor or to the defendant-vendee. We may take it as a settled rule of the law of pre-emption that if the pre-emptive suit has arisen and been decreed before the vendee has paid the whole or part of the purchase-money to the vendor, the Court, in disbursing the purchase-money deposited, would make an order directing that the whole or part of the purchase-money (as the case may be) should be paid to the vendor or vendee, both of whom must necessarily be judgment-debtors, and as such be liable alike to payment of the costs awarded to the pre-emptor-decree-holder. And, because the judgment-debtors, in the case before us, are jointly liable to the costs incurred by the decree-holder-pre-emptor, and it is not for him to decide to whom the purchase-money, which he has to deposit is to be paid, we hold that he is entitled, when depositing the purchase-money under the decree, to deduct from such money such sum as that decree awards to him as costs.

But it is contended by the learned pleader for the respondents, in support of the lower appellate Court's judgment, that the pre-emptor-decree-holder-appellant's right to execute his pre-emption decree was contingent upon his depositing the *full* purchase-money within time, and that till such deposit was actually made he could not be held to be entitled to any costs whatsoever, and could not therefore deduct them from the purchase-money in making the deposit required by the decree. The argument, though plausible, has no force. It seems to aim at giving to mere formality the significance of a substantive effect. For it seems to us to [357] involve a very untenable proposition, that for a pre-emptor-decree-holder the only way to enforce his decree is to come into Court with the full purchase-money in the one hand, offering it to the judgment-debtors, and to stretch out the other hand asking them to give him the costs which the very decree, under which he is depositing the purchase-money, awards him. The argument also involves the contingency that a pre-emptor should pay up the purchase-money to the judgment-debtors in ready cash, and

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may have to wait possibly for years before recovering from them the costs awarded to him by the Court, and it is conceivable that he may never be able to recover them at all. We cannot regard such results as consonant with the principles of justice, equity and good conscience, which we are bound to administer in such cases; and holding these views, we cannot adopt the reasoning upon which the judgment of the lower appellate Court proceeds, nor the argument urged before us in support of that judgment by the learned pleader for the respondents. The effect of our views is to apply, by analogy of ss. 221 and 247, the doctrine of set-off to the case before us—a course which is consonant in principle with that followed by JACKSON, J., in the case of *Jugo Mohun Bukshee* v. *Soorendra Nath Roy Chowdhry* (1), long before the Legislature formulated the rules contained in the two sections just referred to.

Indeed, PONTIFEX, J., in the case of *Brijnath Dass* v. *Juggarnath Dass* (2), seems to have adopted the principle of the rule which we have laid down, by holding that in a redemption suit "the plaintiff is entitled to set-off or deduct the amount of the costs payable to him under the decree from the mortgage-monies payable by him to the defendant," the case before the learned Judge being that of a decree which directed the plaintiff-mortgagor to pay the mortgage-money and interest to defendant, and directed the defendant to pay to the plaintiff the costs of the suit.

We decree this appeal, and setting aside the orders of both the lower Courts, remand the case to the Court of first instance for disposal.

Appeal allowed.

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6 A. 358 = 4 A.W.N. (1884) 115.

[358] APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Duthoit.

SHEO RATAN SINGH (*Defendant*) *v.* SHEO SAHAI MISR AND ANOTHER (*Plaintiffs*).* [1st May, 1884.]

Res judicata—*Civil Procedure Code, s. 13, Explanations I and II, and s. 44.*

L was the owner of a four-anna share in a village. On the 1st March, 1880, his childless widow *R* and his nephew *B*, who had separated from his two brothers and lived for some years with both *L* and *R*, sold to *S* one-third of the four-anna share. The brothers of *B* sued the vendors and the vendee to enforce a right of pre-emption, alleging that they, as well as *B*, had acquired and entered into exclusive possession of the estate of *L* as his heirs. In the second appeal in this suit the High Court held that, as it was proved that the four-anna share was *L*'s separate estate, and *R* had succeeded to it and was in possession of it, and thus the plaintiffs had not established a title to, or acquired possession of, any part of the share, the plaintiffs were not in a position to assert a preferential claim to purchase the property in dispute. The plaintiffs also pleaded that the question of the right and title asserted by them as the actual heirs of *L* should have been tried and determined in the suit; but the High Court rejected this plea on the ground that the suit had been based merely on the allegation of *de facto* possession, and that their claim was to obtain by purchase one-third share only, and not for any remedy in respect of their right to possession by inheritance of the entire four-anna estate. Subsequently to this decision, the same plaintiffs, alleging equal rights with *B* as reversionary heirs of *L*, sued the same defendants

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* Second Appeal No. 1206 of 1883, from a decree of Rai Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 25th June, 1883, affirming a decree of Muhammad Hafiz Rahim, Munsif of Bansgaon, dated the 30th April, 1883.

(1) 13 W.R. 106. (2) 4 C. 742.

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for a declaration of the incompetence of *R*, the widow, to alienate the property, and that the sale-deed might be declared, as against them, null and of no effect. The cause of action was stated to be the execution, on the 1st March, 1880, of the deed of sale.

Held that the plea of *res judicata* failed. The matter now substantially in issue between the parties, *viz.*, the presumptive title of the plaintiffs to possession of the property, had not been "heard and finally decided" in the sense of s. 13 of the Civil Procedure Code. Such title was not "alleged and denied" by the parties in that suit within *Explanation* I, s. 13. It was not matter which "might and ought" to have been made the ground of attack in the former suit, within *Explanation* II.

The law does not require a plaintiff at once to assert all his titles to property, or to be thereafter estopped from advancing them. A plaintiff may, with the leave of the Court (s. 44, Civil Procedure Code), join causes of action; but he is nowhere compelled to do so.

The cause of action in the second suit, although the date of its accrual was the same, was separate and distinct from the cause of action asserted in the previous suit.

[R., 14 B. 31 (53); 28 B. 333 (339); 94 P.R. 1916; **Disappr.**, 25 B. 189 (196).]

THIS was an appeal in a suit to set aside an alienation by a Hindu widow. The following pedigree shows the relationship to **[359]** each other of the persons whose names will have to be mentioned :—

Sukhdeo

Gurdayal — Gaura

Kali Charan — Lakshmi Nawaz (m. s. p.) - Raj Kumari (Deft.)

Sheo Sahai (Plff.) — Bhairo Dat (Plff.) — Bhagwan Sahai (Deft.)

Lakshmi Nawaz owned a four-anna share in the zamindari of mauza Dhakrauli. On the 1st March, 1880, Raj Kumari and Bhagwan Sahai sold to Sheo Ratan one-third (1 anna and 4 pies) of the four-annas share in mauza Dhakrauli. On the 13th March, 1880, Sheo Sahai and Bhairo Dat sued the vendors and vendee under the deed of sale as above to establish a right of pre-emption, on the ground that Sheo Ratan was, as compared with themselves, a mere stranger. The vendors defended the suit on the ground that the plaintiffs had no concern with the property, which, by reason of the fact that Bhagwan Sahai was, and the plaintiffs were not, at the time of Lakshmi Nawaz's death, in union with him, had devolved upon Bhagwan Sahai, to the exclusion of all right in it on the part of the plaintiffs, and that Lakshmi Nawaz's widow was, by an arrangement between herself and Bhagwan Sahai, in actual possession of the property.

The suit was finally disposed of by the High Court in a judgment, the material portions of which, so far as the present appeal is concerned, ran thus :—"It appears from the evidence that Lakshmi Nawaz was throughout his life the separate and exclusive owner of a share in this village. This share was originally a nine-anna share, of which Sheo Ratan Singh, vendee, appears to have acquired a five-anna portion. A few years before his death Lakshmi Nawaz took his nephew, Bhagwan Sahai, to live with him; and since his death Bhagwan Sahai has continued to live on similar terms with Raj Kumari, the widow. This lady is shown to have had exclusive possession and enjoyment of her husband's share, living in his house, cultivating his sir-land, and making

collections from the share, and being recorded in respect of these transactions in the [360] village papers until the year 1879-80, when the nephew Bhagwan Sahai's name became recorded in her stead. These facts are proved by the patwari, a witness of the plaintiffs, who in his cross-examinations made all these admissions against the plaintiffs' case, and stated that Raj Kumari was in all respects separate from the plaintiffs, who had not asserted or acquired any right, title, or possession in respect of their uncle Lakshmi Nawaz's four-anna share, and have also long separated from their brother, Bhagwan Sahai, in respect of their own small ancestral share in the mauza. It was proved by the witnesses of both parties that Sheo Ratan, the vendee, is a sharer in the same *thok* as the vendors and the plaintiffs; and he is described by all the witnesses as "near sharer" (*hissadar karibi*). It was likewise admitted by some of the plaintiffs' witnesses that Lakshmi Nawaz was altogether separate from Kali Charan, father of the plaintiffs. Under these circumstances, as it is proved that the vendee is a "near co-sharer" of the same *thok*, and a sharer in the very share of which he has purchased the portion in dispute, and that the plaintiffs-pre-emptors have not established a title to, or acquired possession of, any part of Lakshmi Nawaz's estate, it is obvious that they are not in a position to assert a preferential claim to purchase the share sold to Sheo Ratan Singh by Raj Kumari, who was in separate and exclusive possession and use of the subject of the sale. It is pleaded in second appeal that the question of their right and title, asserted by the plaintiffs as the natural heirs of Lakshmi Nawaz, the childless cousin of their father Kali Charan, should have been tried and determined in this suit. But this plea cannot be sustained. Their action was based on the allegation that the plaintiffs as well as their brother, the defendant Bhagwan Sahai, had *de facto* acquired and entered into exclusive possession of the estate of Lakshmi Nawaz; and their cause of action was accordingly stated to have accrued on the 1st March, 1880, when their rights were invaded by the sale-deed to Sheo Ratan Singh, which they sought by this suit to set aside, and thereby to obtain by purchase a one-third share only in the whole four-anna estate. They did not ask or pay any court-fees for any remedy in respect of their right to possession by inheritance of the entire four-anna estate of Lakshmi Nawaz, and their allegations of *de facto* possession were [361] found on valid evidence against them. Their suit was therefore rightly dismissed by the lower appellate Court."

The decree of the High Court disposing of the pre-emption suit as above bears date the 16th May, 1881.

The present suit was instituted on the 15th December, 1882, by the same plaintiffs against the same defendants on the allegation of equal rights with Bhagwan Sahai as reversionary heir of Lakshmi Nawaz. The cause of action was stated to be the execution, on the 1st March, 1880, of the deed of sale in favour of Sheo Ratan Singh. The relief sought was the following :—(1) a declaration of the incompetence of Raj Kumari to make any alienation of the property; (2) a declaration that, as against the plaintiffs, the sale-deed of the 1st March, 1880, is null and of no effect; (3) a decree for costs. Raj Kumari confessed judgment. Among the grounds of defence taken by the other defendants (Bhagwan Sahai and Sheo Ratan Singh) was a plea of *res judicata*.

The Courts below concurred in rejecting this plea and in decreeing the suit.

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Sheo Ratan Singh, defendant, appealed to the High Court, and it was contended on his behalf that in the former suit the plaintiffs might have taken two grounds, *viz.*, (*a*) that now taken, and (*b*) that if the sale were valid, they had a right to pre-empt; that by abstaining from asking in the former suit for more than a declaration of their right to pre-empt, the plaintiffs admitted the validity of the sale; and that, with reference to the terms of *Explanations* I and II, s. 13, Act XIV of 1882, the present suit was barred, and ought to have been dismissed.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Shah *Asad Ali*, for the appellant.

Mr. *T. Conlan* and Mr. *G. T. Spankie*, for the respondents.

The Court (BRODHURST and DUTHOIT, JJ.) delivered the following judgment:—

JUDGMENT.

DUTHOIT, J. (after stating the facts as set forth above), continued:— In our opinion the plea of *res judicata* thus urged is of no force. To assert such a plea successfully, in the terms of s. 13 of the Code of Civil Procedure, the defendant must show, [362] not only that the matter now in issue has been in issue in a former suit between the same parties in a competent Court, but also that the matter so in issue was heard, and *was finally decided* by the Court. Now, it is plain that the matter now substantially in issue between the parties, *viz.*, the presumptive title of the plaintiffs to possession of the property, if they survive Raj Kumari, was not heard and finally decided in the former suit. Nor was such title *alleged and denied*,—the words of *Explanation* I, s. 13, Civil Procedure Code, are conjunctive,— by the parties in that suit. What was then asserted by the plaintiffs was a right to immediate possession of a part of the property on the ground of actual possession of the rest.

Nor was the plaintiffs' presumptive title matter which might *and ought*,—the words of *Explanation* II, s. 13, Act XIV of 1882, also are conjunctive,—to have been made the ground of attack in the former suit. The law does not require a plaintiff at once to assert all his titles to property, or to be thereafter estopped from advancing them. A plaintiff may with the leave of the Court (s. 44, Civil Procedure Code) join causes of action; but he is nowhere compelled to do so. The cause of action in the present suit, although the date of its accrual is the same, is separate and distinct from the cause of action asserted in the former suit. To have made the title upon which they now come into Court the ground of attack in the former suit, would have been inconsistent with the object of the plaintiffs in that suit. The appeal fails, and is dismissed with costs.

Appeal dismissed.

6 A. 362=4 A.W.N. (1884) 117.

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APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

SUNDAR LAL AND ANOTHER (*Plaintiffs*) v. YAKUB ALI AND OTHERS (*Defendants*).* [13th May, 1884.]

Joint Hindu family—Joint property—Execution of decree against one brother—Rights of other brothers.

J purchased a 10 biswas share in a village, and *Y* purchased a village, both of which properties were, at the time they were respectively purchased, mortgaged to secure one debt. *J* died, leaving four sons. After *J*'s death *Y*, whose village had been sold in execution of a decree for the sale of the mortgaged property, sued [363] *R*, eldest son of *J*, for rateable contribution, in respect of the debt secured by the mortgage, and he obtained a decree for Rs. 210 and costs, and directing the 10 biswas share to be sold in satisfaction of the decretal amount. Upon attachment of the share in execution of the decree, the three younger sons of *J* claimed 7½ biswas as belonging to them, and prayed that the same might be released from attachment. This objection was disallowed as made too late, and the sale in execution of the decree took place. The sale certificate showed that the property sold was "the rights and interests" of *R* in the 10 biswas. The three younger sons of *J* subsequently brought a suit to establish their right to 7½ biswas out of the 10, and to set aside the sale to that extent.

Held that the shares of the plaintiffs were unaffected by the sale, and all that passed thereunder to the purchaser was the 2½ biswas share of the judgment-debtor. The plaintiffs were not bound by the decree in a suit to which they were not parties, and by a sale to which they objected, and in the teeth of the terms of the sale certificate put forward to defeat them.

THE suit in which this appeal arose was to establish the proprietary right of the plaintiffs to 7½ biswas out of a 10 biswas share of a village called Bawan Sarai, and to set aside a sale in execution of decree of the 7½ biswas. It appeared that Janki Das, the father of the plaintiffs, purchased a 10 biswas share of Bawan Sarai, and Yakub Ali purchased a village called Sipali. Both these properties were at the time they were respectively purchased mortgaged to secure one debt. Janki Das died leaving four sons including the three plaintiffs. After his death Yakub Ali brought a suit against Ramchandar, the eldest son of Janki Das, for a rateable contribution in respect of the debt secured by the mortgage, his village of Sipali having been sold in execution of a decree for the sale of the mortgaged properties. This suit was instituted on the 18th January, 1879. Ramchandar was impleaded in it as "son and heir of Janki Das, deceased," and was sued because he was, it was alleged, in possession of the 10 biswas. The other sons of Janki Das were minors at this time. On the 11th February, 1879, a decree was made against Ramchandar in this suit for Rs. 210 and costs of the suit, and the 10 biswas share was directed to be sold in satisfaction of the decretal amount. The 10 biswas share was attached in execution of this decree, and the three plaintiffs in the present suit claimed 7½ biswas as belonging to them, and prayed that the same might be released from attachment. This objection was preferred on the 18th August, 1879, or two days before the date fixed for the sale of the 10 biswas share, namely, [364] the 20th August, 1879, and the Court executing the decree disallowed the claim as preferred too late. On the 20th August, 1879, the rights and interests of Ramchandar in the

* Second Appeal No. 1463 of 1883, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 29th June, 1883, affirming a decree of Maulvi Mazhar Husain, Munsif of Nagina, dated the 19th February, 1883.

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10 biswas were sold and were purchased by Nazir Ali. From the sale certificate it appeared that the property sold was the "rights and interests" of Ramchandar in the 10 biswas. The plaintiffs subsequently brought the present suit against Nazir Ali to establish their right to the 7½ biswas and to set aside the sale to that extent. On the death of Nazir Ali his heirs were made defendants. They pleaded that the property had been devised by will by Nazir Ali to Yakub Ali. Yakub Ali was accordingly added as a defendant. The lower Courts held that the sale passed the 10 biswas share to the purchaser and dismissed the suit. The lower appellate Court observed as follows:—"Yakub Ali made his claim against the property, and the decree was made enforcing hypothecation against Bawan Sarai. Then, though the claim was made against Ramchandar, the eldest son of Janki Das, it does not follow that only Ramchandar's rights were involved in it and not all Janki Das' property. Ramchandar had no right or individual liability in the matter. He was made a defendant because he was a lambardar and in possession. When Yakub Ali's claim was against the property, and he obtained decree against it, there is no reason why only a fourth share, that of Ramchandar, should be involved, and three-fourths exempted. The above reasons prove fully that Yakub Ali's decree was for enforcement of lien against the zamindari property in Bawan Sarai, and that the entire village was under hypothecation. When it was sold, it is clear that all the 10 biswas were sold. Ramchandar was made a *pro forma* defendant, and there was no claim against him individually, and the claim was in no way injured by omitting to make the appellants defendants, nor can the appellants get any share of the property sold."

In second appeal by the plaintiffs it was contended on their behalf that their rights and interests in the 10 biswas were not sold, inasmuch as they were not parties to the decree in execution of which the 10 biswas share was alleged to have been sold.

Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri*, for the appellants.

[365] Munshi *Hanuman Prasad*, for the respondents.

The Court (STRAIGHT, Offg. C.J., and DUTHOIT, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—We think that the plea taken in this appeal has force and must prevail. Janki Das having died in December, 1875, his three sons, who are plaintiffs in the present suit, along with their elder brother, Ramchandar, inherited the 10 biswas of mauza Bawan Sarai, the 7½ biswas of which are the subject of the present suit, and all four of them were recorded in the khewat for 1283. In the suit for contribution, which was instituted by the now defendant, Yakub Ali, on the 18th January, 1879, Ramchandar alone was cited to appear as being in possession of the share in Bawan Sarai, and not in the character of the legal representative of Janki Das, and the decree that was passed was against him alone. On the 18th August, 1879, the present plaintiffs objected to the sale of the 10 biswas of Bawan Sarai, which had been advertised, alleging they were owners therein to the extent of three-fourths, but their objections were rejected without investigation, on the ground that they were too late. We find, however, upon looking into the sale certificate granted to the deceased defendant, Nazir Ali, the purchaser at the sale of the 20th of August, 1879, that his

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purchase was confined to "the rights and interests" of Ramchandar in the 10 biswas of Bawan Sarai. It seems to us, therefore, that the shares of the plaintiffs were unaffected by the auction-sale of the 20th August, 1879, and that all that passed thereunder was the $2\frac{1}{2}$ biswas share of Ramchandar, the judgment-debtor. To hold that the plaintiffs were bound by the decree in a suit to which they were not parties, and by a sale to which they objected, and in the teeth of the terms of the sale certificate put forward to defeat them, would, we think, be to enunciate a doctrine unsupportable on any legal principle. We are of opinion, therefore, that this appeal should be decreed with costs, and that the decisions of the two lower Courts being reversed, the claim of the plaintiffs should be decreed with costs in the lower Courts.

Appeal allowed.

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6 A. 366=4 A.W.N. (1884) 118.

[366] CIVIL REVISIONAL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

PARAN SINGH (*Decree-holder*) v. JAWAHIR SINGH AND OTHERS (*Judgment-debtors*).* [13th May, 1884.]

Act XV of 1877 (*Limitation Act*), *sch.* ii, *No.* 179 (4)—*Execution of decree*—"*Step-in-aid of execution*"—*Application for sale-proceeds.*

An application by a decree-holder to be paid the proceeds of a sale of property in execution of the decree is a "step-in-aid of execution" of the decree within the meaning of No. 179 (4), sch. ii of Act XV of 1877 (Limitation Act).

[**Diss.**, 23 C. 196 (199); **F.**, 22 B. 340 (342); 11 C.P.L.R. 161; **Appr.**, 12 A. 339 (402) (**F. B.**); 16 M. 452 (453); **R.**, 19 B. 261 (267); 18 O.C. 359; 103 P.R. 1908 (**F.B.**) =14 P.W.R. 1908=207 P.L.R. 1908.]

THE decree of which execution was sought in this case was dated the 5th December, 1878. On the 6th March, 1880, the decree-holder made the first application for execution. On the 17th March, 1880, notice was issued to the judgment-debtors. On the 14th December, 1880, certain property having been sold in execution of the decree, the decree-holder applied to be paid the proceeds. On the 23rd December, 1880, the same were paid to him. On the 8th May, 1883, the decree-holder made his next application for execution. The lower Courts held that this application was not made within time, computing from the 17th March, 1880, the date of issuing notice, and rejected it.

The decree-holder applied to the High Court for revision, contending that limitation should be computed from the 14th December, 1880, when application was made for the sale-proceeds, such an application being a "step-in-aid of execution" of the decree within the meaning of No. 179 (4), sch. ii of the Limitation Act, 1877.

Babu *Ratan Chand*, for the decree-holder.

The judgment-debtors did not appear.

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* Application No. 324 of 1883, for revision under s. 622 of the Civil Procedure Code of an order of W. Kaye, Esq., Commissioner of Jhansi, dated the 13th August, 1883, affirming an order of E. P. Finn, Esq., Assistant Commissioner of Lalitpur, dated the 19th May, 1883.

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The Court (STRAIGHT, Offg. C. J., and DUTHOIT, J.) delivered the following judgment :—

JUDGMENT.

STRAIGHT, Offg. C.J.—This application must be granted. The lower Courts have overlooked the fact that after the property had been sold in execution of decree, the decree-holder applied on the [367] 14th December, 1880, for the sale-proceeds, and they were subsequently handed over to him. The application for the sale-proceeds was a step-in-aid of execution of his decree, and his present application of the 8th May, 1883, was therefore in time. We concur in the ruling of this Court to be found on page 184 of the *Weekly Notes* for 1882. The orders of the lower Courts are reversed, and the applicant's petition of the 8th May, 1883, will be restored to the file of the Court executing the decree and disposed of according to law.

Application allowed.

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6 A. 367 = 4 A.W.N. (1884) 130.

CRIMINAL REVISIONAL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

QUEEN-EMPRESS *v.* HASNU. [15th May, 1884.]

Criminal Procedure Code, ss. 350, 437—"*Further inquiry.*"

A Deputy Magistrate having discharged a person accused of an offence, on the ground that the evidence was insufficient for conviction, the Magistrate of the district recorded an order stating that, in his opinion, the accused had been improperly discharged, and directing, under s. 437, Criminal Procedure Code, that further inquiry should be made, and the accused called on to enter upon his defence. The accused was not called upon to show cause why a further inquiry should not be made, but a summons, in the terms of s. 68 of the Criminal Procedure Code, was issued to him. On his appearance, he was tried by the Magistrate of the district, convicted, and sentenced. The witnesses for the prosecution were not re-called, but the Magistrate relied upon their evidence as recorded in the first trial, and also upon the statement of a witness for the defence which was not receivable in evidence.

Held, that the proceedings of the Magistrate of the district were irregular, first, because notice to show cause why action should not be taken against him in the terms of s. 437 of the Code of Criminal Procedure was not served upon the accused person before proceedings, ostensibly under that section, were commenced; and secondly, because the subsequent proceedings of the Magistrate were not such as are contemplated by the provisions of s. 437, inasmuch as the conviction was practically based upon evidence which was not recorded in the course of a "further inquiry" before the Magistrate of the district, but upon evidence which was recorded by the Deputy Magistrate, and had been adjudicated upon by that officer; and such irregularities were fatal to the conviction.

[**Overruled**, 9 A. 52 = A.W.N. (1886) 281 (**F.B.**); **R.**, 8 M. 336 (340); **Comm.**, 10 B. 131 (144).]

THIS was an application for revision of an appellate order of Mr. J. M. C. Steinbelt, Sessions Judge of Banda, dated the 17th November, 1883, affirming an order of Mr. J. J. D. La Touche, Magistrate of the Banda district, dated the 21st September, 1883, convicting the applicant under s. 324 of the Indian Penal Code. [368] The facts of the case are fully stated in the judgment of the High Court.

Babu *Ram Das Chakarbati*, for the applicant.

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The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

The Court (STRAIGHT, Offg. C.J., and DUTHOIT, J.) delivered the following judgment:—

JUDGMENT.

DUTHOIT, J.—This is an application for the revision of an order of the Magistrate of the Banda district, convicting the applicant, Hasnu, of an offence made punishable under s. 324 of the Indian Penal Code, and sentencing him to one year's rigorous imprisonment.

The case is shortly stated thus:—Jan Bibi is the wife of Hasnu. At the end of August, 1883, Jan Bibi was badly burnt across the upper part of the face. Writing on the 21st September, 1883, the Magistrate of the district notes that she narrowly escaped "with her eye-sight; and now, after twenty-two days, her face is still bandaged." Jan Bibi accused her husband of causing her injuries, and Hasnu was sent by the police before a Magistrate of the first class for trial on a charge under s. 324 of the Penal Code. Five witnesses, including Jan Bibi herself, were examined before the Magistrate. Hasnu was not examined. The conclusion at which the Magistrate arrived was, that though the offence was probably committed, the evidence was insufficient for conviction. The Magistrate accordingly discharged the accused. On the 18th September, 1881, Jan Bibi presented a petition to the Magistrate of the district, in which she prayed that a fresh inquiry might be made, and justice done. The Magistrate upon the same date recorded the following order:—"The accused person, who was *challaned* by the police under s. 324, has been discharged by Salehdi Singh, full-power Magistrate. I have sent for the case, and consider that the accused has been improperly discharged. Under s. 437, Act X of 1882, I order that further inquiry should be made before me, and that the accused be called on to enter upon his defence." Hasnu was not called upon to show cause why a further inquiry should not be held, but a summons (in the terms of s. 68, Criminal Procedure Code) was issued to him. On his appearance, the Magistrate of the district framed a charge under s. 324, Penal Code, and placed [369] him on his defence. Hasnu's defence was to the effect that he did not know how his wife got burnt, but she received her injuries at her father's house, not in his. He named three witnesses who were summoned and examined. Two of them spoke to an *alibi* in favour of the accused at the particular time on the night of the 31st August, at which the offence was said to have been committed. The third witness, Bahadur, deposed that even before the matter was reported to the police, it was notorious in the *mohalla* that there had been a quarrel between Hasnu and his wife, and that she had been branded by him. The witnesses for the prosecution were not recalled; but upon their evidence, recorded by the Magistrate by whom the case was first tried, and upon that of Bahadur, one of the witnesses for the defence, recorded in his own Court, the Magistrate of the district found that there could "be no doubt of the guilt of the accused, and that his discharge by the Assistant Magistrate was a gross failure of justice." He accordingly convicted and sentenced the accused as already stated.

Before this Court it is contended that in convicting the accused substantially upon evidence which had been already considered and rejected by a competent Magistrate, the Magistrate of the district exceeded his authority under ss. 437 and 350 of the Code of Criminal

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Procedure; that without being assured that fresh evidence was forthcoming, he was not competent to make an order in the terms of s. 437; and that if he thought that the Magistrate who tried the case in the first instance had misappreciated the evidence, his proper course was to have reported, in the terms of s. 438, Criminal Procedure Code, the results of his examination of the record for the orders of the High Court.

Being of opinion that the result of the trial in the Court of the Deputy Magistrate was not satisfactory, and that the offence was of so grave a character that the case would have been more fitly disposed of under the provisions of Chap. XVIII than under those of Chap. XXI of the Code of Criminal Procedure, we directed on the 9th ultimo, that notice should be issued to the accused person to show cause why the District Magistrate of Banda should not be directed to hold a fresh inquiry upon the report made by the police, and commit the accused for trial to the Court of Session, if he thought that a *prima facie* case were made out and war-**[370]**ranted a committal. Cause has now been shown on behalf of the prisoner, and we are of opinion that, having regard to the length of time which the prisoner has already spent in jail, and to the difficulty which after this interval would certainly be felt in obtaining trustworthy evidence, it is undesirable that a fresh trial should be held. The rule of the 9th April, 1884, will therefore stand discharged.

The proceedings of the Magistrate of the Banda district now remain to be considered. And regarding them we observe that they err in two particulars, *viz.*, *first*, that notice to show cause why action should not be taken against him in the terms of s. 437 of the Code of Criminal Procedure, was not served upon the accused person before proceedings, ostensibly under that section, were commenced; and *secondly*, that the subsequent proceedings of the Magistrate are not such as are contemplated by the provisions of s. 437 of the Code of Criminal Procedure. The statement made by Bahadur (a witness for the defence) of what he heard said in the *bazaar* is not evidence. The conviction is practically based upon evidence which was not recorded in the course of a "further inquiry" before the Magistrate of the district, but upon evidence which was recorded before the Deputy Magistrate, and had been adjudicated upon by that officer. These irregularities are fatal to the proceedings of the Magistrate of the Banda district. The conviction of Hasnu and the sentence passed upon him are set aside, and he will be immediately released.

Application allowed.

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6 A. 370 = 4 A.W.N. (1884) 119 = 8 Ind. Jur. 688.

APPELLATE CIVIL.

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

KASHI NATH (*Plaintiff*) *v.* MUKTA PRASAD AND OTHERS (*Defendants*).* [15th May, 1884.]

Pre-emption—Rival suits to enforce the right—Form of decrees—Civil Procedure Code, s. 214.

K and *R*, two co-sharers of a village, instituted separate suits in which each claimed to enforce the right of pre-emption, based on the *wajib-ul-arz* in **[371]**

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* Second Appeal No. 1326 of 1883, from a decree of H. D. Willock, Esq., District Judge of Azamgarh, dated the 18th May, 1883, affirming a decree of Maulvi Amin-ud-din, Munsif of Muhammadabad Gohna, dated the 6th December, 1882.

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respect of the same sale of a share in the village to a stranger. The Court of first instance made the plaintiff in one suit a defendant in the other. The suits were tried together, and *R* being held to have a better right under the terms of the *wajib-ul-arz* than *K*, his suit was decreed, contingent upon payment by him of the purchase-money within one month from the date of the decree. *K's* suit was dismissed absolutely.

Held, that decrees in cases where two rival pre-emptors of the same degree seek to enforce pre-emption, as each necessarily must do, in respect of the *whole* property conveyed by one transfer, are defective if they dismiss the suit for any proportion of the property without providing for the contingency of the rival pre-emptor decree-holder omitting to enforce his decree in respect of the share decreed to him. *A fortiori*, where the rival decree-holders possess different degrees of pre-emption, the decree, in at least one of the rival suits, must be essentially defective if no provision is made for the contingency of the superior pre-emptor never enforcing his right.

The question what should be the form of the decree in such cases can be dealt with only by exercising the vast and flexible jurisdiction possessed by the Courts of Equity in adapting their decrees to the exigencies of each case, so as to grant the actual relief required by the parties.

Held, applying the principles of equity to the present case, that the Court of first instance acted rightly in adding the name of each rival pre-emptor as party defendant in the suit of the other, and in decreeing the claim of the superior pre-emptor, bnt that the decree, in *K's* suit was defective and inequitable, inasmuch as it dismissed the suit *in toto*, disallowing his pre-emptive claim wholly irrespective of the contingency of *R's* omission to enforce the pre-emption decreed to him by depositing the purchase-money within time. As *K* admittedly had pre-emptive right as against the vendee, his suit should have been decreed against the latter in the terms of s. 214 of the Civil Procedure Code; subject, however, to the condition that the decree should not take effect, so far as the enforcement of pre-emption was concerned, in the event of *R's* enforcing the superior pre-emptive right decreed to him.

[F., 7 A. 720 (725); 10 A. 182 (186); **Appl.**, 6 A. 455; **Appr.**, 11 A. 108 (116); **R.**, 11 A. 154 (167); 12 A. 234 (270) (**F.B.**); 19 A. 466 (476); A.W.N. (1885) 189; 4 O.C. 397 (406); **D.**, 21 A. 292 (294).]

THIS was an appeal arising in a suit to enforce a right of pre-emption. It appeared that on the 2nd May 1881 one Bhagwan Dat sold his share in a village. On the 28th April, 1882, Kashi Nath, a co-sharer in the village, brought this suit to enforce his right of pre-emption, making the vendor and the vendee defendants. The suit was based on the *wajib-ul-arz*. On the 8th May 1882 a similar suit was instituted by Ramlagan, another co-sharer, against the same persons. The Court of first instance made the plaintiff in one suit a defendant in the other. Kashi Nath set up as a defence to Ramlagan's suit that it had not been instituted in good faith, Ramlagan having instituted it in collusion with the vendor. The Court of first instance tried the suits together, and holding that [372] Ramlagan had a better right, under the terms of the *wajib-ul-arz*, than Kashi Nath, decreed the former's suit contingent upon payment by him of the sum of Rs. 998 within one month from the date of the decree, *viz.*, the 6th December, 1882. On the same day the suit of Kashi Nath was dismissed, on the ground that collusion between Ramlagan and the vendor was not established, and that the former having superior rights of pre-emption, under the terms of the *wajib-ul-arz*, and having come forward to claim pre-emption, Kashi Nath's suit could not succeed.

From both these decrees Kashi Nath appealed to the District Judge; one of the grounds in the appeal from the decree dismissing his suit raising the contention that his claim should not have been absolutely dismissed, but should have been decreed so as to render the decree contingent upon the omission by Ramlagan to obtain possession of the property by execution of his decree. In the appeal from the decree in

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favour of Ramlagan, Kashi Nath repeated his allegation as to collusion between Ramlagan and the vendor, and contended that Ramlagan not having deposited the money within the time allowed by the decree, his claim should be regarded as dismissed. The District Judge dismissed both appeals.

Kashi Nath appealed to the High Court. In the appeal numbered 1326 of 1883, the one arising out of the suit brought by him, it was contended on behalf of the appellant that as he had instituted his suit before Ramlagan came into Court at all, the intervention of the latter, which was unexpected, should not have been allowed to affect the result of the suit; that, although a superior pre-emptor could pre-empt in preference to an inferior pre-emptor, it would be inequitable to hold that a superior pre-emptor, by the mere fact of intervening in a suit instituted by an inferior pre-emptor, should be able to deprive the latter of the right without himself actually enforcing it; that in the present case Ramlagan's intervention was the only reason why the appellant's suit was dismissed, and yet Ramlagan never availed himself of his own decree, and that his omission to deposit the purchase-money within time had had the effect of dismissing his claim also, the result being a total defeasance of the pre-emptive right. On these grounds it was contended for the appellant that the decrees in his suit and in that [373] of Ramlagan should have been so framed as to obviate the obvious hardship and injustice thus pointed out.

Munshi *Sukh Ram*, for the appellant.

Munshi *Kashi Prasad*, for the respondents.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

JUDGMENT.

MAHMOOD, J.—We are of opinion that there is much force in this contention. By a long course of decisions, going as far back as 1840, if not even earlier, the Courts in India have been accustomed to regard decrees in pre-emption suits as exceptions to the ordinary form of decrees, and the practice has been to impose conditions and restrictions both on the method of payment of purchase-money by the pre-emptor and the time within which he should pay it. Many rulings to this effect are to be found in the reports, and this Court never appears to have departed from this view; but the High Court of Calcutta, in the case of *Ashan Ali* v. *Sabokee Bibee* (1), impugned the proposition by ruling that in decreeing a right of pre-emption a Civil Court has no power to make the decree-holder's right depend on payment of the purchase-money within a specified time. All doubts, however, on the question have now been removed by express legislative enactment contained in s. 214 of the Civil Procedure Code. But the provisions of that section fall short of laying down any rules as to the form of decree in cases where rival pre-emptors possessing equal rights of pre-emption come forward to enforce the right in respect of the same sale, and the section is equally silent in respect of cases like the present, where one of the rival pre-emptors possesses superior right of pre-emption to the other. The question then being left unprovided for by the Legislature, the Courts have to fall back upon the general principles of equity in passing decrees such as would suit the exigencies of each case. In the case of rival claimants possessing equal rights of pre-emption, this Court

(1) 10 W.R. 53.

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and the Calcutta High Court, following the rules of Muhammadan Law, have been accustomed to pass decrees awarding equal proportions of the property sued for to the rival pre-emptors, and the rule does not appear to have been limited to cases in which pre-[374] emption is claimed solely on the ground of Muhammadan Law [*Moharaj Singh* v. *Bheechuk Lal* (1); *Roshan Muhammad* v. *Mahomed Kuleem* (2); *Khem Karan* v. *Seeta Ram* (3).] But judging by the reports of these cases, it appears that, in decreeing pre-emption to more than one pre-emptor, the decrees only provided that each pre-emptor was to pay his proportionate purchase-money within a specified time before obtaining possession of the share decreed to him; but the decrees made no provision for the contingency of one of such pre-emptors-decree-holders not actually enforcing his decree. It is obvious that in the absence of special provision in such decrees, to meet the contingency, the effect of the omission by one of the rival pre-emptors-decree-holders to execute his decree would be to leave the share decreed to him in the hands of the purchaser, who has bought in violation of the pre-emptive right—a result which is open to the construction that a mere pretence by a rival pre-emptor to pre-empt the property sold would have the effect of defeating the other pre-emptor's right, at least by half, and of introducing a stranger in contravention to the right of pre-emption. The omission to execute a pre-emption decree, obtained by a rival pre-emptor, may arise either from a *bona fide* want of funds or from collusion with the vendee, and indeed it is easy to conceive that the omission may be due to other accidental causes arising from neither of these circumstances. In a case like the present the unexpected intervention of the superior pre-emptor, Ramlagan, has, on the one hand, operated to defeat totally the rights of the inferior pre-emptor, Kashi Nath; and on the other hand, the superior pre-emptor himself, by omitting to execute his decree within the proper time, has lost his own right of pre-emption, the result being that the only person who has eventually succeeded in the litigation is the purchaser, who admittedly infringed a legal right by purchasing property subject to pre-emption—a result which appears to us a strange contravention of the fundamental maxim of justice, that where there is right there is a remedy.

We take it as a fundamental proposition of the law of pre-emption applicable alike to cases which arise out of the rule of Muham- [375] madan Law and to those which are based either on local custom or the contract of the *wajib-ul-arz*, that irrespective of the existence or non-existence of other pre-emptors, every suit for pre-emption must include the *whole* of the property subject to pre-emption conveyed by one transfer, and that when there are rival suits it is the duty of the Court to determine which of such rival suits is to succeed, and if more than one suit succeed, what extent of the property transferred is to be decreed in such suit. The rule is based upon the equitable principle that a pre-emptor, in seeking to enforce his right, shall not be allowed to break up the bargain which gave rise to his right. The principle has been adopted both by this Court and the Calcutta High Court, and requires no citation of authorities. Such, then, being an essential condition of a pre-emptive claim, it seems to us that decrees, in cases where two rival pre-emptors of the same degree seek to enforce pre-emption, as each of them necessarily must do, in respect of the *whole* property conveyed by one transfer, are defective if they dismiss the suit for any

(1) 3 W.R. 71. (2) 7 W.R. 150. (3) N.W.P.H.C.R (1870) 257.

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proportion of the property, without providing for the contingency of the rival pre-emptor-decree-holder omitting to enforce his decree in respect of the share decreed to him. And it follows, *a fortiori*, that where the rival pre-emptors possess different degrees of pre-emption, the decree, at least in one of the rival suits, must be essentially defective if no provision is made for the contingency of the superior pre-emptor never enforcing his right.

So far as the question discussed by us relates to decrees in suits by rival pre-emptors of the same degree, an improvement upon the older rulings has been introduced by the case of *Mahabir Parshad* v. *Debi Dial* (1) in which TURNER and SPANKIE, JJ., modifying the decree of the lower Court, specified a time within which each rival pre-emptor should pay into Court his proportion of the purchase-money, and declared that, if either failed to pay such proportion within time, the other of them making the further deposit within time should be entitled to the share of the defaulter. The reasons for this form of the decree do not appear from the report; but they were probably based upon equitable considerations similar to those which we have indicated. The case is an authority for the view which we should ourselves have felt **[376]** inclined to take, if the case before us involved claims of rival pre-emptors possessing equal degrees of pre-emption.

The question, however, before us does not relate to rival claims by pre-emptors of the same degree, but to rival claims of two pre-emptors, one of whom possesses a higher degree of pre-emption than the other. The success of the claim of one pre-emptor, therefore, involves the dismissal of the other claim, for it is clear that no shares in the property subject to pre-emption can in such a case be fixed for both the claimants. Nor can there be any doubt that the claim of the inferior pre-emptor must necessarily be ineffective, if the superior pre-emptor enforces his right by taking out execution of his decree. Thus the question before us may be abstractly stated to be when, in respect of the same sale to a stranger, two rival pre-emptors, one of whom possesses a superior degree of pre-emption to the other, institute separate suits claiming to pre-empt the whole property sold, and the claims of both, as against the vendee, are held to be valid, what should be the form of the decree in such suits?

We are of opinion that the question so formulated can be dealt with only by exercising the vast and flexible jurisdiction possessed by the Courts of Equity in adapting their decrees to the exigencies of each case, so as to grant the actual relief required by the parties. "Some modifications of the rights of both parties may be required; some restraints on one side, or on the other, or perhaps on both sides; some adjustments involving reciprocal obligations or duties; some compensatory, or preliminary, or concurrent proceedings to fix, control, or equalize rights; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights, or redress of injuries. In all these cases Courts of Common Law cannot grant the desired relief...............But Courts of Equity are not so restrained. They may adjust their decrees so as to meet most, if not all, of these exigencies, and they may vary, qualify, restrain, and model the remedy, so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties. Nay more, they can bring before them all parties interested in the subject-matter, and

(1) 1 A. 291.

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adjust the rights of all, however numerous."—Story's *Eq. Juris.*, 11th ed., vol. i, ss. 27, 28.

[377] Applying these principles of equity to the exigencies of the present case, we hold that the Court of first instance acted rightly in adding the name of each rival pre-emptor as party defendant to the suit of the other, for such a course was necessary to enable the Court to adjudicate upon their contending claims. Nor did that Court act wrongly in decreeing the suit of Ramlagan, for that decree gave effect to his superior right of pre-emption, both against the vendee and the inferior pre-emptor.

But, for the reasons which we have already fully stated, the decree in Kashi Nath's suit was defective and inequitable, inasmuch as it dismissed the suit *in toto,* disallowing his pre-emptive claim wholly irrespective of the contingency of Ramlagan's omission to enforce the pre-emption decreed to him by depositing the purchase-money within time.

Having considered the equities of the case, and as Kashi Nath admittedly had pre-emptive right as against the vendee, his suit, instead of being dismissed *in toto*, should have been decreed against the latter in the terms of s. 214 of the Civil Procedure Code ; subject, however, to the condition that the decree should not take effect, so far as the enforcement of pre-emption was concerned, in the event of Ramlagan's enforcing the superior pre-emptive right decreed to him.

This appeal having arisen from the suit of Kashi Nath, we decree it, sed aside the decrees of both the lower Courts, and in substitution thereof order and decree that the plaintiff, Kashi Nath, do obtain possession of the property in suit on payment into Court of the sum of Rs. 998 on or before the 31st day of July, 1884 ; that on such payment being duly made, he do recover from all the defendants the costs incurred by him in all the Courts, but that in default of such payment the suit do stand dismissed with costs incurred in all the Courts ; provided always that if the defendant, Ramlagan, obtains possession of the property in suit by enforcement of his decree for pre-emption, the plaintiff, Kashi Nath, shall not be entitled to enforce this decree, so far as it relates to obtaining possession of the property in suit, but will be entitled only to realize the costs incurred by him in all the Courts from the defendants Bhagwan Dat (vendor) and Mukhta Prasad (vendee).

Appeal allowed.

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6 A. 378 = 4 A.W.N. (1884) 122.

[378] APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Oldfield.

DEBI SARAN LAL (*Plaintiff*) *v.* DEBI SARAN UPADHIA (*Defendant*).*
[16th May, 1884.]

Jurisdiction—Civil and Revenue Courts—Institution of suit in wrong Court—Act XII of 1881 (N.-W. P. Rent Act), ss. 206, 207, 208.

In a suit instituted in the Court of an Assistant Collector, an objection was taken that the suit was not maintainable in the Revenue Court. The objection was allowed and the suit dismissed. On appeal by the plaintiff, the Assistant

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* Second Appeal No. 1538 of 1883, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 4th July, 1883, affirming a decree of J. A. Broun, Esq., Assistant Collector of Basti, dated the 13th September, 1882.

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Collector's decision was affirmed. The appellate Court had not before it the materials necessary for the determination of the suit.

Held, reading together ss. 207 and 208 of Act XII of 1881 (N.-W. P. Rent Act), that though the objection to the jurisdiction was taken in the first Court and repeated before the appellate Court, the latter should only have *pro tanto* entertained it for the purpose of determining to what Court it should direct its order of remand, and should not have passed an order the effect of which was to maintain the dismissal of the suit.

[Appr., 12 A. 419 (423) ; R., 6 A. 440 (441).]

THIS was an appeal in a suit for profits under s. 93 (*h*) of the N.-W. P. Rent Act, 1881, instituted in the Court of an Assistant Collector. The plaintiff was the lessee of a recorded co-sharer, and the objection was taken that he not being a "recorded co-sharer" could not maintain a suit in the Revenue Court. This objection the Assistant Collector allowed, and dismissed the suit, and on appeal by the plaintiff the lower appellate Court (District Judge) affirmed the Assistant Collector's decision. The plaintiff appealed to the High Court, contending—(i) that the suit was cognizable in the Revenue Court, and (ii) that assuming that it was not, the District Judge should nevertheless have disposed of the case in advertence to the terms of s. 207 of the Rent Act.

Munshi *Kashi Prasad* and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath*, for the respondent.

The Court (STRAIGHT, Offg. C.J. and OLDFIELD, J.) delivered the following judgment :—

JUDGMENT.

STRAIGHT, Offg. C. J.—The first plea is abandoned, and the question for our determination is whether the Judge, having held the suit one for a Civil Court, should have passed an order pure [379] and simple for the dismissal of the appeal, or should have acted under either of the provisions of ss. 207 or 208. We must take it as conceded that the case was thrown out by the first Court on a preliminary point, and that there were no materials on the record before the Judge necessary for the determination of the suit. The objection to the jurisdiction, however, was taken in the first Court, and therefore we must closely examine the ss. 206, 207, and 208 to see what the precise powers of the appellate Court were under s. 206, if such an objection was *not* taken in the first Court, the appellate Court is to disregard it, and to dispose of the appeal independent of all considerations as to whether the first Court had or had not jurisdiction. Under s. 207, if the objection *was* taken in the first Court, the appellate Court must nevertheless dispose of the appeal, if there are on the record the materials necessary to the determination of the suit. These two sections are clear enough ; but then comes s. 208, which is somewhat more involved, and provides, in substance that whether the objection to the jurisdiction has been taken in the first Court or not, but the appellate Court has not before it materials on the record sufficient for the determination of the suit, it shall exercise its powers under ss. 562, 566 or 570 of the Civil Procedure Code, as the circumstances may require, directing its order either to the Court in which the suit actually was instituted, or to the Court in which it should have been instituted, which order, it may be observed, is incapable of impeachment in special appeal to this Court on the ground that it was directed to the wrong Courts. Applying these sections to the present case, it would seem that though the objection to the jurisdiction was taken in the first

Court, the Judge had power, assuming there were materials on the record sufficient for the determination of the suit, to dispose of the appeal. But there admittedly were not such materials. What then was the course he should have pursued? Reading ss. 207 and 208 together, we think that though the objection to the jurisdiction was taken in the first Court and repeated before him, the Judge should only have *pro tanto* entertained it for the purpose of determining to what Court he should direct his order of remand and should not have passed an order, the effect of which was to maintain the dismissal of the suit. Upon this ground, therefore, [380] the appeal must be decreed. We reverse the order of the Judge, and direct him to restore the appeal to his file, and dispose of it in the manner indicated in our preceding observations. As the costs hitherto incurred by the defendant have been unnecessarily cast upon him by the plaintiff taking his case into the wrong Court, we think it only right that he should be recouped, and they must be paid by the plaintiff.

Appeal allowed.

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6 A. 380=4 A.W.N. (1884) 132.

CRIMINAL REVISIONAL.

Before Mr. Justice Duthoit.

QUEEN-EMPRESS *v.* BHUPAL. [17th May, 1884.]

Act VIII of 1870 (*Infanticide Act*), s. 2—*Rules made by Local Government, N. W. P.—Rule VI—Act XVI of* 1873 (*Village and Road Police Act*), s. 8, *cl.* (3)—*Departures of women of proclaimed families from their homes—Omission to report such departures.*

Although Rule VI of the Rules framed by the Government of the North-Western Provinces under Act VIII of 1870 (Infanticide Act), s. 2, declares it to be the duty of the village chaukidar to report, on the occasion of his periodical visit to the police station, not only the occurrence among proclaimed families in the village, of births, of the deaths of infants, and of the removal of pregnant women to other villages but also "other deaths, removals, and arrivals," this last duty is not cast upon him by the provisions of the Infanticide Act itself: for Rule VI is not on this point consistent with the Act.

Held, therefore, that a chaukidar who had omitted to report the departure of a woman of a proclaimed family from her home was not guilty of an offence under the Infanticide Act.

Held also that the heads of proclaimed families are not bound by any of the Rules framed under the Infanticide Act to give information to the chaukidar regarding the departure of the women of their families.

THIS was a case reported for orders to the High Court, under s. 438 of the Criminal Procedure Code, by Mr. R. S. Aikman, Sessions Judge of Aligarh. It appeared that the Magistrate of the Etah District, by an order dated the 7th June, 1882, convicted Bhupal, chaukidar and resident of a village called Mahori, of a breach of Rule 6, made under the Infanticide Act, VIII of 1870, by the Local Government, and five other persons, called severally Sobha, Tulsi, Lachman, Cheda, and Daljit of the abetment of that offence. The breach of rule complained of was the omission of the chaukidar to report the departures from the village of five women, belonging [381] ing to proclaimed families. The persons accused of abetment of the breach were the heads of the proclaimed families to which the five women severally belonged. The Magistrate observed in his decision as follows:—"The chaukidar is guilty under rule 6. Of course he knew

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about the women's departures, and of course he was asked not to report them."

The Sessions Judge was of opinion, as regards the chaukidar, that his conviction was improper, as there was no evidence to show that he knew of the departure of the women. As regards the other accused, he was of opinion that they were not bound by any of the rules framed under the Infanticide Act to give information to the chaukidar regarding the departure of the women of their families.

The rules made under the Infanticide Act, 1870, by the Local Government, which are material for the purposes of this report, are stated in the order of the High Court.

The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

JUDGMENT.

DUTHOIT, J.—(after stating the facts of the case), continued :—Upon the case of the chaukidar I observe as follows :—

By s. 2, Act VIII of 1870, it is lawful for the Local Government, subject to the provisions of s. 3, from time to time, to make rules consistent with the Act for certain purposes. The only items of those purposes which need now be considered are the following :—

"(1) For making and maintaining registers of births, marriages, and deaths occurring in such district, or in or among the class, family, or persons to whom such notification has been made applicable; and for making, from time to time, a census of such persons or of any other persons, residing within such district.

"(3) For prescribing how and by whom information shall be given to the proper officers of all births, marriages, and deaths occurring, or about to occur, in such district, or in or among such class, family, or persons.

"(6) For defining the duties of any officer or servant appointed to carry out any rule made under this section."

The rules framed by the Local Government were published in the *Gazette of India* of the 20th March 1835, and in the Local *Gazette* of the 27th March, 1875 (p. 408.)

[382] Rules I and II direct the preparation of two registers, to be called Registers (A) and (B)—the latter a private, the former a *quasi* public, register—of all proclaimed families, and of proclaimed families in "specially guilty" villages respectively. Rule I declares it to be the duty of "the police, under the orders of the Magistrate of the district," to draw up Register A. Who is to prepare Register B is not stated—presumably the duty was meant to be cast upon the officers of Government charged with the preparation of Register A. Rule VII requires the "zamindar of the village" to give assistance to the police in drawing up Register A, and in obtaining information regarding all births, marriages, and deaths occurring, or about to occur, among proclaimed families. Rule IV requires midwives to give notice to the village chaukidar of the birth or illness of a new-born child in any proclaimed family, and in the case of a village entered in Register B, of the occurrence of a pregnancy. Rule III requires the registered heads of proclaimed families to report immediately to the chaukidar of the village the occurrence of every birth, death, or illness of any female child in their families, and to produce, on the demand of a police-officer visiting the village, all the children in his family. Rule VI runs thus :—"The chaukidar of the village shall immediately report to the officer in charge of the police station the occurrence of a birth, whether

male or female, in a proclaimed family; the death of a female infant under one year of age, and of a male infant under six months old; the illness of a female child, and the removal of a pregnant woman to another village. He shall also report, on the occasion of his periodical visit to the police station, other deaths, removals, and arrivals; and pregnancies reported to him if the village is entered in Register B."

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Although therefore, to "report on the occasion of his periodical visit to the police station other removals and arrivals" may be a duty cast upon a chaukidar under (*f*) of cl. (3), s. 8 of Act XVI of 1873, I do not find that it is a duty cast upon him by the provisions of Act VIII of 1870; for Rule VI does not upon this point seem to be consistent with the Act.

As regards Bhupal chaukidar (even if the provisions of s. 537, Code of Criminal Procedure, did not stand in the way), no practi-[383]cal effect can be given to this finding; for as the sentence passed upon him was not suspended by the Sessions Judge, he will have served its term nearly two years ago.

The conviction of Sobha, Tulshi, Lachman, Cheda, and Daljit is, however, undoubtedly bad for the reasons stated by the Sessions Judge.

The conviction of Sobha, Tulshi, Lachman, Cheda, and Daljit, and the sentences passed upon them, are set aside. The fines, if paid, will be refunded.

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APPELLATE CIVIL.

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

UMED ALI (*Defendant*) v. SALIMA BIBI (*Plaintiff*).*
[19th May, 1884.]

Remand—Finding not objected to—Practice—Duty of appellate Court—Civil Procedure Code, ss. 567, 574.

Where a first appellate Court has remanded a case to the Court of first instance for the trial of issues, and where, on the return of the findings on these issues, no objections have been preferred under s. 567 of the Civil Procedure Code, the appellate Court, after the period fixed for presenting objections, may, at its discretion, receive or decline to receive any written objection, but is, in any case, bound to consider the findings of the lower Court on the merits, and is not precluded from hearing arguments for and against the findings at the hearing of the appeal. *Akbari Begum* v. *Wilayat Ali* (1), followed.

The imperative provisions of s. 574 of the Civil Procedure Code apply alike to cases remanded by the first appellate Court for the trial of issues and to those in which no such remand has taken place.

[F., 20 M. 496 (498)=7 M.L.J. 236 (237); Appr., 17 B. 428 (430); R., 6 A. 391; 19 B. 551 (552); L.B.R. (1893—1900) 503.]

THE suit in which this second appeal arose was decreed by the Court of first instance (Munsif). On appeal by the defendant the lower appellate Court (District Judge) remanded the case for the trial of certain issues. The findings on these issues were against the defendant. On their return no objections to them under s. 567 of the Civil Procedure Code were preferred by the defendant. On the 28th June, 1883, the lower

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* Second Appeal No. 1488 of 1883, from a decree of G. E. Knox, Esq., District Judge of Jaunpur, dated the 28th June, 1883, affirming a decree of Maulvi Amir-ullah, Munsif of Madiahu, dated the 21st March, 1883.

(1) 2 A. 908.

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appellate Court passed an order disposing of the appeal in the following terms: "The lower Court has found against the appellant. No objection has been taken to the finding: the appeal will stand dismissed."

[384] In second appeal the defendant contended that the lower appellate Court had not disposed of the pleas urged in appeal; that the lower appellate Court ought to have decided the case with reference to the evidence on the record; and that the omission to prefer objections under s. 567 of the Civil Procedure Code did not necessarily make it incumbent on an appellate Court to dismiss the appeal without taking the evidence into consideration.

Mr. *J. Simeon*, for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

JUDGMENT.

MAHMOOD, J.—The judgment of the District Judge leaves little doubt that he, in the absence of objections under s. 567 of the Civil Procedure Code, felt himself bound by the findings of the Court of first instance.

We are of opinion that the view thus taken by the learned Judge was erroneous. It has been settled by a course of rulings of this Court that, after the expiration of the period fixed for presenting objections under s. 567, Civil Procedure Code, the appellate Court may, at its discretion, receive or decline to receive any written objection, but that in any case it is bound to consider the finding of the lower Court on the merits, and is not precluded from hearing arguments for and against the finding at the hearing of the appeal. Such we take to be the effect of the ruling by PEARSON and STRAIGHT, JJ., in *Akbari Begam* v. *Wilayat Ali* (1), and whilst concurring with the rule therein laid down, we go further and hold that the imperative provisions of s. 574, Civil Procedure Code, apply alike to cases remanded by the first appellate Court for trial of issues, and to those in which no such remand has taken place. It is obvious that we, as the Court of second appeal, cannot enter into the merits of the case, in order to ascertain the weight of the evidence produced in support of the allegations of the parties; and it seems to us that, in exercising our jurisdiction as a Court of second appeal, we must insist upon having before us findings recorded in a judgment which strictly conforms to the imperative rule laid down by the Legislature in s. 574 of the Code. [385] That rule cannot be too strictly enforced, and we have no hesitation in holding that a judgment which falls short of complying with the clear provisions of that section is, as such, worthless for the purposes contemplated by the law.

For these reasons we cannot regard the final judgment of the lower appellate Court to be a judgment such as the law requires; and as a consequence of the view we set aside the decree of that Court, and remand the case to that Court for disposal according to law. The costs of this appeal will abide the result.

Appeal allowed.

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(1) 2 A. 908.

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APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

ABDUL KARIM (*Judgment-debtor*) *v.* J. BULLEN (*Decree-holder*).*
[21st May, 1884.]

Execution of decree—Arrest of judgment-debtor—Warrant directed to Nazir—Indorsement to peon—Civil Procedure Code, s. 343—Indorsement of particulars of arrest by Naib Nazir.

Where a warrant issued by a Subordinate Court, directing the Nazir to arrest a judgment-debtor in execution of a decree, was entrusted by the Nazir to a subordinate for execution by indorsing his name upon it, *held* that there is nothing in the Civil Procedure Code to prohibit a Nazir from authorizing a deputy to execute a warrant of arrest for him, and that his indorsement must be regarded as *prima facie* evidence of the authority of the person to whom the warrant is delivered to execute it.

Held that it is most desirable, when the Nazirs of the Subordinate Courts delegate the duty of executing warrants of arrest, that they should confer the authority in more clear and explicit terms than are expressed by a mere indorsement, and that they should be careful in selecting proper persons to discharge that duty, bearing in mind, as far as circumstances permit, the position and caste of the party to be arrested, so as to avoid through the medium of Court process subjecting any such party to personal indignity or offence. Further, that it is important that the person chosen should be made acquainted with the contents of the warrant, in order that he may be able to inform the judgment-debtor at whose suit and for what amount he is being taken into custody.

Where a warrant for the arrest of the judgment-debtor had been executed, and an indorsement thereon, professedly under s. 343 of the Civil Procedure Code, was irregularly made by the Naib Nazir, he not having been "the officer entrusted with the execution of the warrant," *held* that such irregularity did not invalidate the arrest.

[Appr., 22 C. 596 (603, 607).]

THIS was an appeal from an order refusing to release a judgment-debtor arrested in execution of a decree. It appeared that on the 11th February, 1884, an application was made by J. Bullen, who had obtained a decree against Abdul Karim in the Calcutta High [386] Court, and had obtained the transfer of the execution of the decree to the District Court at Cawnpore, for the arrest of the judgment-debtor. In consequence of this application a warrant, bearing the same date, was issued by the District Judge, directing "Shaikh Nazir-ud-din, Central Nazir," to effect the arrest. The Nazir made the following indorsement on the warrant, *viz.*, "Jeorakhan chaprasi," and entrusted it to the peon named in the indorsement, who arrested the judgment-debtor. On the 12th February the peon made a detailed oral report, upon receiving which the Naib Nazir made an indorsement on the warrant professedly under s. 343 of the Civil Procedure Code. When brought before the Court the judgment-debtor applied under s. 344 to be declared an insolvent, and further presented a petition praying for release on the ground that the arrest had been made in an illegal manner. He stated that he had been seized in his own house by one Abdul Karim, who was at enmity with him, and who dragged him violently by the hair of his head for a considerable distance, and then gave him over to the peon. The District Judge, however, disbelieved this statement and rejected the petition for release.

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* First Appeal No. 21 of 1884, from an order of A. Sells, Esq., District Judge of Cawnpore, dated the 20th February, 1884.

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The judgment-debtor appealed to the High Court.

Mr. *G. E. A. Ross* and Mr. *Amir-ud-din*, for the appellant.

Mr. *G. T. Spankie*, for the respondent.

For the appellant it was contended, *first*, that the District Judge ought not to have discredited the account given by the appellant and his witnesses of the arrest; *secondly*, it was urged that the warrant having been issued to the Central Nazir, he ought to have executed it himself, and was not empowered to delegate its execution to another; that, assuming him to have been so empowered, his indorsement did not amount to a sufficient delegation; and that consequently the peon who effected the arrest was not lawfully authorized to do so. It was further argued that the provisions of s. 343 were not sufficiently complied with by the Naib Nazir's indorsement upon the warrant, he not having been the "officer entrusted with the execution of the warrant." *Rhodes* v. *Hull* (1) was referred to.

[387] For the respondent it was contended, as regards the second point, that under the rules made by the High Court in respect of the service of processes, a warrant directed to the Central Nazir might lawfully be executed by him or any of his peons whom he might depute; that the indorsement on the warrant was sufficient proof that the peon who had arrested the appellant had been deputed for that purpose; and that therefore the arrest of the appellant by the peon Jeorakhan was not unlawful.

The Court (STRAIGHT, Offg. C.J. and DUTHOIT, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J. (after deciding the first point against the appellant), continued:—As to the second point, it does not appear to have been urged in terms in the Court below, and one of us entertains very great doubts as to whether, not having been taken before the Judge, we ought to listen to it in appeal. As, however, we are both agreed that it has no force, it will be more convenient to deal with and dispose of it. It may, we think, be taken that the usual practice followed by the Subordinate Courts in enforcing process of arrest is for the warrant to be handed to the Nazir, who entrusts it to some subordinate for execution by indorsing his name upon the back of it. This indorsement should, we consider, be regarded as *prima facie* evidence of the authority of the person to whom the warrant is delivered to execute it, and as in the present case there was such an indorsement in respect of the peon Jeorakhan, we think we should hold he was sufficiently clothed with authority to entitle him to arrest the appellant. It has been held that "If it be proved that by the ordinary course of business in the Under-Sheriff's office, the name of the officer who is to execute the writ is indorsed on the process, and the writ so indorsed is returned and filed, and the plaintiff offers in evidence a writ with the name of a bailiff indorsed, and proves that the indorsement was made at the Under-Sheriff's office, or was made before it got there, and was afterwards adopted, then it will be *prima facie* evidence that the person named in the indorsement was the person authorized by the Sheriff to execute the writ"—(*See* Addison on Torts, p. 676).

[388] There is nothing in the Code that we are aware of to prohibit a Nazir from authorizing a deputy to execute a warrant of arrest

(1) 26 L. J. Exch. 65.

1884 MAY 21.

APPELLATE CIVIL.

6 A. 385 = 4 A.W.N. (1884) 133 = 8 Ind. Jur. 692.

for him; and we know that it has been for years the recognized and sanctioned practice for him to do so; indeed, under existing arrangements, it is impossible it should be otherwise. Such being the condition of things, the case of *Rhodes* v. *Hull* (1) quoted by the learned counsel for the appellant has no bearing upon the matter before us. In this connection, however, we think it proper to observe that it is most desirable, when the Nazirs of the Subordinate Courts delegate the duty of executing warrants of arrest, they should confer the authority in somewhat more clear and explicit terms than are expressed by a mere indorsement, and they should be careful in selecting proper persons to discharge that duty, bearing in mind, as far as circumstances permit, not to lose sight of the position and caste of the party to be arrested, so as to avoid, through the medium of Court process, subjecting any such party to personal indignity or offence. Moreover, it is important that the person chosen should be made acquainted with the contents of the warrant, in order that he may be able to inform the judgment-debtor at whose suit and for what amount he is being taken into custody. We have only further to add that the indorsement, no doubt irregularly made upon the warrant by the Naib Nazir subsequent to the arrest and professedly under s. 343 of the Code, did not, in our opinion, invalidate such arrest. The appeal is dismissed with costs.

Appeal dismissed.

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6 A. 388 = 4 A.W.N. (1884) 134 = 8 Ind. Jur. 693.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

BHAWANI DAS AND ANOTHER (*Judgment-debtors*) *v.* DAULAT RAM AND OTHERS (*Decree-holders*).* [22nd May, 1884.]

Execution of decree—Twelve years' old decree—Act X of 1877 (*Civil Procedure Code*), s. 230—*Act XIV of* 1882 (*Civil Procedure Code*), s. 230.

Where an application was made under s. 230 of the Civil Procedure Code, 1877, as amended by Act XII of 1879, for execution of a decree more than twelve years old and the application was granted, *held* that a subsequent application for execu-[389] tion of the decree under s. 230 of the Civil Procedure Code, 1882, should have been refused, since the decree had been once allowed the benefit of the three years' grace under the last paragraph of s. 230 of the Code of 1877, and then became dead or unexecutable.

Held, that there is nothing in the Code of 1882 to justify the conclusion that it was intended to revive decrees which had become dead before it became law, and that here the decree-holder's right having already become dead before the enactment of the present Code, the passing of that Code could not bring that right into existence again.

Musharraf Begam v. *Ghalib Ali* (2), distinguished.

[R., 8 A. 419 (427).]

THE decree of which execution was sought in this case was dated in 1863. It appeared that on the 4th March, 1880, within three years from the passing of Act X of 1877, an application was made under s. 230 of

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* Second Appeal No. 85 of 1883, from an order of E. B. Thornhill, Esq., District Judge of Aligarh, dated the 26th September, 1883, affirming an order of Maulvi Muhammad Sami-ulla-Khan, Subordinate Judge of Aligarh, dated the 14th April, 1883.

(1) 26 L.J. Exch. 65. (2) 6 A. 189.

1884 MAY 22. — APPELLATE CIVIL. — 6 A. 388 = 4 A.W.N. (1884) 134 = 8 Ind. Jur. 693.

Act X of 1877, as amended by Act XII of 1879, for execution of the decree. At this time the decree was more than twelve years old. This application was granted. On the 3rd March, 1883, the decree-holders next applied for execution of the decree. This application was made under s. 230 of Act XIV of 1882, which was passed on the 17th March, 1882, and came into force on the 1st June, 1882, and by which Act X of 1877 was repealed. The judgment-debtors objected to the application on the ground that after the decree was more than twelve years old, an application had been made and granted, and therefore a second application should not be granted. The lower Courts disallowed this objection, on the ground that the application in dispute was the first made under s. 230 of Act XIV of 1882.

The judgment-debtors appealed to the High Court, again contending that that application was barred.

Munshi *Kashi Prasad*, for the appellants.

Babu *Oprokash Chandar* and Lala *Harkishen Das*, for the respondents.

JUDGMENT.

MAHMOOD, J.—I am of opinion that this appeal is distinguishable from the Full Bench case of *Musharraf Begam* v. *Ghalib Ali* (1). In that case the decree was not twelve years old when the present Civil Procedure Code (Act XIV of 1882) was enacted, and at that time the decree in question was therefore alive, and the application for execution in that case was consequently held **[390]** entitled to the benefit of the last paragraph of s. 230 of the present Code.

In the case before us the decree sought to be executed was passed on the 30th July, 1863, and successive executions were taken out under the old Civil Procedure Code (Act VIII of 1859). Act X of 1877 was passed on the 30th March, 1877, and within three years from that date, *viz.*, on the 4th March, 1880, the decree-holder applied for execution, which was granted under s. 230 of that Act. The application thus had the benefit of the last paragraph of that section, and there is no question that the decree could not, therefore, be executed again if Act X of 1877 had never been repealed.

The present Code was passed on the 17th March, 1882, and came into force on the 1st of June, 1882, reproducing the *ipsissima verba* of s. 230 of Act X of 1877; and the question is, whether the present application for execution, which was made on the 3rd March, 1883, can claim the benefit of the three years' grace allowed by the last paragraph of s. 230 of the present Code for decrees older than twelve years.

I have no hesitation in answering the question in the negative. The decree before us is more than twelve years old; it was once allowed the benefit of the three years' grace under the last paragraph of s. 230 of the Code of 1877, and then became dead or unexecutable. The effect of the Full Bench ruling in *Musharraf Begam's* case (1) is to prolong the life of a decree which was alive at the time when the present Code was passed: and if there is nothing in s. 230 of the Code which positively prohibits the execution of such decrees, there is certainly nothing to justify the conclusion that it was intended to revive decrees which had become dead before the Code of 1882 became law.

This view accords with the fundamental rule of interpretation, that rights once lost cannot be revived by a subsequent statute without

(1) 6 A. 189.

express words to that effect: and here the decree-holder's right having already become dead before the enactment of the present Code, the passing of that Code could not bring that right into existence again.

1884 MAY 22.

APPELLATE CIVIL.

6 A. 388 = 4 A.W.N. (1884) 134 = 8 Ind. Jur. 693.

[391] For these reasons I hold that the application for execution in this case should not have been granted, and I would decree the appeal and reverse the orders of both the lower Courts, making costs in all the Courts payable by the decree-holders-respondents.

STRAIGHT, Offg. C.J.—I concur in the proposed order.

Appeal allowed.

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6 A. 391 = 4 A.W.N. (1884) 129.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

MUMTAZ BEGAM (*Defendant*) v. FATEH HUSAIN (*Plaintiff*).*
[23rd May, 1884.]

Remand—Finding not objected to—Practice—Duty of appellate Court—Civil Procedure Code, ss. 567, 574.

Where a first appellate Court has remanded a case to the Court of first instance for the trial of issues, and where, on the return of findings on these issues, objections under s. 567 of the Civil Procedure Code have not been filed until after the expiration of the prescribed period, the appellate Court, though not bound to entertain the objection, should nevertheless, upon the hearing of the remand, allow the party filing them to be heard with regard to them. *Ratan Singh* v. *Wazir* (1) and *Akbari Begam* v. *Wilayat Ali* (2), referred to.

An appellate Court, because it remands issues, does not therefore, in the absence of subsequent objection by either or both of the parties to the findings when returned, divest itself of its power to exercise its judicial mind as to the propriety of such findings; but, apart from any objection by the parties, it should examine and test them to see whether or not they ought to be accepted. *Akbari Begam* v. *Wilayat Ali* (2), followed. *Umed Singh* v. *Salima Bibi* (3), referred to.

[F., 20 M. 496 (498) = 7 M.L.J. 236; **Appr.**, 17 B. 428 (430); **R.**, 19 B. 551 (552).]

THE suit in which this second appeal arose was dismissed by the Court of first instance. On appeal by the plaintiff, the lower appellate Court (Subordinate Judge) remanded the case to the Court of first instance for the trial of certain issues. On all these issues, the findings of the Court of first instance were against the defendant. These findings were received by the lower appellate Court on the 6th July, 1883, and it was ordered that objections under s. 567 of the Civil Procedure Code should be filed within a week. The defendant's objections, however, were not filed until the 16th July, and accordingly the lower appellate Court refused to admit them on the ground that they were preferred after time, and [392] proceeded to decide the appeal in accordance with the findings, that is to say, it decreed the appeal and the claim, and reversed the decree of the Court of first instance.

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* Second Appeal No. 1433 of 1883, from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 19th July, 1883, reversing a decree of Maulvi Muhammad Wahid Ali, Munsif of Shamli, dated the 15th January, 1883.

(1) 1 A. 165. (2) 2 A. 903. (3) 6 A. 383.

1884 MAY 23. — APPELLATE CIVIL. — 6 A. 391 = 4 A.W.N. (1884) 129.

In second appeal by the defendant, the first ground of appeal was to the effect that the objection to the findings on remand had been taken within time. It was also contended on behalf of the appellant that though the Subordinate Judge was not bound to entertain the objection, he should nevertheless at the hearing upon the return of the remand have allowed the defendant's pleader to be heard orally with regard to them.

Pandit *Nand Lal*, for the appellant.

Munshi *Hanuman Prasad* and Shaikh *Moula Bakhsh*, for the respondent.

The Court (STRAIGHT, Offg. C.J. and DUTHOIT, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—The first plea cannot be sustained. The last day for the defendant-appellant to file objections in the lower appellate Court was the 14th July, and they were in fact not filed until the 16th. But under s. 542 of the Code we have permitted the appellant's pleader to raise a point not taken in his memorandum of appeal, namely, that though the Subordinate Judge was not bound to entertain the objections, he should nevertheless at the hearing upon the return of the remand have allowed the appellant's pleader to be heard orally with regard to them. There are two rulings on this point which certainly favour this contention —*Ratan Singh* v. *Wazir* (1) and *Akbari Begam* v. *Wilayat Ali* (2)—and if we had any materials before us to show that the pleader applied to be heard, we should be disposed to hold that the Subordinate Judge, looking to the peculiar circumstances of the case, should have heard him. But upon a broader ground we think that the Subordinate Judge's decision is defective. In *Akbari Begam* v. *Wilayat Ali* (2) it was remarked:— "Even if no objection was preferred in writing or orally, we are not of opinion that the lower appellate Court's duty was to accept it blindly without examining the evidence on which it was founded, and satisfying itself that it was correct and fit to be accepted." An ap-**[393]** pellate Court, because it remands issues, does not therefore, in the absence of subsequent objection by either or both of the parties to the findings when returned, divest itself of its power to exercise its judicial mind as to the propriety of such findings, nor indeed is the decision of the appeal, to which it thereupon proceeds, confined to the grounds taken, either in the original memorandum of appeal or in the petition or petitions of objection. The Subordinate Judge in the present case appears to have thought himself bound by the findings of the Munsif on the issues remitted, and does not even say whether he concurs in them or not. We think, apart from any objections by the parties, he should have examined and tested them to see whether they ought to be accepted by him, and that, not having done so, his decision does not satisfy the requirements of the law. In this connection we may refer to a recent ruling of this Court in *Umed Ali* v. *Salima Bibi* (3). We decree the appeal, and direct that the record be returned to the lower appellate Court, which will restore the case to its file and dispose of it according to law. The costs will be costs in the cause.

Appeal allowed.

(1) 1 A. 165. (2) 2 A. 908. (3) 6 A. 383.

6 A. 393 = 4 A.W.N. (1884) 135.

1884 MAY 26. — APPELLATE CIVIL. — 6 A. 393 = 4 A.W.N. (1884) 135.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Duthoit.

JANKI SINGH (*Defendant*) *v.* ABLAKH SINGH AND ANOTHER (*Plaintiffs*).*
[26th May, 1884.]

Suit by judgment-debtor to set aside execution-sale—Question for Court executing decree —Fresh suit—Civil Procedure Code, s. 244.

A judgment-debtor sued the decree-holder for recovery of possession of certain land which had been sold in execution of the decree, and to set aside the sale on the ground that the land was not liable under s. 9 of the N.-W. P. Rent Act to sale in execution of decree. *Held* that the question at issue between the parties was clearly one relating to the execution and satisfaction of the decree, and that the suit was therefore barred by the provisions of s. 244 of the Civil Procedure Code.

[F., 6 A. 448 (449); D., 7 A. 641 (643).]

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Kashi Prasad*, for the appellant.

The respondents did not appear.

[394] The Court (BRODHURST and DUTHOIT, JJ.) delivered the following judgment :—

JUDGMENT.

DUTHOIT, J.—This is an appeal from a decree of the Subordinate Judge of Ghazipur, affirming a decree of the Munsif of Sayyidpur in favour of the plaintiffs-respondents for recovery of possession of certain land, and for setting aside certain proceedings held in execution of decree.

The facts, so far as the purposes of this appeal are concerned, may be thus stated :—

Janki Singh, the defendant in this suit, held against Ablakh Singh and Raghunath Singh, the plaintiffs in this suit, a decree for Rs. 189-0-1. In execution of this decree Janki Singh caused to be attached and proclaimed for sale a certain cultivatory tenure held by his judgment-debtors. The 20th December, 1881, was fixed as the date of sale. On the 16th December, 1881, the judgment-debtors (the now plaintiffs) objected to the sale being held, on the ground that their holding was not a tenancy at fixed rates, but merely one with rights of occupancy, and was therefore not transferable in execution of a decree. The objection was disallowed. The sale was held on the date fixed, the tenure was sold, and was purchased by the decree-holder for Rs. 150. The sale was confirmed on the 7th February, 1882, and formal possession was subsequently delivered to the auction-purchaser. There was no appeal. The present suit was instituted on the 8th February, 1883, but on the 19th *idem* Ablakh Singh withdrew from the suit, admitting that the tenancy was at fixed rates. The allegations of the plaint are in substance the same as those of the objection made on the 16th December, 1881. The Courts below have concurred in decreeing the suit, on the ground that with reference to the terms of s. 9, Act XII of 1881, the judgment-debtors had no saleable interest in the property sold.

* Second Appeal No. 1564 of 1883, from a decree of Babu Mrittonjoy Mukarji, Subordinate Judge of Ghazipur, dated the 23rd July, 1883, affirming a decree of Moulvi Muhammad Aziz-ul-Raman, Munsif of Sayyidpur, dated the 5th March, 1883.

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6 A. 393 = 4 A.W.N. (1884) 135.

It is contended in second appeal that the suit was barred by the terms of s. 244 of the Code of Civil Procedure.

The plea was raised in the lower appellate Court, and was disposed of thus :—

"The question as to whether any property is or is not liable, under s. 9, Act XII of 1881, to sale in execution of decree, is not [395] properly speaking, a question relating to execution of decree, but a question relating to its liability to sale in execution of decree, and a regular suit to try it is not therefore barred by s. 244 of the Code of Civil Procedure."

There has been no appearance in this Court by the respondents, and we have therefore not had the advantage of hearing arguments in support of the judgment of the lower appellate Court ; but the learned pleader for the appellant has referred us to the decision of a Division Bench of this Court reported at p. 218 of the *Weekly Notes* for 1883 (S. A. No. 769 of 1883), to which one of us was a party.

We are of opinion that the appeal must prevail. The parties to this suit were parties to the suit in which the decree was passed, and the question now arising between them is clearly one relating to the execution and satisfaction of the decree.

The suit is therefore barred by the provisions of s. 244 of the Code of Civil Procedure.

We decree the appeal, and dismiss the suit with costs in all the Courts.

Appeal allowed.

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6 A. 395 = 4 A.W.N. (1884) 136.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

LACHMAN SINGH (*Defendant*) v. TANSUKH (*Plaintiff*).*
[26th May, 1884.]

Hindu Law—Inheritance—Relinquishment—Admission on pleadings.

A plaintiff suing two defendants, *N* and *L*, for the possession of certain property by right of inheritance, admitted in his plaint the right by inheritance of the defendant *M* to a moiety of the property, and only made him a defendant because he would not join in bringing the suit. The claim, however, was for the entire property. The defendant *M* filed a written statement setting forth that he had long ago willingly resigned all his rights in favour of the plaintiff, and that the suit had been instituted with his consent.

Held that this statement was only an admission by *M* of the plaintiff's title which could not be used against the other defendant *L*, so as to entitle the plaintiff to a decree for the entire estate; that since *L* did not set up *M's* title to defeat the plaintiff, he could not be affected by *M's* disclaimer ; and that the plaintiff could not be allowed in this suit to obtain *M's* share as his representative, for that would be to decree him the share on a title he never set up.

[396] *Amirtolal Bose* v. *Rajoneekant Mitter* (1), referred to.

[F., 7 A. 353 (359).]

THE plaintiff in this suit, Tansukh, sued for possession of certain immoveable property. The defendants in the suit were—(i) Lachman

* First Appeal No. 84 of 1882, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 17th July, 1882.

(1) 15 B.L.R. 10 = 23 W.R. 214 = 3 Suth. P.C.C. 101 = 2 I.A. 113.

Singh and (ii) Madho Singh. The property in suit was the property left by one Rup Singh, who died without issue. In the third paragraph of his plaint the plaintiff stated as follows:—"Under the Hindu Law the plaintiff and Madho Singh, defendant No. 2, cousins (paternal uncle's sons) of Rup Singh, deceased, are entitled to inheritance, but Madho Singh, not having joined in the present suit for inheritance, has been made a defendant. The defendant No. 1 has no right of inheritance to the estate of Rup Singh.........The plaintiff is entitled to possession of the property." In the 6th paragraph of his written statement of defence, filed on the 30th May, 1882, the defendant Lachman Singh stated as follows:—"When the plaintiff admits that Madho Singh is the owner of an equal share, it is quite unjust to claim the entire property: no one can ask for more than what he is entitled to." The defendant Madho Singh, on the 24th June, 1882, after the issues had been framed, filed the following written statement:—"Claim for the possession of the property. In this case the plaintiff has brought a suit in respect of the entire estate of Rup Singh, as his heir under Hindu Law. Defendant is also, like plaintiff, an heir of Rup Singh. Owing to his old age, defendant has long ago willingly resigned all his rights in favour of the plaintiff, who is his brother; and defendant, in opposition to the plaintiff, has no connection with the estate of Rup Singh, inasmuch as the plaintiff is the owner and representative of defendant's rights. The suit in respect of the entire estate of Rup Singh has been instituted by the plaintiff with defendant's consent, since he is entitled to all the property under right of heirship. Defendant neither has nor had any objection to make against the suit."

The Court of first instance framed the following issue with reference to the question whether the plaintiff should be allowed to recover possession of the entire property left by Rup Singh, notwithstanding his admission that he was only entitled by inheritance to one moiety, *viz.*—"Is the plaintiff competent to sue for the share **[397]** of Madho Singh also?" Upon this issue the Court, having regard to the written statement of Madho Singh, held that as Madho Singh had waived his right, the plaintiff was entitled to the whole property.

On appeal by the defendant from the decree of the Court of first instance, giving the plaintiff possession of the entire property in suit, it was contended on his behalf that the plaintiff was not entitled to a decree for more than his own legal share of such property, namely, one moiety.

Mr. *T. Conlan* and Pandit *Bishambar Nath*, for the appellant.

Munshi *Kashi Prasad* and Pandit *Nand Lal*, for the respondent.

The judgment of the Court (OLDFIELD and MAHMOOD, JJ.), so far as it related to the contention set out above, was as follows:—

JUDGMENT.

OLDFIELD, J.—The second objection is, in our opinion, valid. Madho Singh is admitted by the plaintiff to be entitled to succeed Rup Singh, and was made a defendant by him because he would not join in bringing the suit. This is, however, no reason for permitting plaintiff to claim his share.

Madho Singh, however, on the 24th June, 1882, after issues had been fixed, put in a statement through his pleader, in which he states that he is an heir of Rup Singh, but had long ago resigned all his rights in favour of the plaintiff, whom he styles the owner and representative of his rights,

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and he further states that plaintiff had instituted the suit with his consent.

It is with reference to this admission by Madho Singh that the lower Court has decreed the plaintiff's claim to Madho Singh's share. It is to be noticed that plaintiff did not rest his claim to Madho Singh's share on the ground that he represented Madho Singh at the time of the institution of the suit by the transfer to him or relinquishment of the share, so that Madho Singh's statement is opposed to plaintiff's allegation; but apart from this consideration, Madho Singh's statement is only an admission by a co-defendant of appellant of plaintiff's title and a disclaimer of his own, and cannot, under the circumstances of this case, be used against appellant so as to entitle plaintiff to a decree for the entire estate.

[398] Appellant did not set up Madho Singh's title to defeat plaintiff, and cannot be affected by Madho Singh's disclaimer, nor can plaintiff be allowed in this suit to obtain Madho Singh's share as his representative, for that would be to decree him the share on a title he never set up, and upon an admission of a co-defendant of the appellant, which cannot be used in this suit against appellant, who would have no opportunity of answering it.

As supporting our view, we may refer to the case of *Amritolal Bose* v. *Rajoneekant Mitter* (1).

The plaintiff is therefore only entitled to a moiety of the property in suit, for which he will have a decree in modification of the decree of the lower Court with proportionate costs in both Courts.

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6 A. 398 = 4 A.W.N. (1884) 137.

CIVIL JURISDICTION.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

RAJA SINGH (*Plaintiff*) *v.* SULKA (*Defendant*).* [27th May, 1884.]

Act XII of 1881 (*N.-W.P. Rent Act*), ss. 182, 183, 189—*Appeal to District Judge.*

An appeal lies to the District Judge under s. 189 of the N.-W.P. Rent Act as well from appellate as from original decisions of the Collector.

THIS was a reference under s. 205 of the North-Western Provinces Rent Act, 1881. The suit out of which the reference arose was one for Rs. 105-8-0, arrears of rent, instituted in the Court of an Assistant Collector of the second class under that Act. The Assistant Collector dismissed the suit. The plaintiff appealed to the Collector, and that officer dismissed the suit. The plaintiff then appealed to the District Court. A preliminary objection was taken to the hearing of the appeal, on the ground that the appellate decision of the Collector was final, under s. 183 of the Rent Act, s. 189 not applying to appellate decisions of the Collector, but to original decisions of that officer. The District Judge, being doubtful whether he could take cognizance of the appeal, referred [399] the following question to the High Court under s. 205 of the Rent Act:—"Does a second appeal lie to the District Judge from a

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* Reference No. 93 of 1884, under s. 205 of the Rent Act, by H. P. Mulock, Esq., District Judge of Farukhabad.

(1) 15 B.L.R. 10 = 23 W.R. 214 = 3 Suth. P.C.C. 101 = 2 I.A. 113.

judgment in appeal from the decision of an Assistant Collector of the second class, when the amount or value of the subject-matter exceeds one hundred rupees?"

1884 MAY 27. — CIVIL JURISDICTION. — 6 A. 398 = 4 A.W.N. (1884) 137.

The appellant did not appear.

Mr. *Sirajuddin* and Pandit *Ajudhia Nath*, for the respondent.

The Court (STRAIGHT, Offg. C.J., and MAHMOOD, J.) passed the following order:—

ORDER.

STRAIGHT, Offg. C.J.—The subject-matter of the suit admittedly exceeded Rs. 100. The Court of first instance was an Assistant Collector of the second class, and under s. 183 of the Rent Act his order was appealable to the Collector, whose order, in its turn, was, under that section, final. But by s. 189 it is provided that in certain cases therein specified, "notwithstanding anything contained in ss. 182 and 183, an appeal shall lie to the District Judge from the decision of the Collector of the district or Assistant Collector of the first class in all suits mentioned in s. 93." The suit in which the point referred to us by the Judge arose was one for rent under s. 93 of the Rent Act, and we think that, in advertence to the terms of s. 189 already set forth, the decision of the Collector was appealable to the Judge. Taking ss. 189 and 183 together, we cannot adopt the learned Judge's view that the appeal mentioned in s. 189 has reference only to the decision of the original suit. Let the Judge be informed accordingly.

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6 A. 399 = 4 A.W.N. (1884) 138.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

MAKHAN KUAR AND ANOTHER (*Plaintiffs*) *v.* JASODA KUAR AND OTHERS (*Defendants*).* [29th May, 1884.]

Mortgage—Regulation XVII of 1806, *ss.* 7, 8—*Tender of mortgage-money—Redemption.*

Where in a suit for foreclosure of a mortgage by conditional sale, a notice of foreclosure had been issued under Regulation XVII of 1806, and the mortgagors [400] deposited in Court the money due on the mortgage before the expiry of the year of grace, but at the same time denied the mortgagee's right to receive the money and threatened them with legal proceedings if they took it from the Court,—*held* that the deposit was not an unconditional tender of the money due on the mortgage, that it was vitiated by the conditions under which it was made, that the mortgagees were not bound to accept a deposit so vitiated, and that therefore it was not valid to prevent foreclosure.

Prannath Roy Chowdry v. *Ram Rattan Raee* (1) and *Abdoor Ruhman* v. *Kisto Lall Ghose* (2), followed.

[D., 4 O.C. 355 (358, 359).]

THIS appeal arose in a suit for foreclosure of a mortgage of certain immoveable property. The mortgage, which was one by conditional sale, was dated the 22nd January, 1859. The mortgagors delivered possession of the property to the mortgagees, authorizing them to appropriate the

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* Second Appeal, No. 1588 of 1883, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 5th July, 1883, affirming a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 27th March, 1883.

(1) 7 M.I.A. 323. (2) B.L.R. Sup. Vol. 598 = 6 W.R. 225.

1884 MAY 29. — APPELLATE CIVIL. — 6 A. 399= 4 A.W.N. (1884) 138.

profits in lieu of interest. Upon the expiration of the term of the mortgage the mortgagees, on the 7th June, 1867, issued a notice of foreclosure under Regulation XVII of 1806. The mortgagors contested the notice in a suit for redemption of mortgage, on the allegation that they had paid the mortgage-debt, but on the 8th April, 1868, while this suit was pending, and before the expiration of the year of grace, they deposited Rs. 543 in the District Judge's Court. On the same day they made an application to the District Judge, in which, after referring to the suit which was pending between them and the mortgagees, they went on to say that they had brought the money for deposit in order to save their proprietary right, but that the money was not actually due on the mortgage, and that after the decision of the suit they would sue the mortgagees for having taken double payment of the mortgage-money. The suit of the mortgagors was subsequently dismissed, on the 22nd April, 1868, on the ground that their allegation as to the payment of the mortgage-money was not proved. This decision was finally upheld by the High Court on the 9th December, 1868. The mortgagees therefore continued in possession, and on the 15th June, 1872, they preferred an application to the District Judge declining to take payment of the money deposited by the mortgagors, and asking him to write the usual foreclosure proceeding, declaring the mortgage foreclosed. No such proceeding was recorded, but the mortgagees were directed, by an order, dated the 17th July, 1872, **[401]** to seek their remedy by suit. On the 10th October, 1882, the present suit was brought by the representatives of the mortgagees against those of the mortgagors, in which the plaintiffs, alleging that the defendants had disturbed their possession, claimed recovery of proprietary possession by right of foreclosure of mortgage.

Both the lower Courts dismissed the suit on the preliminary ground that the deposit made by the mortgagors on the 8th April, 1868, was valid, notwithstanding that it was accompanied by a protest that the debt had previously been paid out of Court, and that legal proceedings would be taken against the mortgagees if they realized the deposited money. The lower appellate Court further held that by reason of the deposit the plaintiffs had lost their right of foreclosure, and their only remedy was to realize the money deposited by the mortgagors.

In second appeal the plaintiffs contended that foreclosure was not saved by the deposit in question, having regard to the manner in which such deposit had been made.

Mr. *Carapiet*, Lala *Lalta Prasad* and Babu *Baroda Prasad*, for the appellants.

Shah *Asad Ali*, for the respondents.

The Court (BRODHURST and MAHMOOD, JJ.) delivered the following judgment :—

JUDGMENT.

MAHMOOD, J.—We are of opinion that both the lower Courts have erred in law in holding that the deposit made by the defendants-mortgagors, on the 8th April, 1868, was valid to prevent foreclosure. It was no doubt made within the year of grace, and it has been found that the amount of the deposit covered the money due on the mortgage. But the deposit was not an unconditional tender, because the application depositing the money distinctly denied the mortgagees' right to receive the money deposited, and it threatened them with subsequent legal proceedings if they took the money from the Court. The reason of the rule can be best

stated in the words of Lord Kingsdown in the case of *Prannath Roy Chowdry* v. *Ram Rutton Rae* (1) :—"The remaining objection related to the payment into Court, in the nature of a tender, which [402] was made by the defendant Ram Rutton Rae. Ram Rutton Rae directed the money to be paid out to the appellant; but at the same time in his petition to the Court he disputed the validity of the appellant's title to foreclosure, and expressed an intention, amounting to a notice, to sue the appellant to recover back the very money which he was tendering. The meaning of the direction that the money may be paid into Court clearly is, that the mortgagor may have adequate and lasting evidence of that which is put in place of a tender, and the mortgagee the security and advantage of a deposit in acknowledgment of the title. The mortgagee would have little inducement to take the money, waiving his lien by its acceptance, if litigation on the very same subject were to recommence upon his acceptance of the money; and though mere words in the form of a protest, which may accompany a tender, will not defeat it, where they can reasonably be regarded as idle words, their Lordships think that the proceedings of Ram Rutton Rae, with respect to the mortgagee's title to foreclosure, forbid such an interpretation of his language and his act" (2). The rule so laid down was subsequently adopted by a Full Bench of the Calcutta High Court in *Abdoor Ruhman* v. *Kisto Lall Ghose* (3). Both these cases appear to us to be similar to the case before us, and, adopting the rule laid down in those cases, we hold that the deposit of 8th April, 1868, was vitiated by reason of the conditions under which it was made, that the plaintiffs-mortgagees were not bound to take the deposit, and that therefore the mortgage was foreclosed, extinguishing the rights of the defendants-mortgagors to redeem the same.

As a result of this view we decree the appeal, and setting aside the decrees of both the lower Courts, remand the case to the Court of first instance for disposal on the merits.

Appeal allowed.

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[403] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

AJUDHIA PRASAD (*Defendant*) v. SHEODIN AND ANOTHER (*Plaintiffs*).*
[21st March, 1884.]

Jurisdiction of Civil Court—Resumption of rent-free grant—Suit for a declaration that land is "garden land" and for possession—Act XII of 1881 (*North-Western Provinces Rent Act*), ss. 10, 30, 95 (*a*), (*c*), (*n*).

A zamindar applied to the Revenue Court under s. 30 of the North-Western Provinces Rent Act, and obtained an order for the resumption of certain plots of land, on the finding that they were resumable rent-free grants. The occupiers of the land were ejected, and the zemindar obtained possession. Subsequently the occupiers brought a suit in the Civil Court to obtain a declaration that they held the plots in question, under a license from the zamindar's predecessor in title as orchard land, without payment of any rent or other allowance to the

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* Second Appeal No. 1064 of 1883, from a decree of R. D. Alexander, Esq., Officiating District Judge of Allahabad, dated the 13th April, 1883, reversing a decree of Babu Promoda Charan Banarji, Subordinate Judge of Allahabad, dated the 11th January, 1883.

(1) 7 M.I.A. 323. (2) At p. 358. (3) B.L.R. Sup. Vol. 598 = 6 W.R. 225.

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landlord, and that they were entitled to retain the land on this footing, so long as it should, continue to be occupied with trees. They sought to recover possession of the soil and timber, asking also for "a determination of the nature of their tenure" therein.

Held that the cognizance of the suit by the Civil Court was not barred by the provisions of s. 13 of the Civil Procedure Code inasmuch as the jurisdiction of the Civil Court to entertain it was not ousted by s. 95 of the Rent Act, since the "matter" presented by the plaintiffs was not one "on which an application of the nature mentioned in that section" could by them have been made to a Court of Revenue: clauses (*a*) (*c*) and (*n*) of the section not being applicable to the case.

[R., 26 A. 468 (471) = A.W.N. (1904) 109.]

AT the settlement of a village called Jaitpur, two plots of land, numbered respectively 241 and 242, were recorded as the maufi holding of the plaintiffs in this suit. The defendant in this suit, the zamindar of the village, applied, under s. 30 of the North-Western Provinces Rent Act, for the resumption of this land, and obtained an order for the resumption thereof. The plaintiffs brought the present suit in the Civil Court for a declaration that the land was "garden land," and that the order of the Revenue Court was illegal and void, and for possession of the land and trees. The defendant set up as a defence to the suit, *inter alia*, that it was not cognizable by the Civil Court. The Court of first instance (Subordinate Judge) allowed this defence, and dismissed the suit. It observed as follows:—"The determination of the question whether this Court has jurisdiction to entertain the suit depends upon the decision of the further question, whether the lands in question were the plaintiffs' rent-free **[404]** holding. If it be found that the said lands formed the rent-free holding of the plaintiffs, it was solely within the province of the Revenue Court to determine whether the holding was liable to resumption or not, and, with reference to the provisions of s. 95 of the Rent Act, the Civil Court would have no jurisdiction. It is stated by the plaintiffs' own witnesses that the land in suit originally formed the cultivatory holding of one Bafati *bhatiara*, who used to pay a rent of Rs. 6 a year. About fifteen years ago, Pir Muhammad, the former zamindar, induced Bafati to give up the land, and he made it over to Sheodin, plaintiff, free of rent, and the plaintiff planted trees on it. On the plaintiffs' own showing, therefore, the land in suit was the plaintiffs' rent-free holding, and it was entirely for the Revenue Court to decide whether it was resumable or not. That Court has held it to be resumable, and it is not within the competence of this Court to decide whether that Court has arrived at a right conclusion or not. The suit is therefore not maintainable in this Court." On appeal by the plaintiffs, the lower appellate Court (District Judge) reversed the decision of the Subordinate Judge, and decreed the claim. It observed as follows:—"In this case the appellants sued in the Civil Court on the allegation that the respondent had obtained an order from the Revenue Court ordering resumption of certain land of theirs as being a rent-free tenure, whereas it was really grove land on which their trees were planted. The lower Court found the land to be a rent-free holding, and therefore dismissed the suit. I am of opinion that on the evidence the land was distinctly proved to be grove-land (*bagh*). Such land is always given rent-free to tenants on the condition that they will not cultivate it. Accordingly fifteen years ago the zamindar gave the appellants this land rent-free, and they planted trees on it, hence it was grove-land. As a matter of fact, too, rent-free holdings are always cultivatory holdings, and *bagh* holdings are never included in them. The

decree of the lower Court will therefore be reversed, and a decree made declaring the appellants' proprietary rights to the trees, and that land Nos. 241 and 242 are *bagh* lands of trees."

The defendant appealed to the High Court, contending that the cognizance of the suit by the Civil Court was barred by s. 95 of the Rent Act.

[405] Mr. *W. M. Colvin*, Babu *Oprokash Chandar Mukarji*, and Babu *Beni Prasad*, for the appellant.

Mr. *G. T. Spankie*, and Munshi *Ram Prasad*, for the respondents.

The Court (STRAIGHT and TYRRELL, JJ.) delivered the following judgment:—

JUDGMENT.

TYRRELL, J.—This is a suit brought by the respondents in a Civil Court to obtain a declaration that they hold two plots of land under license from the predecessor in title of the appellant as orchard land, without payment of any rent or other allowance to the landlord, and that they are entitled to retain the land on this footing so long as it shall continue to be occupied as at present with trees. It is admitted that the land was originally arable. The appellant, now zamindar of the estate, applied to the Revenue Court under s. 95 (*c*) and obtained an order for the resumption of the plots in question on the finding that they were resumable rent-free grants. The respondents were consequently ejected, and the appellant got possession. In the present suit the respondents seek to recover possession over the soil and timber, asking also for "a determination of the nature of their tenure" therein.

At the hearing of the appeal we were much pressed by the argument based on the first plea, that the jurisdiction of the Civil Court is ousted by the provisions of s. 95, *supra*. But on mature consideration this contention is found to have more apparent than real force. For the "matter" presented by the plaintiffs in this suit is not one "on which an application of the nature mentioned in that section" could by them have been made to a Court of Revenue. In the first place, this suit does not involve any remedy in respect of rent-free grant (95*c*), for the plaintiffs' case is that the land is not held in that character, but under a planting license limited to the subsistence thereon of an orchard, but otherwise not resumable or assessable with rent at the pleasure of the landlord. Again, though the plaintiffs ask for the "determination of the character of their tenure" of the plots, they do not do so in the sense or within the scope of 95 (*a*), for that sub-article refers to s. 10 of the Act only, and is thereby restricted to decisions whether a tenant, that is to say a rent paying occupant of arable [406] land, is (*a*) "a tenant at fixed rates," or (*b*) "an ex-proprietary tenant," or (*c*) "an occupancy-tenant" or (*d*) "a tenant without a right of occupancy." The plaintiffs do not pretend to come under any of these categories. And lastly, the present "dispute or matter" does not fall under 95 (*n*) for the reason that occupancy is not reclaimed by the plaintiffs in the character of "tenants," but on the contrary licensees of orchards *not* assessed to rent. We must therefore disallow the plea against the jurisdiction of the Civil Court, and hold that the determination of the Revenue Courts on the application of the appellant to resume the plots as "rent-free grants" does not bar this suit under s. 13 of the Civil Procedure Code. But we cannot accept the judgment and decree of the lower appellate Court as properly determining the points raised in first appeal. And we are constrained to remit the following issues under s. 566

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of the Civil Procedure Code, *viz.*—1.—When, and in what terms was the grant or license made and given to the respondents? 2.—When did the planting of trees begin on the plot in question? How many trees now stand on the land, and is the whole area now in fact an orchard? 3.—Did the appellant's predecessor in title acquiesce in the use of the land as a plantation?

On the return of this order, ten days will be allowed for objections.

Issues remitted.

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6 A. 406 = 4 A.W.N. (1884) 140.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Duthoit.

NATHA SINGH AND ANOTHER (*Plaintiffs*) *v.* JODHA SINGH AND OTHERS (*Defendants*).*

NATHA SINGH AND ANOTHER (*Plaintiffs*) *v.* JODHA SINGH AND OTHERS (*Defendants*).† [26th May, 1884.]

Suit for relief on the ground of fraud—Suit to set aside execution-sale—Suit for possession of immoveable property—Act XV of 1877 (Limitation Act), sch. ii, Nos. 12, 95, 144—Pleadings—Verbal admissions—Knowledge of fraud—Evidence—Burden of proof.

Z and his three minor sons were joint owners of a village. This *Z* hypothecated by deed of simple mortgage to *J*. Subsequently *Z* executed another deed of [407] mortgage to *J*, part of the consideration whereof was the cancellation of the former bond, which was paid off and extinguished accordingly. *J*, however, fraudulently caused it to appear from the novating document that the former mortgage was still alive, and, after the death of *Z*, put the bond in suit against *Z*'s widow who, being ignorant of the fraud, confessed judgment as guardian of her minor sons. The entire rights and interests of *Z*'s heirs were sold in execution of the decree so obtained by *J*. Subsequently the fraud was discovered, and *Z*'s sons brought a suit to set aside the execution-sale, and to recover possession of the property first mortgaged. In regard to three-fourths of this property, they prayed that "possession might be awarded to them by establishment of their right and share, by amendment of the revenue papers." In regard to the remaining one-fourth, they prayed for possession "by right of inheritance to *Z*," by cancelment of the execution-sale, and of the fraudulent decree. They further alleged that they had first become aware of the fraud upon the day when they obtained from the registration office a copy of the novating instrument in which the fraudulent entries were contained.

Held that pleadings in the Indian Courts must not be construed with the same strictness as in English Courts; that, although in an informal and loose way, what the plaint substantially set out, as the primary relief sought, was the entire avoidance of the decree and the proceedings resulting therefrom as vitiated by fraud, and, as secondary relief, to be granted if the Court should not see its way to setting aside those proceedings, a declaration that they took effect only as regards one-fourth of the property. *H. H. the Nawab Nazim* v. *Omrao Begam* (1), referred to.

Held also, that the law of limitation applicable to the case was not that contained in art. 12, nor in art. 144, but that contained in art. 95 of sch. ii of the Limitation Act, inasmuch as fraud vitiates all things, and prevents the application of any other law of limitation than that specially provided for relief from its consequences.

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* Second Appeal No. 1485 of 1883, from a decree of A. F. Millet, Esq., District Judge of Shahjahanpur, dated the 19th July, 1883, affirming a decree of Mirza Abid Ali Khan, Subordinate Judge of Shahjahanpur, dated the 14th May, 1883.

† Second Appeal No. 1486 of 1883, from a decree of A. F. Millet, Esq., District Judge of Shahjahanpur, dated the 19th July, 1883, modifying a decree of Mirza Abid Ali Khan, Subordinate Judge of Shahjahanpur, dated the 14th May, 1883.

(1) 21 W. R. 59 (60).

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Held, again applying the principle above enunciated as to the construction of pleadings, that the defendants could not be held, by reason of their not having denied it, to have admitted the truth of the plaintiffs' allegation as to the date upon which knowledge of the fraud was acquired.

Held also, in reference to the terms of certain statements made by the plaintiffs' pleader, from which the lower appellate Court had inferred that the plaintiffs must have become aware of the fraud at a date earlier than that alleged by them, that verbal admissions made by the pleader of a party to a suit must be received with caution, must be taken as a whole, and must not be unduly pressed.

Held, further, that the knowledge predicated by the terms of art. 95 of sch. ii of the Limitation Act is not mere suspicion, but such definite knowledge as enables the person defrauded to seek his remedy in Court.

Held, under the circumstances of the present case, that the burden of proving such knowledge on the part of the plaintiffs, prior to the date alleged by them, lay upon the defendants.

[F., 9 Bom. L.R. 320 (N); 2 N.L.R. 98 (99); R., 34 C. 241 (247)=5 C.L.J. 385; D., 14 A. 498 (499).]

[408] THESE appeals arose out of a single suit. They were heard and disposed of together. The plaint in the suit was, in effect, as follows:—

"(1) The entire 20 biswas of mauza Japua, pargana Khutar, was the property of Kalian Singh, grandfather, Nainsukh, brother, and Zabar Singh, father of the plaintiffs; after the demise of Kalian Singh, the plaintiffs, Nainsukh and Zabar Singh, father of the plaintiffs, obtained joint possession of the property in question.

"(2) On the 10th April, 1861, Zabar Singh executed a bond for Rs. 855 in favour of Jodha Singh, defendant No. 1, for no necessary or legal purpose.

"(3) In the beginning of 1864, Zabar Singh was attacked with severe illness; and Jodha Singh, who is a near relation, removed him to Shahjahanpur with a view to his obtaining medical aid. When he became worse and all hopes of his recovery were given up, Jodha Singh got a usufructuary mortgage-deed of the zamindari of mauzas Seramau, Mohanpur, Gobindpur, Raipur, Bichpuri, and Bazpur, pargana Khutar, executed on the 28th April, 1864, for Rs. 1,025-4-0, as the total amount due under former bonds, in which was included the bond of the 10th April, 1861, for Rs. 855, and had it registered. He did not, however, return any bond.

"(4) After this, Zabar Singh returned to Seramau and died there, leaving as heirs his sons Natha Singh, Lahori Singh, and Nainsukh.

"(5) Jodha Singh, defendant, instituted a suit (although the consideration of the bond of the 10th April, 1861, had been satisfied) and obtained a decree, and had the rights and interests of Zabar Singh in the 20 biswas of mauza Japua sold, which were purchased by the defendants and their ancestor.

"(6) Kundan Kuar, mother of the plaintiffs, and Nainsukh put in an objection, praying that the sale of the 1 biswa share possessed by the plaintiffs and Nainsukh might not be sanctioned; and the decree-holder, *i.e.*, Jodha Singh, admitting this objection, said that the rights and interests of Zabar Singh alone, which were in the possession of his heirs, and in which the minors had no personal right, were sold, so that the sale of the 5 biswas only, being the [409] property of Zabar Singh, was, at the instance of Jodha Singh's vakil, sanctioned.

"(7) On the 20th December, 1871, the defendants unlawfully took possession of the 15 biswas, the property of the plaintiffs and Nainsukh,

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along with the 5 biswas, the property of Zabar Singh, which they had purchased at auction-sale.

"(8) After this Nainsukh died, and Natha Singh and Lahori Singh, plaintiffs, his brothers, became his heirs.

"The cause of action arose on the 20th December, 1871, the day on which possession was taken of the 15 biswas, and on the 20th November, 1881, the day the plaintiffs became aware of the fraud in respect of the 5 biswas. The claim is based upon Hindu Law and the evidence of witnesses.

"The plaintiffs therefore seek the following relief:—

(*a*) That possession of 15 biswas zamindari of mauza Japua, pargana Khutar, with everything appertaining thereto, be awarded to the plaintiffs by establishment of their (plaintiffs') right and share, by amendment of the revenue papers.

(*b*) That possession be awarded to the plaintiffs of the 5 biswas property in mauza Japua, pargana Khutar, with everything appertaining to it, by right of inheritance of Zabar Singh, by cancelment of the sale of the 20th March, 1871, and the fraudulent decree of the 8th September, 1866."

The suit was defended on the ground that, not having been instituted within three years from the time when the plaintiffs attained their majority, the claim was barred by limitation; that there had been no fraud practised as alleged by the plaintiffs; that the bond of the 10th April, 1861, was not merged in the bond of the 28th April, 1864; that the bond of the 10th April, 1861, was, at the time of the suit of 1865, a valid document; that it represented a debt contracted by Zabar Singh for the benefit of the family as its manager, and was therefore binding upon the entire family; that the decree passed upon the bond of the 10th April, 1861, was passed in a suit in which the plaintiffs were represented by their mother [410] as their guardian; and that, under these circumstances, the rights and interests of the entire family passed to the defendants, by virtue of the sale held in execution of the decree of the 8th September, 1866.

The facts found by the lower Courts were as follow:—

On the 10th April, 1861, Zabar Singh hypothecated to Jodha Singh, by deed of simple mortgage as security for a loan of Rs. 855, the entire estate of mauza Japua. This transaction took place under circumstances which caused the entire family to be bound by it. On the 25th September, 1862, Zabar Singh mortgaged usufructuarily to Jodha Singh a fractional share of mauza Hamirpur for a loan of Rs. 135.

On the 28th April, 1864, the money due under these two bonds amounted with interest to Rs. 1,025-4-0. For this amount, the consideration being the cancelment of the bond of the 10th April, 1861, and the 25th September, 1862, Zabar Singh executed in favour of his creditor, Jodha Singh, a deed of usufructuary mortgage of five villages, *viz.*, Mohanpur, Gobindpur, Raipur, Bichpuri, Bazpur, and Seramau Khas. Upon the execution of the deed of the 28th April, 1864, the mortgages of Japua and of a fractional share of Hamirpur by the bonds of the 10th April, 1861, and the 25th September, 1862, were paid off and extinguished. But Jodha Singh fraudulently caused the dates of the extinguished mortgages to be wrongly set out in the novating document, that is to say, instead of the 10th April, 1861, and the 25th September, 1862, he caused the 26th April, 1861, and the 21st December, 1862, to be entered as the dates of the extinguished mortgages. And Jodha Singh fraudulently

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kept back the superseded documents, although the novating document recited the fact of their return to the mortgagor. Jodha Singh held no bonds of Zabar Singh bearing date the 26th April, 1861 and the 21st December, 1862. The mention of such bonds was a fiction. Zabar Singh died about two and a half months after executing the deed of the 28th April, 1864, leaving a widow, who was *pardahnashin*, and three minor sons, *viz.*, the plaintiffs in this cause, and Nainsukh, who had died without issue.

The condition of Zabar Singh's family at the time of his death facilitated the concealment of the fraud which had been practised [411] upon him by Jodha Singh: and Zabar Singh's widow, in ignorance of the actual facts of the mortgage of the 28th April, 1864, completed the delivery of possession of the villages pledged by that deed, and failed to demand from the mortgagee the bonds of the 10th April, 1861, and the 25th September, 1862, and possession of the fractional share of mauza Hamirpur.

In 1866, Jodha Singh put the cancelled bond of the 10th April, 1861, in suit, and Zabar Singh's widow, being still in ignorance of the fraud, confessed judgment, as guardian of her three minor sons. The suit was decreed on the 8th September, 1866, but execution of the decree was not obtained till 1871, on the 20th March of which year the entire rights and interests of Zabar Singh's heirs in mauza Japua were sold at auction and were purchased by the defendants, who, on the 20th December, 1871, took possession of the entire estate.

In 1876, the plaintiffs redeemed the extinct mortgage of the 25th September, 1862, but they did not get back the mortgage-deed till some time in 1879.

On the 20th November, 1881, the plaintiffs obtained from the Registration Office at Shahjahanpur a copy of the deed of the 28th April, 1864.

The Court of first instance (Subordinate Judge) held that, as not having traversed it, the defendants must be held to have admitted the truth of the allegation of the plaintiffs, that they first became aware of the fraud on 20th November, 1881, and that the plaintiffs would have been entitled to recover the entire property on the ground of fraud; but that as they had based their claim to recover the 15 biswas of mauza Japua, not upon this ground, but upon the allegation that Zabar Singh's rights and interests extended not to the entire estate, but to 5 biswas only, which allegation they had failed to establish, they were not entitled to a decree for more than the 5 biswas, regarding which they had alleged the sale of the 20th March, 1871, to be bad by reason of fraud. Decreeing, therefore, in the plaintiffs' favour for 5 biswas, the Subordinate Judge dismissed the plaintiffs' claim to the remaining 15 biswas of mauza Japua.

Both parties appealed. The District Judge held that the suit was governed by the limitation provided in art. 95, sch. ii, Act XV [412] of 1877; that in this country parties must not be held to be strictly barred by their pleadings; that the defendants therefore could not be held, by reason of their not having denied it, to have admitted the truth of the plaintiffs' allegation as to the date of their first becoming aware of the fraud; that the plaintiffs appeared to have been aware of the fraud at an earlier period than the 20th November, 1881; and that their suit was therefore time-barred.

The Judge accordingly decreed the appeal of the defendants, and dismissed the appeal of the plaintiffs, thus dismissing the entire suit.

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The plaintiffs appealed to the High Court from both decrees.

Mr. *G. T. Spankie* and Babu *Ram Das Chakarbati*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Pandit *Ajudhia Nath*, for the respondents.

For the appellants it was contended that, on a true construction of the plaint, what the plaintiffs asked for was that the decree of the 8th September, 1866, and the entire proceedings resulting therefrom, might be set aside on the ground that the decree and those proceedings were vitiated by fraud, and that, failing success in this contention, it might at any rate be held that the sale of the 20th March, 1871, passed to the defendants no more than 5 biswas, the limited estate of Zabar Singh himself. It was further contended that art. 95, sch. ii, Act XV of 1877, is framed on the analogy of art. 91, and applies to those cases only in which a plaintiff seeks to be relieved of the consequences of his own acts, induced by fraud, which is not what was asked in this suit; that this suit was in its essence and substance a suit for the recovery of immoveable property, and as such was governed by the terms of art. 144, not art. 95, sch. ii, Act XV of 1877; that even if art. 95 be the law applicable, still the way in which the lower appellate Court had dealt with the case was erroneous, for that Court had not decided, as it was bound to decide, on what date the fraud became known to the plaintiffs; that mere inferences upon such a point were insufficient; that the inferences which the Judge had drawn from statements made by the plaintiff's pleader on the 12th April, 1883, were erroneous; that the plaintiffs distinctly alleged the 20th November, [413] 1881, to be the date upon which the fraud became known to them; that it lay with the defendants to prove this allegation to be untrue; and that by not traversing that allegation, the defendants must be taken to have admitted its truth.

The Court (BRODHURST and DUTHOIT, JJ.) delivered the following judgment:—

JUDGMENT.

DUTHOIT, J. (After stating the facts as above, continued):—The points for decision in this appeal are the following:—

(1) Will the plaint, or will it not, bear the construction which the learned counsel for the appellants would have us put upon it?

(2) What is the law of limitation applicable to the suit?

(3) From what date did such limitation begin to run?

As regards the first of these issues, we are of opinion that the plaint will bear the construction put upon it by the learned counsel for the appellants. The doctrine that a plaintiff can succeed only *secundum allegata et probata* is one of which we fully admit the force; but, on the other hand, we must hold, as the Judge has himself remarked with reference to the pleadings for the defence, that pleadings in Indian Courts must not be construed with the same strictness as they are in English Courts. As Sir Richard COUCH, C.J., observed in *H. H. the Nawab Nazim* v. *Omrao Begam* (1) "Allowance must be made for what our experience tells us exists here, a very inaccurate mode of setting forth the claims of persons and the answers or defences to them. It would be quite incorrect to look at a plaint in these Courts in the same manner as a declaration in an English Court." The plaint now before us is conspicuously wanting in skill and orderly arrangement; but it is obvious that

(1) 21 W.R. 59 (60).

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the proceedings connected with the suit of 1866 cannot be considered piecemeal, but are bad, or good, as a whole; and we think that, although in an informal and loose way, the plaint does set out, as the primary relief sought, the entire avoidance of those proceedings as vitiated by fraud, and, as secondary relief, to be granted if the Court should not see its way to setting aside the proceedings of 1866 and 1871, a declaration that those proceedings took effect as regards one-fourth only of the property. We think that the Court of first instance acted erroneously in holding itself precluded **[414]** from granting relief to the plaintiffs, on the ground of fraud, with reference to 15 biswas of mauza Japua.

Upon the second of the issues as stated above we are of opinion that art. 95, sch. ii, Act XV of 1877, contains the law of limitation applicable to this suit. The allegation of fraud is the essence and substance of the claim; for unless the proceedings connected with the suit of 1866 are vitiated by fraud, the plaintiffs, as parties to them by their mother as guardian, are bound by those proceedings. The Junior Government Pleader has contended on behalf of the respondents that the suit is barred by art. 12, sch. ii, Act XV of 1877; but this contention is erroneous, for fraud vitiates all things, and prevents the application of any other law of limitation than that specially provided for relief from its consequences in art. 95.

The third of the appeal issues remains to be considered. The point raised in it was not *totidem verbis* put in issue in the Court of first instance. An issue as to limitation was framed in that Court; but it strictly followed the pleadings and was in these terms:—"What was the age of the plaintiffs at the time of the institution of the suit, and is their claim barred by efflux of time?"—and the natural effect of the issue being thus stated was to direct the attention of the defendants to the terms of s. 7, rather to those of art. 95, sch. ii, Act XV of 1877. We admit the force of the lower appellate Court's remarks as to the necessity of allowing the defendants to traverse the allegation of the plaintiffs as to the date upon which knowledge of the fraud was acquired, although they omitted to do so in their written statement of defence. But we hold that the plaintiffs set up a good *prima facie* case in favour of the date alleged by them, and that it was for the defence to rebut the plaintiff's allegation, and to prove that the knowledge of the fraud, if not acquired on the 20th November, 1881, was acquired at some definite earlier period. The lower appellate Court has not determined the date upon which the plaintiffs first became aware of the fraud; but it appears to think that they must have become aware of it when they got back the bond of the 25th September, 1862; and it has drawn this inference from the terms of certain statements made by the pleader for the plaintiffs which are recorded in an "interrogatory proceeding" of the 12th April, 1883.

[415] But here the Judge is, we think, mistaken. The knowledge predicated by the terms of art. 95, sch. ii, Act XV of 1877, is not mere suspicion: it is such definite knowledge as will enable the person defrauded to seek his remedy in Court. And what the plaintiffs' pleader said on the 12th April, 1883, was this:—

"The mortgage of the 25th September, 1862, was with possession. Three years ago the mortgage money was paid, and redemption was effected. But neither then, nor when, under the decree upon the bond of the 10th April, 1861, the property was sold at auction, had the plaintiffs any knowledge that these two bonds had been included in the deed

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of mortgage of the 28th April, 1864. Afterwards, from that time, the plaintiffs began to wonder (*shuba hua*) whence other bonds, besides the usufructuary mortgage-deed of 1862, contemporaneous with the mortgage of 1864, were coming from, although all former debts had been settled. The plaintiffs then obtained from the Registration Office a copy of the mortgage-deed of 1864, and learned from it that at the time of registration no former bond had been returned; consequently from that date it became known (*yih ilm hua*) that the mortgage-deed of 1864 had been executed in lieu of the bonds of the 10th April, 1861, and the 25th September, 1862, and that, in place of the bond of the 10th April, 1861, and the 25th September, 1862, fictitious bonds of the 26th April, 1861, and the 21st December, 1862, had been fraudulently entered in the mortgage-deed of 1864, and that the defendants are in possession under the mortgage-deed of 1864."

To conclude from these statements, as the Judge has done, that the plaintiffs "already knew of the inclusion of the claim of the 10th April, 1861, in that of the 28th April, 1864, when they redeemed the mortgage of 25th September, 1862," is, we think, to place upon them a construction which they will by no means bear. Verbal admissions must be received with caution, must be taken as a whole, and must not be unduly pressed; and we do not find in those which are set out above anything more than a statement that some three years ago (*i.e.*, about 1880), the suspicions of the plaintiffs were aroused, which suspicions eventually led them to obtain from the Registration Office a copy of the 1864 bond, on obtaining which they discovered the fraud which had been practised upon them. The remark of the Judge that, at the time of the redemp-**[416]**tion of the mortgage of 1862, the plaintiffs "must have had previous knowledge that the bond of 1864 included all claims against them," is, we think, a mere assumption; and it is an assumption which is opposed to all the probabilities of the case. The plaintiffs' house is at Seramau Khas (or Seramau Shimali, as it is sometimes called), a village lying at the extreme north of the Shahjahanpur district, a part of the country where the habits of the people are even now unsophisticated and simple, and will have been more so twenty years ago.

The bond of the 28th April, 1864, was (this appears from the document itself) executed in Shahjahanpur, and was registered at Shahjahanpur on the same day. Shahjahanpur is some fifty miles distant from Seramau Khas. Shortly after executing the document Zabar Singh died; his widow was a *pardahnashin*; his sons were minors; the bond was in the possession of Jodha Singh, who was anxious to conceal its terms. We think that, under these circumstances, it is not probable that the plaintiffs would have known what the terms of the bond of 1864 were. If before they redeemed the mortgage of 1862 they possessed the knowledge, is it conceivable that they would have wasted their money in effecting that redemption?

We do not find in the "interrogatory proceeding" of the 12th April, 1883, or elsewhere in the record, an admission by the plaintiffs that, on any date prior to the 20th November, 1881, they had such knowledge of the fraud as would have justified them in seeking the assistance of the Court to relieve them from its consequences; nor does the idea of such knowledge on their part consist, in our opinion, with the common course of natural events in their relation to the facts of this particular case; and we think that the burden of proving such knowledge was upon the defendants in this suit.

The defendants have not discharged this burden; but it may be fairly urged on their behalf that, in consequence of the turn taken by the case in the Courts below, they have had no actual opportunity of discharging it.

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In the terms, therefore, of s. 566 of the Code of Civil Procedure, we refer to the lower appellate Court for trial the following issue:—

[417] On what date, if any, prior to the 20th November, 1881, had the plaintiffs such knowledge of the fraud to which they had been subjected as would have entitled them to seek relief against such fraud?

The Registrar will fix a period for the return of the finding upon this issue together with the evidence, if any, recorded thereon. Thereafter, from a date to be fixed by the Registrar, ten days will be allowed for objections.

Issue remitted.

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6 A. 417 = 4 A.W.N. (1884) 144.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

MAKUNDI (*Plaintiff*) v. SARABSUKH (*Defendant*).*
[30th May, 1884.]

Hindu Law—Guardian and minor—Sale of minor's property—Legal necessity.

Where a guardian conveyed the property of her minor son by a deed of sale in which she did not in terms describe herself as his guardian,—*held* that the omission was immaterial, since it clearly appeared from the deed that it was the minor's property which formed the subject of sale. *Hunooman Persaud* v. *Mussumat Babooee Munraj Koonweree* (1) and *Jadoonath Chuckerbutty* v. *James Tweedie* (2), followed.

A widow, guardian of her minor son, being left after her husband's death in a state of extreme poverty, sold the entire property of the minor for less than one-fourth of its real market value, by a sale-deed reciting that the object of the sale was the minor's maintenance and marriage. It was found that the sale was obtained by the vendee by taking advantage of the guardian's poverty, and that there was nothing to show that, in purchasing the property, he had satisfied himself of the actual existence of the necessities for which the sale purported to be made.

Held that the recital in the deed of the objects of sale was in itself no evidence of the necessity of the alienation. *Rajlakhi Debia* v. *Gakul Chandra Chowdhry* (3), followed.

Held also, that the needy circumstances of the minor did not, by themselves, constitute a sufficient legal necessity for such an alienation. Under the Hindu Law, the maintenance or marriage of a minor may be a legitimate cause for the alienation of his property by the guardian, but cannot justify a Court of Equity in upholding a bargain obviously imprudent and reckless. The best test is whether the alienation would have been reasonably and prudently made by the minor himself, had he been of full age.

Held further, that upon such an alienation being set aside in consequence of a suit brought by the minor, the vendee was entitled to be recouped by the plaintiff [418] to the extent of any portion of the purchase-money which had been appropriated to the latter's benefit. *Paran Chandra Pal* v. *Karunamayi Dasi* (4); *Bai Kesar* v. *Bai Ganga* (5); *Kuvarji* v. *Moti Haridas* (6) and *Gadgeppa Desai* v. *Apaji Jivanrao* (7), referred to.

[**Appr.**, 20 B. 286 (288).]

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* Second Appeal No. 1582 of 1883, from a decree of J. C. Leupolt, Esq., District Judge of Agra, dated the 31st August, 1883, affirming a decree of Babu Mrittonjoy Mukerji, Subordinate Judge of Agra, dated the 23rd December, 1882.

(1) 6 M.I.A. 393. (2) 11 W.R. 20. (3) 3 B.L.R. P.C. 57.
(4) 7 B.L.R. 90. (5) 8 B.H.C.R. A.C.J. 31. (6) 3 B. 234.
(7) 3 B. 237.

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THE plaintiff in this case sued to recover the value of the materials of a house, with interest thereon, and to set aside two sale-deeds which had been executed during his minority, and which purported to convey his rights in the house. The house had been owned by his father, Juala Prasad, and one Khiali Ram. The former died some time before 1872, leaving a widow, Raj Kuar, and a son, Makundi, the plaintiff.

On the 12th June, 1872, Khiali Ram, representing himself to be the owner of the whole house, sold it for a sum of Rs. 3,000 to Sarabsukh. On the 13th November, 1874, Sarabsukh obtained from Raj Kuar a sale-deed, whereby she, after stating that her husband was the owner of half the house conveyed under the sale-deed of the 12th June, 1872, sold her half right in the house for Rs. 350. The deed did not describe her as the guardian of her son, but it recited that the object of the sale was to raise money for the maintenance and marriage of her infant son, Makundi. On the 21st January, 1875, Ganga Ram, brother of Raj Kuar, executed a "*zamanat-nama*," whereby he agreed to indemnify Sarabsukh for any loss which the latter might sustain on account of any claims which the minor, Makundi, might bring upon attaining majority. Both these deeds were registered on the same day, 26th January, 1875. Subsequently Sarabsukh sold the materials of the house to various persons, and the site to one Kishori. On the 17th March, 1882, the present suit was brought by Makundi against Sarabsukh. The plaintiff alleged that the sale by Khiali Ram on the 12th June, 1872, and the sale by Raj Kuar on the 13th November, 1874, were fraudulent, and that under neither of those sales did the plaintiff's share in the house pass to Sarabsukh, Khiali Ram's right being limited to one-half of the house, and the action of Raj Kuar not being justified by any legal necessity. Both the lower Courts dismissed the suit. The lower appellate Court found that, after the death of Juala Prasad, his widow, Raj Kuar, was left in absolute poverty; that she went [419] to her parents' house after her husband's death, as she had no means of livelihood at her husband's house, and was maintaining herself by grinding corn; that "under these circumstances she would only be too glad to get what she could for the maintenance and probable marriage of her son, and that the sale by her is a thoroughly *bona fide* affair."

In second appeal, the plaintiff contended that, in the sale-deed of the 13th November, 1874, Raj Kuar did not describe herself as guardian of her minor son; that therefore the deed could in no case be regarded as a conveyance of the rights of the minor; that the circumstance that, under the sale-deed of the 12th June, 1872, the house was sold by Khiali Ram for Rs. 3,000, indicated that the market value of the minor's half share would be Rs. 1,500; that the sale of the 13th November, 1874, which was made only for Rs. 350, was obviously an unconscionable bargain which a Court of Equity would not allow to stand, especially as it was directly against the interests of the minor.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

Mr. *W. M. Colvin* and Lala *Lalta Prasad*, for the respondent.

The Court (BRODHURST and MAHMOOD, JJ.) delivered the following judgment :—

JUDGMENT.

MAHMOOD, J.—The first part of the learned pleader's argument has no force. It is true that in the sale-deed of the 13th November, 1874, Raj Kuar did not describe herself as the guardian of her minor son, but

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this circumstance in itself is of no consequence, as it is clear from the deed that it was the share of the minor which formed the subject of sale. Such was the view taken by PEACOCK, C.J., in *Jadoonath Chuckerbutty* v. *James Tweedie* (1) which followed the rule laid down by the Lords of the Privy Council in the celebrated case of *Hunooman Persaud* (2). Nor can it be doubted in this case that the position of Raj Kuar was that of a guardian, and the finding of the lower appellate Court, to the effect that the sale-deed was executed by Raj Kuar with the concurrence and advice of her brother, Ganga Ram, precludes the contention that the sale-deed was obtained from her under fraud, undue influence, [420] or misrepresentation. Indeed, the whole case depends upon the question whether, on the facts found in this case, the sale of the 13th November, 1874, was executed under necessity and was beneficial to the interests of the minor.

Upon this point we are of opinion that the facts found in this case favour the contention of the learned pleader for the appellant. It may be that the defendant-respondent in purchasing the house from Khiali Ram under the sale-deed of the 12th June, 1872, acted *bona fide*, and that he was misled into believing that his vendor was the owner of the whole house. But this circumstance would not affect the interests of the minor, for it is admitted in this case that the rights of Khiali Ram extended only to one-half of the house, and he could not therefore convey more than he owned himself. The defendant-respondent himself seems to have become aware of this circumstance, as is shown by the fact of his obtaining the deed of sale of the 13th November, 1874. It is obvious, from the circumstances of the case, as found by the lower appellate Court, that this latter deed was obtained by the defendant-respondent to make his title to the whole house complete. The lower appellate Court has found that, at the time when the sale-deed of 1872 was executed, the plaintiff's mother was very probably at her father's house, that she returned in 1874, and, having learnt that the house had been sold, claimed her share of the value, and "the defendant-respondent, to deprive her of any further right, and taking advantage of her necessity, bought her share for Rs. 350." But whilst arriving at these conclusions, the learned Judge goes on to say that they have no bearing upon the case, and cannot vitiate the sale.

We are unable to accept this view. The question in the case was not whether the sale would have been valid if the half share in the house belonged to Raj Kuar herself. The question was whether her action in executing the sale of the 13th November, 1874, was such as in equity would bind the plaintiff, who, at the time, was a minor under her protection and guardianship. We have no hesitation in holding that the circumstances of the sale were not such as would justify a guardian in alienating the property of the minor ward. It may be, as the lower appellate Court has found, that [421] the minor was in needy circumstances, but, whatever these may have been, they would not necessitate the sale of the entire property belonging to him for less than one-fourth of its real market value. The cogency of this circumstance was felt by the learned counsel for the respondent himself, and the only way in which he has attempted to meet it is that, by reason of the sale of 1872, which purported to convey the whole house to the defendant-respondent, the market value of the minor's

(1) 11 W.R. 20.

(2) 6 M.I.A. 393.

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half share had been materially reduced, as any claim by the minor would probably involve litigation. But the argument cannot be countenanced by us, for it amounts to claiming the benefit of the wrongful act of the defendant himself in purchasing the share of the minor from Khiali Ram. The defendant-respondent may have found it to his advantage to obtain the sale-deed of the 13th November, 1874. But, reading that document with the *zamanat-nama* executed by Ganga Ram on the 21st January, 1875, it is obvious that the object of obtaining the sale-deed was not, as the learned Judge has erroneously held, to guard against any claim that Raj Kuar might subsequently advance. It was a distinct attempt to deprive the minor of such claim as he could, upon attaining majority, urge in a Court of Equity against the action of his mother in executing the sale. The object of the defendant was to patch up the defective title to the house which he had acquired under Khiali Ram's sale-deed of the 12th June, 1872. It is true that Raj Kuar's sale-deed of the 13th November, 1874, describes the object of the sale to be the maintenance and marriage of the minor; but such recital is in itself no evidence of the necessity, as was held by the Privy Council in the case of *Rajlakhi Debia* v. *Gakul Chandra Chowdhry* (1). The maintenance and support of a minor may be taken to be a reasonable justification under any system of law, and, under the peculiarities of the Hindu Law, the marriage of a minor may be perhaps a legitimate cause for the alienation of the property by the guardian [*Jugessur Sircar* v. *Nilambur Biswas* (2)]. But in neither of these cases can a bargain obviously imprudent and reckless be upheld by a Court of Equity. The best test in such cases is whether the alienation would have been reasonably and prudently made by the minor himself had he been of full age.

[422] In the present case, the sale of 13th November, 1874, was obviously one which cannot be said to be either a prudent bargain or for the benefit of the minor. It was, as the learned Judge has found, obtained by the defendant-respondent by taking advantage of the poverty of the plaintiff's mother. It is not shown that she made any attempt to sell the minor's share to any other purchaser, and property which, judging by the standard of Khiali Ram's sale-deed of 1872, was worth Rs. 1,500, was purchased by the defendant for only Rs. 350. Again, neither of the Courts below has found that any portion of the purchase-money was actually spent on the maintenance or marriage of the minor. Nor has it been found that the defendant-respondent, in purchasing the property from Raj Kuar, had satisfied himself of the actual existence of the necessities for which the sale purported to have been made. The finding of the lower appellate Court is that "the money was needed and taken, possibly to defray the plaintiff's marriage expenses, but certainly for his support and necessary expenses." But this circumstance in itself, as we have already observed, would not justify an obviously imprudent and reckless sale; and we hold that the deed of sale executed by Raj Kuar on the 13th November, 1874, cannot stand. At the same time, if it is true that any portion of the purchase-money was spent upon the maintenance or marriage of the plaintiff, we are of opinion that the defendant-respondent is entitled to be recouped by the plaintiff to the extent of the money appropriated to the latter's benefit. This is a rule of equity which has been recognized by the Courts in India when setting aside illegal sales by guardians of minors [*Paran Chandra Pal* v. *Karunamayi Dasi* (3); *Bai*

(1) 3 B.L.R. P.C. 57. (2) 3 W.R. 217. (3) 7 B.L.R. 90.

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Kesar v. *Bai Ganga* (1); *Kuvarji* v. *Moti Harjdas* (2); *Gadgeppa Desai* v. *Apaji Jivanrao* (3)] and, applying the rule to the present case, we hold that the plaintiff, who is suing for money as the value of the materials of the house appropriated by the defendant, is bound to allow a deduction in favour of the defendant to the extent above indicated. Neither of the lower Courts, however, has gone into the merits of the case to ascertain whether the amount claimed by the plaintiff is justifiable, nor have they found how much money, **[423]** out of the consideration of the sale of 13th November, 1874, was actually spent to the benefit of the plaintiff.

With reference to these observations we decree this appeal, and, setting aside the decrees of both the lower Courts, remand the case to the Court of first instance for disposal. The costs in all the Courts will abide the result.

Appeal allowed.

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6 A. 423 = 4 A.W.N. (1884) 146.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

DURGA PRASAD (*Defendant*) *v.* MUNSI AND OTHERS (*Plaintiffs*).*
[2nd June, 1884.]

Pre-emption—Suit to enforce the right in respect of a part of the property sold.

Every suit for pre-emption must include the whole of the property, subject to the plaintiff's pre-emption, conveyed by one bargain of sale to one stranger; and a suit by a plaintiff pre-emptor, which does not include within its scope the whole of such pre-emptional property, is unmaintainable as being inconsistent with the nature and essence of the pre-emptive right.

Izzutoolla v. *Bhikaree Mollah* (4) and *Baisun Thakooranee* v. *Ram Singh* (5), followed.

Oomur Khan v. *Moorad Khan* (6) and *Salig Ram* v. *Debi Prasad* (7), distinguished.

Cazee Ali v. *Sheikh Museeutoollah* (8); *Abdool Guffoor* v. *Noor Banoo* (9); *Sheodyal Ram* v. *Bhyroo Ram* (10); *Guneshee Lal* v. *Zaraut Ali* (11) and *Bhawani Prasad* v. *Damru* (12), referred to.

[F., 10 A. 182 (186); R., 7 A. 720 (725); 21 A. 292 (294); A.W.N. (1885) 189; 4 O.C. 397 (399); 13 O.C. 260 (264) = 8 Ind. Cas. 272 (274).]

THIS was a suit to enforce a right of pre-emption in respect of a portion only of certain lands sold by one Sheo Prasad and others to Durga Prasad, defendant in the suit. The lands were situated partly in the *patti* of the village in which the plaintiffs were co-sharers, and partly in another *patti* of the same village. The whole property was sold for Rs. 2,000, and the plaintiffs claimed the right of pre-emption in respect of that portion of it which was in the *patti* in which they were co-sharers, on payment of Rs. 400 or any other amount which the Court might

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* Second Appeal No. 1584 of 1883, from a decree of Pandit Jagat Narain, Subordinate Judge of Farakhabad, dated the 31st August, 1883, reversing a decree of Maulvi Zakir Husain, Munsif of Farukhabad, dated the 12th April, 1883.

(1) 8 B.H.C.R. A.C.J. 31.
(2) 3 B. 234.
(3) 3 B. 237.
(4) 14 W.R. 469.
(5) N.W.P.S.D.A.R. (1863) 394.
(6) N.W.P.S.D.A.R. (1865) 173.
(7) N.W.P.H.C.R. (1875) 38.
(8) 2 W.R. 285.
(9) 10 W.R. 111.
(10) N.W.P.S.D.A.R. (1860) 53.
(11) N.W.P.H.C.R. (1870) 343.
(12) 5 A. 197.

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adjudge as a proportionate part of the purchase-money. They based their claim [424] on the *wajib-ul-arz*, one clause of which set out that "when any sharer shall wish to sell or mortgage his share, he shall first offer it to his near co-sharer, and, if he shall refuse the offer, then it shall be offered to other co-sharers in due order, and if no sharer shall wish to take the share, then a stranger shall take it." In this case, the defendant vendee was "a stranger," that is he had no share in the village at all. The Court of first instance (Munsif) dismissed the claim, observing that, by the terms of the *wajib-ul-arz*, the plaintiffs could only maintain a suit for pre-emption in respect of the whole of the property sold, and further that their omission to sue for the lands not situate in their own *patti* amounted to an acquiescence on their part in the purchaser's title to such lands, and that the purchaser must therefore be regarded as a co-parcener of the village with rights equal to their own. On appeal by the plaintiffs, the lower appellate Court (Subordinate Judge) reversed the decree of the Munsiff, relying on the ruling of the Full Bench of the High Court in *Salig Ram* v. *Debi Prasad* (1).

The defendants appealed to the High Court, contending that the Court of first instance had properly dismissed the claim.

Babu *Ratan Chand*, for the appellant.

Mr. *Carapiet*, for the respondents.

The Court (BRODHURST and MAHMOOD, JJ.) delivered the following judgments:—

JUDGMENTS.

MAHMOOD, J.—I am of opinion that the appellant's contention is perfectly sound. It is a fundamental principle of the law of pre-emption that the pre-emptor cannot break up the bargain of sale by suing only for a portion of the property conveyed by the sale which gave rise to the pre-emptive claim; and the rule has been repeatedly adopted by the Calcutta High Court [*Cazee Ali* v. *Sheikh Musseeutoollah* (2); *Abdool Guffoor* v. *Noor Banoo* (3); *Izzutoclla* v. *Bhikaree Mollah* (4)] in cases which appear from the reports to have been governed by the Muhammadan Law of pre-emption. But the doctrine has its origin in the general principles of justice, equity, and good conscience, and the reason of the rule is that the very nature of the pre-emptive right means that the [425] pre-emptor can substitute himself in the place of the purchaser only by taking all the benefits as well as all the disadvantages of the sale in respect of which he chooses to pre-empt,—an illustration of the maxim of law that he who takes the benefit ought also to bear the burden. He is not allowed to exercise his choice by pre-empting only a portion of the property sold, for if fertile land is sold in conjunction with barren land under one and the same bargain of sale, it would be opposed to natural justice to allow the pre-emptor to take only the fertile land and to leave the barren tract to the purchaser, who would probably have not bought the waste land at all, unless he acquired with it also the ownership of the fertile area. But this is not the only reason upon which the rule is based. The right of pre-emption owes its origin to the policy that the introduction of a stranger into an estate will not be conducive to peace, but will disturb the quiet enjoyment of their rights by the co-sharers of the vendor. Now, if

(1) N.W.P.H.C.R. (1875) 38.
(2) 2 W.R. 285.
(3) 10 W.R. 111.
(4) 14 W.R. 469.

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a pre-emptor objects to the introduction of a stranger, he must necessarily object to his introduction, on principle, as a proprietor of any part of the estate, or he must not object at all. The Agra Sudder Dewany Adawlut in the case of *Sheodyal Ram* v. *Bhyroo Ram* (1) carried the rule to the extent of holding that the sale of a share of an estate to a stranger jointly with a co-sharer of the village was in violation of the terms of the *wajib-ul-arz*, the express object of which was to prevent the intrusion of strangers,—a violation whereby the purchasing co-sharer forfeited the benefit of his pre-emptive right, and the entire share sold was rendered liable to the pre-emptive claim of other co-sharers. The rule so laid down was adopted by this Court in *Guneshee Lal* v. *Zaraut Ali* (2) and in the more recent case of *Bhawani Prasad* v. *Damru* (3) a Division Bench of this Court carried the rule further by holding that when a co-sharer in suing for pre-emption joins with him any person who has no right of pre-emption, such pre-emptor must be taken to have acquiesced in the sale, an acquiescence which will estop him in equity from complaining of the sale in a pre-emptive suit. The *ratio decidendi* of these cases is fully applicable to the question now before us, because the action of the plaintiffs-pre-emptors in seeking to enforce their right only in respect of a por-[426]tion of the property sold, amounts to their acquiescence in the sale of so much of the property as they have omitted to sue for. In other words, the plaintiffs do not complain of the intrusion of a stranger, but they wish to oust him only from so much of the land as they choose to pre-empt. The right of pre-emption was never intended to confer such a capricious choice upon the pre-emptor, and the rule has been well expressed by a distinguished authority, DWARKA NATH MITTER, J., when, in speaking of the pre-emptor, he said :—"The plaintiff had no right to divide the bargain and to sue for a portion of the property covered by the bill of sale on the ground of pre-emption. The plaintiff must either place himself in the position of the purchaser, by taking up the whole contract, or he must give up his right of pre-emption [*Izzutoolla* v. *Bhikaree Mollah* (4).] The rule so expressed had been even more stringently adopted by the majority of a Full Bench of the Agra Sudder Dewany Adawlut in *Baisun Thakooranee* v. *Ram Singh* (5), in which it was held that in case of a purchase of landed property, whereof the ownership of part only is subsequently found to have belonged to the vendor, the purchaser, if he has acted *bona fide* in the sale, is not compellable to surrender the remnant portion of his purchase to a pre-emptor at a less sum than that which he paid for the entirety of his purchase, if the purchaser elects to abide by his bargain and to retain the residue which he has bought at the amount he paid for the whole.

These cases are clear authorities for the proposition that in suing for pre-emption the pre-emptor is absolutely bound to sue for the whole of the property or properties conveyed by the sale which gave rise to his pre-emptive right. This is the general rule, to which there are exceptions, though more apparent than real. For if, under one and the same deed of sale, property subject to pre-emption is sold along with other property not subject to the right, the plaintiff-pre-emptor cannot, *ex necessitate rei*, sue for the whole property conveyed by the sale ; but only for so much as is subject to his pre-emptive right. The rule was recognized by the Agra Sudder Dewany in the case of *Oomur Khan* v. *Moorad*

(1) N.W.P.S.D.A.R. (1860) 53.
(2) N.W.P.H.C.R. (1870) 343.
(3) 5 A. 197.
(4) 14 W.R. 469.
(5) N.W.P.S.D.A.R. (1863) 394.

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Khan (1), wherein it was held that the pre-emptor was entitled to pre-empt only [427] that part of the property sold to which his pre-emptive right extended, on payment of a proportionate amount of the purchase-money paid for the whole subject of sale. And the reason of the rule is the same as the *ratio decidendi* of the Full Bench ruling of this Court in *Salig Ram* v. *Debi Prasad* (2), whereupon the lower appellate Court has relied, and relied erroneously, for the proposition that a pre-emptor can maintain a suit for pre-empting only a portion of the property conveyed by the sale which gave rise to his pre-emption. The effect of that ruling is simply to show that, when property is sold to the co-sharers of a village who are themselves possessors of the pre-emptive right in respect of only a portion of the subject of sale, the other co-sharers can maintain a pre-emptive suit only in respect of so much of the subject of sale as is liable to their *preferential* right of pre-emption, and that such claimants should be allowed to pre-empt on payment of a proportionate amount of the purchase-money. But the ruling has no application to a case like the present, where the purchaser is a total stranger to the village, and the pre-emptors, whilst possessing the right of pre-empting, *as against him*, the whole of the subject of the sale, choose to sue for pre-emption only in respect of a portion of the property conveyed by the sale. It is true, as the lower appellate Court has found, that there are persons in the village holding superior rights of pre-emption who could resist the plaintiff's claim for such lands as are not situate in their *patti*. But those superior pre-emptors have not appeared in this litigation.

The result is that the plaintiffs could have sued for the entire 51 bighas, 12 biswas, 17 biswansis of land purchased by the stranger Durga Prasad, defendant-appellant, and their omission to sue for such lands as are not situate in their *patti*, but still are subject to their pre-emptive right, amounts to an acquiescence on their part in the introduction of the purchaser into the village co-parcenary. To put the matter broadly, then, they have no reason to complain, and their complaint, based upon their pre-emptive right, is fictitious and not real: a circumstance which necessitates the dismissal of their claim.

I have no hesitation in laying down the general rule that every suit for pre-emption must include the whole of the property, sub-[428]ject to the plaintiff's pre-emption, conveyed by one bargain of sale to one stranger; and that a suit by a plaintiff-pre-emptor, which does not include within its scope the whole of such pre-emptional property, is unmaintainable as being inconsistent with the very nature and essence of the pre-emptive right

For these reasons I would decree the appeal, and, setting aside the decree of the lower appellate Court, restore that of the Court of first instance, making the costs in all the Courts payable by the plaintiffs-respondents.

BRODHURST, J.—I entirely concur in my learned colleague's judgment and proposed order. The appeal is therefore allowed; the decree of the appellate Court is set aside, and that of the Court of first instance is restored, the suit being dismissed, and costs in all the Courts will be borne by the plaintiffs-respondents.

Appeal allowed.

(1) N.W.P.S.D.A.R. (1865) 173. (2) N.W.P.H.C.R. (1875) 38.

6 A. 428=4 A.W.N. (1884) 151.

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APPEL-
LATE
CIVIL.

6 A. 428=
4 A.W.N.
(1884) 151.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

MADARI AND ANOTHER (*Plaintiffs*) *v.* MALKI AND OTHERS (*Defendants*).* [4th June, 1884.]

Hindu Law—Alienation by Hindu widow—Reversioner—Right to sue—Daughters.

The reversioners of the estate of a deceased Hindu sued his widow to set aside an alienation of the property by her, as not justified by legal necessity. The deceased had two daughters, who were still living.

Held that, in the absence of any proof of collusion or connivance between the widow and her daughters, the plaintiffs, in the presence of the latter, were not competent to maintain the suit. *Rani Anund Koer* v. *The Court of Wards* (1), referred to.

[N.F., 29 P.R. 1903 ; F., 15 A. 132 (133); R., 11 A. 253 (256) ; 15 M. 422 (423); 5 O.C. 360 (363) ; 6 P.L.R. 1902 ; Cons., 32 C. 62 (69)=9 C.W.N. 25.]

THE facts of this case were as follows:—Param and Kirat were two brothers living as a joint Hindu family. They were recorded as owners of a two-annas share each of a certain village. Param died first, and his widow, Chitani, was recorded in his place in respect of his two-annas share. Kirat then died, and his widow, defendant No. 1, was recorded in his place in respect of his share. Kirat left two daughters and no sons. Chitani died in 1879, and defendant No. 1 then applied to have her name recorded in respect of Param's share. Objections to this application were raised in [429] the Revenue Department by the plaintiffs, who were grandsons of the paternal uncle of Kirat and Param, but eventually a compromise was effected on the 20th May, 1880, by which it was agreed that defendant No. 1 should retain possession of the property for her life, that after her death the plaintiffs should become proprietors, and that meanwhile she was not to mortgage or sell it. In 1881, however, certain creditors under an hypothecation bond executed by her deceased husband Kirat, obtained a decree against her, and in order to satisfy this decree she executed a conditional sale-deed with possession for eleven years, in respect of the entire ancestral zamindari share of 4 annas, in favour of defendants Nos. 2 and 3.

The plaintiffs now sued, as reversioners of the estate of Kirat and Param, for a declaration that the conditional sale was null and void after the death of defendant No. 1, alleging that the deed had been executed without legal necessity. They were met principally by the contention that many years previously a partition had been effected between the father of the plaintiffs on the one hand and Kirat and Param on the other, and that the plaintiffs were not competent to maintain the suit in presence of the two daughters of Kirat, and also that the deed had been executed for necessary purposes, and was therefore valid.

The Court of first instance (Subordinate Judge) decreed the claim so far as it related to the two-annas share of Param, but dismissed it in respect of the two-annas share of Kirat. The defendants appealed, and

* Second Appeal No. 1603 of 1883, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 2nd July, 1883, reversing a decree of Maulvi Farid-ud-din, Subordinate Judge of Cawnpore, dated the 25th September, 1882.

(1) 8 I.A. 14.

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the lower appellate Court (District Judge) decided in their favour, holding that the fact of the daughters being alive absolutely precluded the plaintiffs from maintaining the suit, and moreover that the purposes for which the mortgage had been executed were necessary and valid.

In second appeal, it was contended first, that the existence of the daughters did not preclude the plaintiffs from suing; secondly, that the concurrence of the daughters ought to have been presumed, inasmuch as the mortgagees were connected with them by marriage; and thirdly, that the lower appellate Court had failed to deal with the case with reference to the compromise agreed to by the parties in the Revenue Department, and which divested the defendant No. 1 of all power of alienation.

[430] Mr. *T. Conlan* and Babu *Jogindro Nath Chaudhri*, for the appellants

Mr. *Howell* and the *Senior Government Pleader* (Lala *Juala Prasad*), for the respondents.

The Court (STRAIGHT, Offg. C.J., and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C. J.—We think it more convenient to dispose of the third plea first, as that was the one on which most stress was laid by the learned pleader for the plaintiffs-appellants. We have very carefully gone through the judgments of both the lower Courts, and it is obvious from them that the case of the plaintiffs was not rested upon the condition of the compromise of the 20th of May, 1880, for neither the Subordinate Judge nor the Judge makes any reference to relief being asked upon that ground. Moreover the decision of the Subordinate Judge directly controverted any such position; and though he dismissed a substantial portion of the plaintiffs' suit, no appeal was presented by them to the Judge upon the basis of any such contention as that which is now put forward in the third plea. Under such circumstances we do not think that they should be allowed in second appeal to present their case in an entirely new shape, though we may add, that had we to consider it from this aspect, we should not feel called upon to disturb the decree of the Court below.

Assuming that the plaintiffs can be regarded as reversioners seeking to impeach the alienation of a Hindu widow, we consider that the Judge was right in holding that in the absence of any proof of collusion or connivance between the defendant Malki and her two daughters, the plaintiffs in the presence of the latter were not competent to maintain the suit (see *Rani Anund Koer* v. *The Court of Wards* (1).)

As to the second plea, it was for the plaintiffs to prove any connivance or collusion of the kind above referred to, but they do not in their plaint venture to hint at the existence of anything of the kind. The appeal is dismissed with costs.

Appeal dismissed.

(1) 8 I.A. 14.

6 A. 431=4 A.W.N. (1884) 155=9 Ind. Jur. 43.

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APPELLATE CIVIL.

6 A. 431=4 A.W.N. (1884) 155=9 Ind. Jur. 43.

[431] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

BALGOBIND (*Plaintiff*) *v.* RAMKUMAR AND OTHERS (*Defendants*).* [10th June, 1884.]

Hindu Law—Alienation by Hindu widow—Reversioner—Acquiescence—Right to sue—Daughter.

A reversioner of the estate of a deceased Hindu sued for cancellation of a sale-deed executed by the widow, on the ground that it was executed without legal necessity, and for a declaration that the alienation was void and incapable of affecting his right of succession. A daughter of the deceased was still living, and had taken no steps to set aside the sale.

Per MAHMOOD, J., that mere delay by a reversioner in instituting a suit to set aside an illegal sale made by a childless Hindu widow, cannot be understood to amount to acquiescence in the sale. The acquiescence which would entitle a more remote reversioner to maintain the suit must be such as would amount to an equitable estoppel, precluding the first reversioner from contesting the validity of the sale made by the widow. *Dulsep Singh* v. *Sree Kishoon Panday* (1), followed.

Also *per* MAHMOOD, J., that the existence of female heirs, whose right of succession cannot surpass a "widow's estate," does not affect the status of the nearest presumptive reversionary heir to the *full ownership* of the estate, and that such presumptive heir can maintain a suit for declaratory relief, such as was prayed for in the present suit, irrespective of the question of collusion or concurrence by such female heirs in the alienation by a childless Hindu widow or other female heir holding a similar estate. *Chunderkoomar Hozaree* v. *Dwarkanath Purdhan* (2) and *Bal Gobind Ram* v. *Hirusranee* (3), followed. *Bhagwandeen Doobey* v. *Myna Baee* (4); *Sri Gajapathi Nilamani Patta Maha Devi Garu* v. *Sri Gajapathi Rhadamani Patta Maha Devi Garu* (5) and *Ram Lal* v. *Bunsee Dhur* (6), referred to. *Rani Anund Koer* v. *The Court of Wards* (7), distinguished.

Per OLDFIELD, J., that, the nearest reversioner being the widow's daughter, who herself could only take a limited interest in the property, and who had herself taken no steps to set aside the sale, the Court would be exercising a proper discretion in permitting the plaintiff, as the next reversioner after the daughter, to bring the suit.

[N.F., 15 A. 132 (133); F., 15 M. 422 (423); 149 P.R. 1908; A.W.N. (1908) 207; 9 A.L.J. 158=13 Ind. Cas. 632=34 A. 207; R., 8 A. 365 (370); 11 A. 253 (256); 32 C. 62 (69)=9 C.W.N. 25; 5 O.C. 360 (363,364); 29 P.R. 1903.]

THE relative positions of the parties in this suit, so far as is necessary for the purposes of this report, appear from the following table:—

Mansaram.

Jaijit. | Dinbandhan. | Harnath.

Bhajawan. | Raghobar. | Sarnam.

Balgobind (plaintiff). | Sheodin (defendant). | Sheodihal (defendant). | Kadma (widow). | Phalera (daughter).

* Second Appeal No. 1725 of 1883, from a decree of D. M. Gardner, Esq., Judge of Benares, dated the 26th June, 1883, affirming a decree of Shah Ahmad Ullah, Munsif of Benares, dated the 19th April, 1883.

(1) N.W.P H.C.R. (1872) 83.
(2) S D.A. L.P. (1859) part ii, 1623.
(3) 2 W.R. 255.
(4) 11 M.I.A. 487.
(5) 4 I.A. 212.
(6) S.D.A. N.W.P. (1866) 67.
(7) 8 I.A. 14.

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[432] The property in suit was admitted to have belonged to Sarnam, and, on his death, it descended to his sonless widow, Musammat Kadma. On the 26th May, 1882, the widow, conjointly with Sheodin and Sheodihal, alleged by the plaintiff to be the illegitimate sons of Raghobar, executed a deed of sale conveying the property in suit to Ramkumar, defendant No. 1, for a sum of Rs. 599.

The present suit was instituted on the 25th January, 1883, by Balgobind, claiming to be the presumptive heir of the deceased Sarnam, for cancellation of the sale-deed, on the ground that it was executed without legal necessity, and for a declaration that the alienation was void and incapable of affecting his right of succession. In the course of the trial of the suit, the Court of first instance (Munsif) found, and its finding was not disputed, that Phalera, a daughter of the deceased Sarnam was still alive. On this ground, the Court held that the plaintiff, not being the next presumptive reversioner, had no *locus standi* to maintain the suit, which was therefore dismissed. On appeal, the lower appellate Court (District Judge) upheld the decree on the same ground, without going into the merits of the case.

In second appeal, the plaintiff contended that the existence of the daughter, Phalera, could not, under the Hindu Law, operate as a bar to his right to maintain the suit.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgments :—

JUDGMENTS.

MAHMOOD, J.—I take it as a settled proposition of law that a reversioner, who upon the death of a sonless Hindu widow would succeed to the estate, has a right to maintain a suit like the present. And it is an equally settled rule that, "although a suit of this nature may be brought by a contingent reversionary heir, yet that, *as a general rule*, it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment." But, "such [433] a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering.........It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself, by his own act or conduct, from suing, or has colluded with the widow or concurred in the act alleged to be wrongful, the next presumptive reversioner would be entitled to sue. In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit." This rule, which has been laid down by the Lords of the Privy Council in the case of *Rani Anund Koer* v. *The Court of Wards* (1), has annulled some of the

(1) 8 I.A. 14.

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older rulings and has adopted others, and the question in this case is whether these observations can be understood to apply to the present case so as to preclude the plaintiff from seeking the relief prayed for by him.

Having carefully considered the entire judgment in the case to which I have referred, I am of opinion that the Lords of the Privy Council cannot be understood to lay down a hard and fast rule to be applied to all cases alike, the circumstances of which might in some essential matters of principle be different to those which existed in the case in which the judgment was passed. It seems to me that the observations of their Lordships have two distinct aspects—the one relating to the nature of the rights possessed by a remote reversioner under the Hindu Law, the other relating to the judicial discretion which the Courts must exercise in awarding declaratory relief. It is hardly necessary to say that the question of awarding declaratory relief is now governed by s. 42 of the Specific Relief Act (I of 1872), and, without saying that the observations of their Lordships are not consistent with the new enactment, I may mention that the suit to which their Lordships' **[434]** observations referred would seem from the report to have been commenced before the Specific Relief Act came into force.

The aspect of the Privy Council ruling, so far as it relates to Hindu Law, is, however, the main question in the present case. In the case now before us, far from stating that the widow's daughter Phalera had either colluded with her mother, or had consented to the sale, or had refused to join the suit, or had otherwise precluded herself from contesting the sale, the plaintiff did not in the plaint even allege her existence. Nor was the question of collusion, consent or refusal tried or ascertained by either of the Courts below. It is, however, contended by the learned pleader for the appellant that the mere fact of omission by Phalera to sue for setting aside the sale amounts to such acquiescence as would entitle the plaintiff to maintain the suit.

I am of opinion that this contention is not sound. Neither consent nor collusion nor refusal to sue can be presumed from the mere fact that no suit has yet been instituted by Phalera. Mere delay by a reversioner in instituting a suit to set aside an illegal sale made by a childless widow cannot be understood to amount to acquiescence. Such I understand to be the rule laid down by a Division Bench of this Court in *Duleep Singh* v. *Sree Kishoon Panday* (1). And I understand the observations of the Lords of the Privy Council to mean that the acquiescence contemplated must be such as would amount to an equitable estoppel precluding the reversioner from contesting the validity of the sale made by the widow. In the present case no such acquiescence is either alleged or proved,

The real question on which the determination of the case depends is whether the present case can be distinguished from the Privy Council ruling in the case of *Rani Anand Koer* (2). In other words, can the plaintiff, without proving any of the circumstances stated by the Lords of the Privy Council, in the passage which I have quoted, maintain the present suit?

I am of opinion that the question must be answered in the affirmative. The case before the Privy Council was one in which the plaintiff's position in the line of succession as reversionary **[435]** heir was remoter than that of other male reversioners, who immediately upon the death of the widow would become entitled to *full ownership* of the estate. It is intelligible,

(1) N.W.P.H.C.R. (1872) 83. (2) 8 I.A. 14.

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therefore, that in exercising the discretion vested in Courts of Equity, the Privy Council declined to give declaratory relief to one between whom and the widow were others having a more immediate reversionary right to the *full ownership* of the estate. The discretion in such cases is exercised by Courts of Equity with reference to considerations of the nature mentioned by Mr. Justice STORY in s. 1511 of his celebrated work; and I understand the ruling of the Lords of the Privy Council to proceed upon similar reasons. In the present case, however, between the plaintiff as reversionary heir and the widow there is none entitled to the reversion of the *full ownership* of the property in suit. The only person who may be described as a nearer reversioner is the daughter of the last full owner of Sarnam. And I take it as a settled rule of law, on the authority of cases cited by Mr. Mayne in his recent work on Hindu Law (s. 526) that under the Mitakshara the estate of a daughter exactly corresponds to that of a widow, both in respect to the restricted power of alienation, and to its succession after her death to her father's heirs, and not her own. In Bombay a different view appears to have been taken; but, so far as the rest of India is concerned, the rule may be said to be undoubted, that the law as to daughters may be taken to be the same as that which governs widows and mothers in every part of India except Bombay. In other words, the distinctive feature of such estates is that upon the death of the female heir the estate reverts to the heirs of the last male owner, as she can never become a fresh stock of descent to regulate the devolution of property which she has inherited.

Such then being the nature of a daughter's estate, can her existence operate to have the same effect as the existence of a nearer male reversioner, who immediately upon the death of the widow would succeed, *not* to a limited ownership like a "widow's estate," but to full proprietorship? After much consideration, I have come to the conclusion that a distinction must be drawn between the two cases thus contemplated. It appears to me that, under the Hindu Law, when a full owner dies leaving a mother, a daughter, or a widow or widows, the estate which devolves upon **[436]** them is of one and the same character, and their succession to the estate after the death of one another must be understood to be a prolongation of the "widow's estate"—a prolongation which cannot, for the purposes of the present question, be regarded as affecting the position of the nearest male reversioner to the *full ownership* of the estate. The reason of the distinction appears to me to be that the succession of a widow, a mother, or a daughter can never alter the devolution of inheritance; the fact of their succeeding to the estate one after the other cannot reduce the plaintiff's position from being the nearest reversioner to the *full ownership*. Indeed, the case before us must be taken to be analogous to that in which, upon the death of a childless full owner, his estate devolves on two or more widows - a circumstance which would not affect the *status* of the nearest presumptive reversionary heir to the *full ownership*, although all the widows of a full owner succeed jointly to the estate with the right of survivorship, and no part of the estate passes to any reversioner till *all* the widows are dead [*Bhagwandeen Doobey* v. *Myna Baee* (1); *Sri Gajapathi Nilamani Patta Maha Devi Garu* v. *Sri Gajapathi Rhadamani Patta Maha Devi Gara* (2).] The existence of a daughter, like the existence of a young widow, may indeed delay the succession of the nearest presumptive reversionary heir to the full

(1) 11 M.I.A. 487. (2) 4 I.A. 212.

ownership of the estate, but it seems to me to be as untenable to say that the existence of the daughter affects the *status* of the next presumptive heir to full ownership, as it would be to hold that the existence of a young widow along with an old one has such an effect: and the analogy so suggested is all the more significant, as I can conceive a special case in which, upon the death of the full owner, his widows succeed to the estate not jointly and at once, but in succession to one another according to the rules of seniority or precedence which the Hindu Law provides.

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For those reasons, and distinguishing the present case from the ruling of the Privy Council in the case of *Rani Anund Koer* (1), I hold that the existence of female heirs, whose right of succession cannot surpass a "widow's estate," does not affect the *status* of the nearest presumptive reversionary heir to the *full ownership* of the [437] estate, and that such presumptive heir can maintain a suit for declaratory relief such as is prayed for in this suit, irrespective of the question of collusion or concurrence by such female heirs in the alienation by a childless Hindu widow or other female heir holding a similar estate.

I am glad to find that this is not the first occasion upon which such a rule has been laid down. So long ago as the year 1859 three learned Judges of the late Sudder Dewany Adawlut of Calcutta in delivering their judgment in the case of *Chunderkoomar Hazaree* v. *Dwarkanath Purdhan* (2) concurred in making the following observations:—"A preliminary objection was taken to the plaint by the defendant's vakeel, on the ground of the interest of the minor on whose behalf it is brought being too remote. We see, however, no force in the objection. The minor is the first reversioner after the death of the two intervening life-tenants, the widow and daughter of Biressur Purdhan. His right is undoubtedly only contingent and has not vested, and it is possible that he may never succeed; nevertheless we think, in accordance with the precedents of this Court, that a suit like the present, to remove obstructions out of the way of the first reversioner, and so to enable him, on the death of the tenants for life, if he survives them, immediately to enter on possession, is maintainable in our Courts." I have been unable to discover the older rulings to which the learned Judges refer; but the rule laid down by them was approved by the Calcutta High Court (in the case of *Bal Gobind Ram* v. *Hirusranee* (3)) in a judgment to which a learned Hindu lawyer, Shumbhoonath Pandit, J., was a party. The learned Judges observed:—"In a case like this, where the *immediate* reversioner is so situated, and where, moreover, the immediate reversioner is a woman having qualified and limited rights similar to the rights of the widow (the grandmother) whose acts of waste are complained of, the *next* reversioner, who has full and unlimited rights, may intervene in order to protect his own future rights." The rule so laid down does not appear to have been determined by any reported ruling of this Court; but the two rulings which I have just cited were brought to the notice of a Division Bench of the late Sudder Dewany Adawlut of Agra in the case of *Ram Lal* v. [438] *Bunsee Dhur* (4) in which ROBERTS and SPANKIE, JJ. (who soon after became Judges of this Court), in considering the rulings, made observations which certainly cannot be taken to imply any dissent.

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(1) 8 I.A. 14.
(2) S.D.A.L.P. (1859) part ii, 1623.
(3) 2 W.R. 255.
(4) S.D.A.N.W.P. (1866) 67.

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6 A. 431 = 4 A.W.N. (1884) 155 = 9 Ind. Jur. 43.

Applying these views to the present case, I hold that the existence of Phalera cannot preclude the plaintiff from maintaining a suit like the one from which this appeal has arisen; and as neither of the Courts below has disposed of the suit on the merits, I would decree this appeal; and, setting aside the decrees of both the lower Courts, remand the case to the Court of first instance for disposal on the merits. The costs in all the Courts to abide the result.

OLDFIELD, J.—It is sufficient for the disposal of this appeal to say that under the circumstances in this case that the nearest reversioner is the widow's daughter, who herself can only take a limited interest in the property, and who has herself taken no steps to set aside the sale, the Court will be exercising a proper discretion in permitting the plaintiff, as the next reversioner after the daughter, to bring this suit. The decree is set aside and the case remanded for disposal on the merits. Costs to follow the result.

Appeal allowed.

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6 A. 438 = 4 A.W.N. (1884) 153.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

DIANAT-ULLAH BEG (*Judgment-debtor*) *v.* WAJID ALI SHAH (*Decree-holder*).* [10th June, 1884.]

Execution of decree—Act XV of 1877 (*Limitation Act*), *sch. ii, No.* 179 (2)—"*Where there has been an appeal, &c.*"

Where an application for appeal was presented to the High Court, but rejected, owing to the memorandum of appeal being insufficiently stamped,—*held*, that, under such circumstances, there had not been an appeal or a final decree or order of an appellate Court within the meaning of No. 179 (2) of the Limitation Act, so as to give a period from which limitation for execution of the decree appealed from could run.

[R., 3 O.C. 50 (53, 54); D., 7 A. 42 (44) = A.W.N. (1884) 223.]

ON the 8th September, 1880, the respondent in this case, Wajid Ali Shah, obtained a decree against the appellant, Dianat-ullah Beg. **[439]** The judgment-debtor preferred an appeal to the High Court from this decree, but, owing to the memorandum of appeal being insufficiently stamped, it was rejected. The decree-holder on the 8th January, 1884, applied for execution of his decree, and the judgment-debtor resisted the application on the ground that, more than three years having elapsed since the decree was passed, it was barred by limitation. In answer to this, it was contended that the order of the High Court rejecting the application for appeal was a "final decree or order of the appellate Court," within the meaning of No. 179 (2), sch. ii of the Limitation Act; that consequently the period of limitation should be computed from the date of that order; and that therefore the application for execution was within time. The Court of first instance (Subordinate Judge) decided in accordance with this contention, and overruled the objection of the judgment-debtor. The judgment-debtor appealed to the High Court.

Babu *Beni Prasad*, for the appellant, contended that inasmuch as the application for appeal had been rejected, no appeal was in fact filed at all;

* First Appeal No. 28 of 1884, from an order of Munshi Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 11th February, 1884.

that the order rejecting the application was not a decree or order of the kind contemplated in No. 179 (2), sch. ii of the Limitation Act, from which the period of limitation should be calculated, and that such order did not fall within the definitions of "decree" and "order" in s. 2 of the Civil Procedure Code. 1884 JUNE 10. — APPELLATE CIVIL. — 6 A. 438 = 4 A.W.N. (1884) 153.

Munshi *Hanuman Prasad*, for the respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment :—

JUDGMENT.

OLDFIELD, J.—We find that the application for appeal was presented to the High Court by the plaintiff, but not admitted, on the ground of deficiency of the Court-fees. We cannot hold that there has, under such circumstances, been an appeal or a final decree or order of an appellate Court within the meaning of art. 179 (2), Limitation Act, so as to give a period from which limitation for execution of the decree can run. The application is barred by limitation. We reverse the order and dismiss the application for execution with costs.

Appeal allowed.

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6 A. 440=4 A.W.N. (1884) 154.

[440] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

SHEO PRASAD AND OTHERS (*Plaintiffs*) v. ANRUDH SINGH (*Defendant*).*
[10th June, 1884.]

Act XII of 1881 (*N.-W.P. Rent Act*), s. 207.

In a suit instituted in the Court of an Assistant Collector under cl. (*h*), s. 93 of the N.-W.P. Rent Act, an objection was taken that, the plaintiffs not being recorded shareholders, the suit was not maintainable in the Revenue Court. The objection was allowed, but the Court, at the same time, disposed of the case on the merits, and dismissed the suit. On appeal, the lower appellate Court affirmed the decree, on the ground that the Revenue Court had no jurisdiction in the matter.

Held, that as there were materials on the record for the determination of the suit, the Judge should, with reference to s. 207 of the Rent Act, have disposed of the appeal on the merits. *Debi Saran Lal* v. *Debi Saran Upadhia* (1), referred to.

THIS was a suit instituted in the Court of the Assistant Collector of Farukhabad, under the following circumstances. The father of the defendant, Anrudh Singh, mortgaged his zamindari to the father of the plaintiffs, whose names were subsequently recorded in the *khewat* or proprietary roll of the zamindari. A suit for redemption of the mortgage was brought by the defendant, who deposited the mortgage-money and obtained a decree for re-entry, whereupon the names of the plaintiffs were expunged from the *khewat*. This decree, however, the defendant failed to execute, and it became barred by limitation. Subsequently he brought a fresh suit for redemption of the mortgage, but it was dismissed

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* Second Appeal No. 1680 of 1883, from a decree of H. P. Mulock, Esq., Offg. District Judge of Farukhabad, dated the 6th September, 1883, affirming a decree of Khwaja Fazl Ahmad, Assistant Collector of the first class, Farukhabad, dated the 21st May, 1883.

(1) 6 A. 378.

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by the High Court on appeal, on the ground that it was barred by s. 13 of the Civil Procedure Code. The plaintiffs, who had taken away the money deposited by the defendant in the first redemption suit, then sued him in the Civil Court for mesne profits, but their claim was dismissed, and they returned the money to him.

The plaintiffs now brought the present suit against the defendant in the Revenue Court, for profits, amounting to Rs. 422, under cl. (*h*), s. 93, Act XII of 1881 (North-Western Provinces Rent Act), contending that, by the decree of the High Court barring the institution of a fresh suit by the defendant for redemption of **[441]** the mortgage, they had been restored to their original *status* as recorded share-holders, and were entitled to sue in that capacity. The Assistant Collector dismissed the claim, holding that the plaintiffs had no right to sue for profits until they had recovered possession of the property, and that since their names were no longer recorded in the *khewat*, the suit was not cognizable by the Revenue Court. The District Judge affirmed this decision on the latter ground, and without entering upon the merits of the case. The plaintiff appealed to the High Court, contending first that the suit was cognizable in the Revenue Court, and, secondly, that, assuming that it was not, the District Judge should nevertheless have disposed of the case in advertence to the terms of s. 207 of the Rent Act.

Munshi *Hanuman Prasad*, for the appellants.

Pandit *Bishambhar Nath*, for the respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following udgment :—

JUDGMENT.

OLDFIELD, J.—The plaintiffs bring this suit for profits in the Revenue Court under s. 93, Rent Act. They are not recorded shareholders, and an objection was taken in the Court of first instance that the suit would not lie in the Revenue Court. That Court, however, disposed of the case on the merits, and dismissed the suit, both on the ground that the plaintiffs had not established any right of suit, and also that they were not recorded shareholders. The lower appellate Court has affirmed the decree on the ground that the Revenue Court had no jurisdiction in the case. As there are materials on the record for the determination of the suit, the Judge should, with reference to s. 207 of the Rent Act, have disposed of the appeal on the merits [*Debi Saran Lal* v. *Debi Saran Upadhia* (1)]. We therefore set aside the decree of the lower appellate Court and remand the case for disposal by the lower appellate Court. Costs to follow the result.

Cause remanded.

(1) 6 A. 378.

6 A. 442=4 A.W.N. (1884) 154.

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[442] APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

THAKUR PRASAD (*Plaintiff*) v. PARTAB (*Defendant*).*
[10th June, 1884.]

Joint Hindu family—Separation—Joint property—Act XV of 1877 (*Limitation Act*), *sch.* ii, *Nos.* 62, 127.

After the separation of *P* and *T*, two members of a joint Hindu family, certain bonds continued to be held by them jointly. Four years after the separation, *P* obtained a decree in respect of one of these bonds (which had been obtained in his name alone), and realized the amount decreed in the same year. Eight years afterwards, *T* brought a suit against *P* claiming to be entitled to a share in the money realized.

Held that art. 62, and not art. 127, of sch. ii of the Limitation Act, was applicable to the suit.

[F., 4 N.L.R. 84 (85); R., 24 C. 309 (314); 32 C. 527=1 C.L.J. 167; 5 Bom. L.R. 355 (363); L.B.R. (1893—1900) 415; 15 O.C. 397=16 Ind. Cas. 882; 36 P.R. 1913 =16 P.L.R. 1913=17 Ind. Cas. 311; D., 14 C.W.N. 221 (225)=3 Ind. Cas. 9.]

THE parties to this suit were brothers, and originally members of a joint Hindu family, but in 1870 they separated, and from that date lived and messed apart. Certain bonds and landed property, however, continued to be held jointly. The defendant being the head of the family, most of the bonds had been obtained in his name alone. In 1874 he obtained a decree in respect of one of the bonds. When the amount decreed had been realized, which was in the same year, the plaintiff filed an objection, stating that he was entitled to a share in it. An order was passed dismissing the objection and directing the plaintiff to institute a regular suit.

The plaintiff did not sue to recover his share until the 5th October, 1882, and he was met by the contention that his claim fell under art. 62, sch. ii of the Limitation Act, and was therefore barred, and that the advances on the bond had been made by the defendant from his own personal resources, and not from a joint fund. The plaintiff maintained that art. 127 of the Limitation Act applied. The Court of first instance (Subordinate Judge of Gorakhpur) allowed the defendant's contention, and dismissed the suit.

On appeal, the District Judge affirmed the Munsif's decree, on grounds which he stated as follows:—"In my view of the law, after due study of the Limitation Act and the several precedents marginally noted [*Shidhojirav* v. *Naikojirav* (1); *Saroda Soondary Dos*-**[443]***see* v. *Doyamoyee Dossee* (2); *Issuridutt Singh* v. *Ibrahim* (3); *Obhoy Churn Ghose* v. *Gobind Chunder Dey* (4); *Hansji Chhiba* v. *Valabh Chhiba* (5)], it is not enough that the property in dispute should have been joint family property at some previous period, for so much might be predicated of most property in the possession of a Hindu; but it is essential that it should have been the property of an existing joint family

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* Second Appeal No. 1634 of 1883, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 27th August, 1883, affirming a decree of Munshi Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 17th February, 1882.

(1) 10 B.H.C.R. 228. (2) 5 C. 938. (3) 8 C. 653.
(4) 9 C. 237. (5) 7 B. 297.

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at the date when the cause of action accrued, and, if this cannot be shown, I hold that art. 127 is inapplicable. Now in the present case, whereas the earliest possible cause of action arose in 1874, a separation of the four brothers, even on the plaintiff's showing, took place as early as in 1870. From that date they lived and messed apart and carried on business separately, and although certain bonds and certain landed property may have continued to be held jointly, it by no means follows that the property was joint *family* property within the meaning of the Hindu Law. On the contrary, in provinces such as these, where the Mitakshara Code is applicable, it has been distinctly held by the Privy Council, as well as by the Courts in India, that division of title once made, without a division of the subject to which the title applies, is sufficient to take away from the subject whose title is divided the character of joint estate. [Cowell's *Hindu Law*, Part II, pp. 61, 64-66; *Musammat Jusoda Koonwar* v. *Gowrie Byjonath Sohae Singh* (1), and *Appovier* v. *Ramasubha Aiyan* (2) also Mayne's *Hindu Law*, para. 417]. I hold, therefore, that the property in dispute not having been "*joint family property*" when the cause of action arose, art. 127 is inapplicable, and that the suit, having been instituted more than three years after the defendant's realization of the money, was barred by the limitation prescribed in art. 62."

In second appeal it was contended for the plaintiff that the lower appellate Court was in error upon this point, and further that assuming art. 127 to be inapplicable, art. 120, prescribing a limitation of six years, prevented the claim from being barred.

Lala *Lalta Prasad*, for the appellant.

Mr. *T. Conlan* and Munshi *Sukh Ram*, for the respondent.

[444] The Court (STRAIGHT, Offg. C.J., and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—We are of opinion that the Judge has rightly held art. 62 and not art. 127 of Act XV of 1877 applicable to the suit, and has properly ruled that the claim of the plaintiff is barred by limitation. The appeal is dismissed with costs.

Appeal dismissed.

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6 A. 444 = 4 A.W.N. (1884) 158.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

BHAGWAN DAS (*Defendant*) *v.* NATHU SINGH AND OTHERS (*Plaintiffs*).* [11th June, 1884.]

Registered and unregistered documents—Transfer of property "pendente lite"—Act IV of 1882 (*Transfer of Property Act*), *s.* 52*—Act III of* 1877 (*Registration Act*), s. 50.

B held a decree for the sale of property which had been mortgaged to him by an instrument which was not compulsorily registrable and was not registered. *N* purchased the same property *pendente lite*, by a registered deed of sale.

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* Second Appeal No. 1723 of 1883, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 4th September, 1883, reversing a decree of Lala Baij Nath, Munsif of Meerut, dated the 13th July, 1883.

(1) 6 W.R. 139. (2) 11 M.I.A. 75.

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Held, that there was here no competition between a registered and an unregistered instrument to which s. 50 of the Registration Act could apply; and that *N*'s purchase was, by s. 52 of the Transfer of Property Act, subject to the decree passed in *B*'s favour.

[R., 1 O.C. 280 (282).]

THIS was a suit to establish the right of the plaintiffs to a certain house which had been purchased by them under a deed of sale, dated the 4th January, 1883, and to protect the said house from sale in execution of a decree obtained by the defendant.

On the 19th October, 1882, the owners of the house executed a simple mortgage of it to the defendant by an instrument of mortgage which was not compulsorily registrable, and which was not registered. On the 2nd January, 1883, the defendant instituted a suit for the sale of the mortgaged property, and, on the 8th January, obtained a decree, the mortgagors confessing judgment. In the meantime, on the 4th January, the mortgagors had sold the house in question to the plaintiffs in the present suit, by a registered instrument of sale. On application by the defendant for sale of the property in execution of his decree, the plaintiffs objected to the sale, on the ground that their sale-deed of the 4th January, being registered, was entitled to priority in respect **[445]** of the house against the defendant's bond, which was not registered. The objection was disallowed, and they accordingly instituted the present suit. The defence was that the sale to the plaintiffs could only pass to them the equity of redemption; that the sale, having taken place while the defendant's suit was pending, was invalid under the provisions of s. 52 of the Transfer of Property Act (IV of 1882), and that a decree for sale of the property having been made in that suit, the plaintiffs could not question it. The Court of first instance framed the following issue for trial, amongst others: "Is the plaintiffs' registered deed of sale entitled to priority over the defendant's unregistered bond?" Upon this issue, the Munsif held that although the plaintiffs' registered deed of sale was entitled to priority over the defendant's unregistered bond, yet as the sale had taken place after the defendant had instituted a suit for the sale of the mortgaged property, the transfer could not, under the provisions of s. 52 of the Transfer of Property Act, affect the rights of the defendant. The Munsif accordingly dismissed the suit. On appeal by the plaintiffs, the lower appellate Court (Subordinate Judge) decreed the claim, observing as follows:—

"The bond in defendant's favour for Rs. 99, and dated the 19th October, 1882, on the basis of which the defendant sued and obtained a decree, is not a registered document, while the deed of sale in appellants' favour, and dated 4th January, 1883, is registered. Although the bond in defendant's favour was not compulsorily registrable, but under s. 50, Act III of 1877, on the execution of the deed of sale in favour of the plaintiffs-appellants, the hypothecation bond became inoperative in respect of the property, and the defendants' decree, to which the plaintiffs were no party, could not revive the effect of the defendant's bond with reference to the property. This view is supported by the decision of the Allahabad High Court in *Abdul Rahim* v. *Ziban Bibi* (1). The Munsif is wrong in applying the Transfer of Property Act to the present case. Section 2 of the Act provides that the Act shall not affect the provisions of any law not specifically rescinded thereby; Act III of 1877 does not appear to have been superseded by the later enactment."

(1) 5 A. 593.

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[446] The defendant appealed to the High Court relying upon the reasoning of the Munsif, and impugning the grounds on which the lower appellate Court had decreed the claim.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Pandit *Nand Lal*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—The appeal on the part of the defendant must prevail. It will be seen that the defendant holds a decree for sale of the property, and that the plaintiffs' purchase was made *pendente lite*. There is here no competition between a registered and an unregistered instrument to which s. 50 could properly apply; the question is whether the plaintiffs' purchase is not subject to the defendant's decree; and the deed of sale in the plaintiffs' favour, whether registered or not, can give them no rights as against the right which the defendant has under his decree, since the sale was effected while the suit in which the defendant obtained his decree was pending. The plaintiffs' purchase was by s. 52, Transfer of Property Act, subject to the decree passed in the defendant's favour. The view of the law taken by the Munsif is correct. Appeal decreed with all costs. We set aside the decree of the lower appellate Court, and restore that of the Munsif which dismissed the suit with all costs.

Appeal allowed.

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6 A. 446 = 4 A.W.N. (1884) 158.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

MUHAMMAD ABDUL RAHMAN KHAN (*Plaintiff*) *v.* MUHAMMAD QUTAB-UD-DIN AND OTHERS (*Defendants*).* [11th June, 1884.]

Act XII of 1881 (*N.-W.P. Rent Act*), ss. 128 (*a*), 140—*Judgment by default—Appeal.*

S. 128 (*a*), Act XII of 1881 (N.-W.P. Rent Act) refers to the procedure described in ss. 124, 125, 126, when no appearance has been put in on the day fixed by the summons or proclamation for the appearance of the defendant, or on any subsequent day to which the hearing of the case may be adjourned prior to the recording of an issue for trial, and not to subsequent non-appearance of parties on a day fixed for trial of issues, to which s. 140 relates.

[447] THIS was a suit instituted under s. 93 (*h*) of the N.-W. P. Rent Act, in the Court of the Assistant Collector of Moradabad, to recover the sum of Rs. 234-4-8 claimed by the plaintiff as his share of the profits of a mahal from 1287 to 1289 fasli. After the parties had appeared and issues had been framed, the 3rd July, 1883, was fixed for the hearing of the case, but, on that day, the Assistant Collector adjourned the hearing to the 21st July, 1883. On the last mentioned date the plaintiff did not appear, and the Assistant Collector, under s. 140 of the Rent Act, tried and determined the issue upon such evidence as was before him, and

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* Second Appeal No. 1736 of 1883, from a decree of C. Daniell, Esq., District Judge of Moradabad, dated the 20th September, 1883, affirming a decree of Muhammad Ismail Khan, Assistant Collector of Moradabad, dated the 21st July, 1883.

dismissed the suit. The plaintiff appealed to the District Judge of Moradabad, who held that the appeal was barred by s. 128 (*a*), and that the course which the appellant should have taken was to apply under s. 128 (*b*) to the Court which had given judgment against him, to revise the suit, and alter or rescind the judgment according to the justice of the case. The plaintiff thereupon appealed to the High Court, contending that an appeal lay from the decision of the Assistant Collector, and that the provisions of s. 128 were not applicable to the case.

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Pandit *Nand Lal*, for the appellant.

Shah *Asad Ali*, for the respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—The appeal of the plaintiff must prevail. The dismissal of a suit under s. 140, on a day fixed for the trial of issues, when the defendant appears, and the plaintiff does not, does not operate as a judgment by default against a plaintiff within the meaning of s. 128 (*a*). That section refers to the procedure described in ss. 124, 125, 126, when no appearance has been put in on the day fixed by the summons or proclamation for the appearance of the defendant, or on any subsequent day to which the hearing of the case may be adjourned prior to the recording of an issue for trial, and not to subsequent non-appearance of parties on a day fixed for trial of issues to which s. 140 refers. The Judge must therefore dispose of the appeal on the merits. We set aside the decree and remand the case. Costs to follow the result.

Cause remanded.

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6 A. 448=4 A.W.N. (1884) 159.

[448] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

RAM GOPAL (*Defendant*) v. KHIALI RAM (*Plaintiff*).*
[13th June, 1884.]

Civil Procedure Code, s. 244—Questions for Court executing decree—Fresh suit—Suit by judgment-debtor to set aside execution-sale—Order to refund purchase-money.

A judgment-debtor, alleging that his right as occupancy-tenant of certain land had been sold in execution of the decree, sued the decree-holder and the auction-purchaser to set aside the sale as illegal under s. 9 of the N.-W.P. Rent Act. The Court of first instance decreed the claim, and ordered the defendant-decree-holder to refund the purchase-money.

Held that, as between the defendant-decree-holder and the plaintiff, the question at issue was one arising between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree, and was therefore, under s. 244 of the Civil Procedure Code, to be determined by the Court executing the decree, and not by separate suit. *Janki Singh* v. *Ablakh Singh* (1), followed.

Held also that, apart from this consideration, it was beyond the lower Court's powers to make an order directing the decree-holder to refund the purchase-money, that being a matter between two co-defendants which was not raised, and could not be decided, in the present suit.

[D., 7 A. 641 (642).]

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* Second Appeal No. 1757 of 1883, from a decree of Maulvi Mahmud Baksh, Subordinate Judge of Mainpuri, dated the 12th June, 1883, affirming a decree of Maulvi Sakhavat Ali, Munsif of Etah, dated the 28th February, 1883.

(1) 6 A. 393.

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APPELLATE
CIVIL.

6 A. 448 = 4 A.W.N. (1884) 159.

THE plaintiff in this suit, alleging that he was the occupancy-tenant of certain land, and that his right as such had been sold in execution of a decree, sued the decree-holder and the purchaser to set aside the sale, on the ground that under s. 9 of the N.-W.P. Rent Act the sale of a right of occupancy was prohibited, and that the sale of his right was therefore void. The defendants disputed the right of the plaintiff to bring the suit. The Court of first instance (Munsif of Etah) decreed the claim, and made an order directing the defendant-decree-holder to refund the purchase-money. On appeal by the defendant-decree-holder the lower appellate Court (Subordinate Judge of Mainpuri), affirmed the decree of the Court of first instance. The defendant-decree-holder appealed to the High Court, contending that a regular suit by a judgment-debtor to set aside a sale in execution of the decree was not maintainable in reference to the terms of s. 244 of the Civil Procedure Code, that the plaintiff could only take proceedings relating to the execution of the decree in the execution department, and that the **[449]** lower Courts were not competent to order a refund of the purchase-money.

Munshi *Sukh Ram*, for the appellant.

The respondent did not appear.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the pleas are valid. As between the appellant the decree-holder and the plaintiff, the judgment-debtor, the question raised in this suit as to the liability to attachment and sale of the tenant interest of the plaintiff as judgment-debtor, in execution of the appellant's decree, is one arising between the parties to the suit in which the decree was passed, and relating to the execution, discharge, or satisfaction of the decree, and is therefore under s. 244, Civil Procedure Code, to be determined by the Court executing the decree and not by separate suit—*Janki Singh* v. *Ablakh Singh* (1).

Apart also from this consideration, it was beyond the lower Court's powers to make an order directing the appellant to refund the purchase-money to the auction-purchaser; that was a matter between two co-defendants which was not raised, and could not be decided in this suit. We decree the appeal by dismissing the claim against the appellant, and modify the decree so far as it refers to the appellant, who will have costs in all Courts.

Appeal allowed.

(1) 6 A. 393.

6 A. 449=4 A.W.N. (1884) 179.

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6 A. 449= 4 A.W.N. (1884) 179.

CIVIL REVISIONAL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

SOHAN AND OTHERS (*Defendants*) v. MATHURA DAS (*Plaintiff*).*
[16th June, 1884.]

Suit for money received for the plaintiff's use—Small Cause Court suit—Act XI of 1865, s. 6—*Joint creditors—Payment of debt to one.*

When one of two or more joint creditors receives full payment of the debt, he does so under the implied contract that he will deliver their shares to the other [450] joint creditors. Such implied contract falls under the purview of s. 6 of the Mufassal Small Cause Courts Act (XI of 1865). *Lachman Prasad* v. *Chammi Lal* (1); *Haro Mohan Roy* v. *Khettro Monee Dossee* (2) and *Sunkur Lal Pattuck Gyamal* v. *Ram Kalee Dhamin* (3), referred to.

[F., 7 A. 384 (385).]

THE parties to this suit were brothers, the sons of one Diyala Mal, who died, being owed money by one Samai Ram. Upon his death, a dispute arose among his sons in regard to the property, and, on the 9th March, 1881, the plaintiff, Mathura Das, obtained a decree against his brothers, the present defendants, whereby he was declared entitled to a one-fourth share of the assets left by the deceased.

The plaintiff subsequently brought the present suit against the same defendants, alleging that, after the passing of the decree of the 9th March, 1881, they had realized the money due by Samai Ram, and praying for recovery from them of one-fourth of the said money. The suit was instituted in the Court of Small Causes at Meerut. The Court decreed the claim.

The defendants applied to the High Court for revision on the ground that the suit was of a nature not cognizable in a Court of Small Causes.

Munshi *Sundar Lal*, for the defendants, contended that the nature of the claim did not fall within the purview of s. 6 of the Mufassal Small Cause Courts Act (XI of 1865), the expression "contract" as used in that section not having been intended to include such relations as subsisted between the parties, with reference to the debt due by Samai Ram.

Babu *Oprokash Chandar Mukarji*, for the plaintiff.

JUDGMENT.

MAHMOOD, J.—I am of opinion that this contention cannot prevail. In the case of *Lachman Prasad* v. *Chammi Lal* (1) the principle was laid down by STRAIGHT, J., that a suit for money had and received by the defendant for the use of the plaintiff fell under the purview of s. 6 of Act XI of 1865, as the defendant in such a case must be held to be under an implied contract to pay the money to the plaintiff. Again, in the case of *Haro Mohun Roy* v. *Khettro Monee Dossee* (2) a Division Bench of the Calcutta [451] High Court held that a suit against a co-sharer for a share of money realized upon a decree which was joint property of the parties was cognizable by the Small Cause Court. But a case more analogous to the one now before us is that of *Sunkur Lal Pattuck Gyamal* v. *Ram*

* Application No. 373 of 1883, for revision, under s. 622 of the Civil Procedure Code, of a decree of Rai Bakhtawar Singh, Judge of the Court of Small Causes at Meerut, dated the 30th August, 1883.

(1) 4 A. 6. (2) 12 W.R. 372. (3) 18 W.R. 104.

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6 A. 449 = 4 A.W.N. (1884) 179.

Kalee Dhamin (1) in which COUCH, C.J., in placing a wide interpretation upon the word *contract* as used in s. 6 of Act XI of 1865, explained the reason of the rule. In that case the claim was to recover the plaintiff's share of a sum of money received by the defendants, and the learned Chief Justice, in stating the law, said :—"In fact, the claim is founded upon this, that the defendant, with regard to that portion of the money which belonged to the plaintiff, received it for and on behalf of the plaintiff, and the right to recover it is founded upon what has always been regarded as an implied contract to pay it over to the person for whom it was received." The learned Chief Justice then proceeds to show that the first two provisos to the section would be unnecessary unless the word "*contract*" in the main part of the section was to be interpreted so as to include implied contracts; and he then explains the law that "a right to recover a balance of a partnership account by one partner against another if founded upon one partner acting as agent for the others, and receiving money as such agent, and being bound to pay the others their shares."

In the present case, upon the findings of the learned Judge of the Small Cause Court, there can be no question that the money realized by the defendants was money jointly due to all the four brothers as sons of the original creditor Diyala Mal, and that the sum realized by the defendants included the share of the plaintiff, whereof the recovery was prayed for in the suit from which this application has arisen. This being so, the rule laid down in the cases to which I have referred fully applies, and I hold that when one of two or more joint creditors receives full payment of the debt, he does so under the implied contract that he will deliver their shares to the other joint creditors, and I hold further that such implied contract falls under the purview of s. 6 of the Mufassal Small Cause Courts Act, XI of 1865.

[452] The second ground of this application is not pressed, and it is moreover not substantiated by the facts of the case.

I would dismiss this application with costs.

STRAIGHT, Offg. C.J.—I concur.

Application rejected.

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6 A. 452 = 4 A.W.N. (1884) 165.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

RAM DAYAL (*Judgment-debtor*) v. MEGU LAL (*Decree-holder*).*
[17th June, 1884.]

Decree for share of undivided plot of land and removal of trees thereon—Execution of decree—Separation of share—Civil Procedure Code, s. 265—Act XIX of 1873 (Land Revenue Act), ss. 107-139—Partition of mahal.

M obtained against *R* a decree for possession of "a one-fourth share of the two fallow lands, Nos. 490 and 541, measuring 7 bighas and 2 bighas 16 biswas respectively, after removal of the trees planted thereon." The Court, in executing the decree, placed the decree-holder in joint possession of the two plots, to

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* Second Appeal No. 74 of 1883, from an order of H. P. Mulock, Esq., Offg. District Judge of Farukhabad, dated the 27th August, 1883, modifying an order of Maulvi Anwar Husain, Munsif of Kaimganj, dated the 5th March, 1883.

(1) 18 W.R. 104.

the extent of the one-fourth share decreed to him, but declined to remove the trees until the said share had been specifically ascertained and partitioned by the Collector, in reference to s. 265 of the Civil Procedure Code. 1884 JUNE 17.

Held that the decree could not be understood to entitle the plaintiff to remove the trees from a larger area than that to which he was entitled under that decree; and that, so long as that area remained joint and unascertained, the plaintiff could not execute the decree in the manner sought. APPELLATE CIVIL.

Held also that the decree in the present case could not be called a "decree for the partition or for the separate possession of a share of an undivided estate paying revenue to Government," within the meaning of s. 265 of the Civil Procedure Code, so as to require the intervention of the Collector for the purpose of executing the decree; and that the Court of first instance, in order to meet the exigencies of the decree, should have separated the one-fourth to which the plaintiff was declared entitled, and, in executing the decree, should have ordered that the trees standing on the one-fourth area should be uprooted. 6 A. 452 = 4 A.W.N. (1884) 165.

[R., A.W.N. (1908) 197; 13 O.C. 251 (253) = 7 Ind. Cas. 1018 (1019); D., 10 A. 5 (8).]

THE plaintiff, on the 15th June, 1882, obtained a decree against the defendant for possession of "a one-fourth share of the two fallow lands, Nos. 490 and 541, measuring 7 bighas and 2 bighas 16 biswas respectively, after removal of the trees planted thereon." The plaintiff took out execution. The Court of first instance (Munsif of Farukhabad), in executing the decree, placed the plaintiff in joint possession of the two plots, to the extent of the one-fourth [453] share decreed to him; but declined to uproot the trees until the said share had been specifically ascertained and partitioned by the Revenue authorities, holding that, without such ascertainment and partition, it was impossible to discover the specific fourth share of which the decree-holder had obtained possession, or the specific trees which he was entitled to have removed. On appeal by the decree-holder, the lower appellate Court (District Judge) varied the Munsif's order by directing that all the trees situate on the *whole* area of the plots should be removed in execution of the decree, being of opinion that the original planting of the trees was a violation of the decree-holder's right of co-parcenary, and that it was impossible to hold that his injury thus caused was limited to one-fourth. From this order the judgment-debtor appealed to the High Court.

Munshi *Kashi Prasad*, for the appellant.

Mr. *Niblett* and Munshi *Hanuman Prasad*, for the respondent.

The Court (STRAIGHT, Offg. C.J., and MAHMOOD, J.) delivered the following judgment:—

JUDGMENT.

MAHMOOD, J.—We are of opinion that the decree cannot be understood to entitle the plaintiff to remove the trees from a larger area than that to which he is entitled under that decree; and so long as that area remains joint and unascertained, the plaintiff cannot execute the decree in the manner in which he seeks. But then the question arises whether such ascertainment and partition as the decree contemplates for the purpose of uprooting the trees can be said to be a partition of "an undivided estate paying revenue to Government," within the meaning of s. 265 of the Civil Procedure Code, so as to involve "the partition of the estate or the separation of the share" "by the Collector and according to the law, if any, for the time being in force for the partition, or the separate possession of the share of such estate."

We are of opinion that the question must be answered in the negative. The law in force in these Provinces relative to partition by revenue authorities, is contained in the Land-Revenue Act XIX of 1873,

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ss. 107-139. S. 107 lays down that "partition is either perfect or imperfect. *Perfect partition* means the division of a *mahal* into two or more *mahals*. *Imperfect partition* [454] means the division of any property into two or more properties, jointly responsible for the revenue assessed on the whole." S. 135 of the Act provides that "no Civil Court shall entertain any suit or application for perfect or imperfect partition."

In order to interpret these statutory provisions, it is necessary to determine the exact meaning assigned by the Legislature to the word "*estate*," as it occurs in s. 265 of the Civil Procedure Code, and to the word "*property*," as used in s. 107 of the Land Revenue Act. Neither of these words has been defined in either of the two enactments; but having considered them in the light of the sections of the Land-Revenue Act, which are placed under the heading "*Partition and Union of Mahals*," we have arrived at the conclusion that neither of these two words can be taken to mean isolated plots of land which fall short of being the share of a co-sharer of a *mahal*. The law as to partition by revenue authorities of estates paying revenue to Government was consolidated in Regulation XIX of 1814, which was repealed by Act XIX of 1863, which, in its turn, was repealed by the Land-Revenue Act XIX of 1873, which is the present law on the subject. These enactments appear to us to relate to such partitions of an estate paying revenue to Government as would affect the interest of the Government in the imposition, apportionment, or collection of revenue. They cannot be understood to bar the inherent power of the Civil Court to apportion an isolated piece of land to meet the exigencies of its own decree—an apportionment which has no bearing whatsoever upon the interests of the State relating to the imposition or collection of land-revenue. Such a division of an isolated plot cannot be properly called either a "perfect" or "imperfect" partition within the meaning of ss. 107 and 135 of the Land Revenue Act; nor can the decree in the present case be called a "decree for the partition or for the separate possession of a share of an undivided estate paying revenue to Government" within the meaning of s. 265 of the Civil Procedure Code, so as to require the intervention of the Collector for the purpose of executing the decree.

As the decree awarded possession of only one-fourth area of each of the two plots 490 and 541, and the specific method by [455] which such possession was to be given to the decree-holder was by uprooting the trees which had been wrongfully planted by the defendants-judgment-debtors, the Court of first instance, in order to meet the exigencies of the decree, should have separated the one-fourth to which the plaintiff was declared enlitled, and in executing the decree should have ordered that the trees standing on that one-fourth area should be uprooted.

For these reasons we decree this appeal, and setting aside the orders of both the lower Courts, remand the case to the Court of first instance, directing that Court to execute the decree in accordance with our observations.

The costs in all the Courts will be borne by the respondent-decree-holder.

Appeal allowed.

6 A. 455 = 4 A.W.N. (1884) 166.

1884 JUNE 19.

APPELLATE CIVIL.

6 A. 455 = 4 A.W.N. (1884) 166.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

HULASI AND OTHERS (*Plaintiffs*) *v.* SHEO PRASAD AND OTHERS (*Defendants*).* [19th June, 1884.]

Pre-emption—Rival pre-emptors—Suit to enforce the right in respect of a part of the property.

The prior institution of a suit by rival pre-emptors in no way entitles a pre-emptor to depart from the general rule of pre-emption, by suing for a portion only of the property sold. *Kashi Nath* v. *Mukhta Prasad* (1), referred to.

[F., 10 A. 182 (186); R., 7 A. 720 (725); 11 A. 164 (166); A.W.N. (1885) 189; D., 21 A. 292 (294).]

THE right of pre-emption, to enforce which this suit was brought, was claimed against the same vendee, and in respect of the same sale as in the case of *Durga Prasad* v. *Munsi* reported at p. 423 *ante*. The sale comprised lands situated in two *pattis* of the same village. The plaintiffs in this case (appellants in this appeal) were co-sharers in the *patti* in which the plaintiffs in *Munsi's* case were not co-sharers, and, like the plaintiffs in that case, they sued to enforce the right of pre-emption in respect only of the land situate in their own *patti*. Like, too, the plaintiffs in that case, they were entitled under the terms of the *wajib-ul-arz* to enforce **[456]** pre-emption as against the vendee in respect of all the property sold. The only point of difference between the two cases was, that the present suit was instituted about a fortnight after the institution of Munsi's suit.

Munshi *Sukh Ram*, for the appellants, contended that this suit having been instituted after Munsi's suit, the cases were distinguishable, and the rule laid down in Munsi's case did not govern this case, inasmuch as the appellants, though they might have sued for all the property, yet were prevented from doing so by reason of the fact that Munsi and others had already instituted a suit for the land in their own *patti*, in respect of which they had a superior right of pre-emption to that of the appellants.

Babus *Jogindro Nath Chaudhri* and *Ratan Chand*, for the respondents.

The Court (BRODHURST and MAHMOOD, JJ.) delivered the following judgment:—

JUDGMENT.

MAHMOOD, J.—We are of opinion that this contention cannot prevail. In the case of *Kashi Nath* v. *Mukhta Prasad* (1) a Division Bench of this Court laid down that it was a fundamental rule of pre-emption that "irrespective of the existence or non-existence of other pre-emptors, every suit for pre emption must include the whole of the property subject to pre-emption conveyed by one transfer, and that when there are rival suits, it is the duty of the Court to determine which of such rival suits is to succeed, and if more than one suit succeeds, what extent of the property transferred is to be decreed in such suit." It is true that in the present case not only did rival pre-emptors exist, but

* Second Appeal No. 1599 of 1883, from a decree of H. P. Mulock, Esq., Offg. District Judge of Farukhabad, dated the 27th August, 1883, affirming a decree of Syad Zakar Hussain, Munsif of Farukhabad, dated the 18th May, 1883.

(1) 6 A. 370.

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APPELLATE CIVIL.

6 A. 455 = 4 A.W.N. (1884) 166.

they had already instituted a suit some days before the suit from which this appeal has arisen. But this circumstance in no way renders this case an exception to the general rule, for the scope of every pre-emptive suit must depend upon its own merits, and be independent of extraneous circumstances. The reason of the rule is, that the previous suit may be unsuccessful by reason of having been instituted in a defective form, or by reason of other circumstances, such as acquiescence or refusal to purchase, &c., which would be complete answers to that previous suit. Further, it is perfectly pos-[457]sible, and indeed is not a very uncommon event, that a pre-emptor, after obtaining a decree for pre-emption, is unable to take the benefit of it by reason of not being able to deposit the purchase-money within the time allowed by the Court. When such contingencies occur, their effect would be to break up the bargain of sale, if a suit like the present were treated as instituted in proper form because of the institution of the previous suit by other pre-emptors. Indeed, in the present case, the previous suit instituted by Munsi and others has actually proved unsuccessful, and the effect of decreeing the present suit would be to break up the bargain of sale—a procedure which, as we pointed out in the case of Munsi is wholly opposed to the fundamental principles of pre-emption. We therefore hold that the mere fact of the institution of the previous suit by Munsi and others was a matter which in no way entitled the present plaintiffs to depart from the general rule of pre-emption, by suing only for a portion of the property conveyed by the sale of 21st April, 1882.

We dismiss the appeal with costs.

Appeal dismissed.

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6 A. 457 = 4 A.W.N. (1884) 168.

CIVIL REVISIONAL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

IMDAD ALI AND OTHERS (*Petitioners*) *v.* NIJABAT ALI (*Opposite party*).*
[23rd June, 1884.]

Contract—Continuing breach—Limitation.

A agreed with *B* to refund to *N* the price of certain property sold by *A* to *N*, and of which a share belonged to *B*. *A* having died without fulfilling the agreement, *N* obtained against *B* a decree for possession of part of the property. Five years subsequent to *N*'s suit, *B*'s heirs sued *A*'s heirs for damages for breach of the agreement.

Held that such breach of the agreement was a continuing breach, and had not even yet ceased, and that therefore the present suit was not barred by No. 115, sch. ii of the Limitation Act.

THE facts stated in the plaint in this suit were as follows:—Waris Ali, the proprietor of two houses, one situate in Mohallah Daudhipur and the other in Mohallah Shahganj, died, leaving as his heirs his widow Abadi Bibi and his nephew Ahmad Ali. Abadi [458] Bibi was the sister's daughter of Nijabat Ali. On the 18th July, 1875, Abadi Bibi sold the house in Daudhipur to Nazir-un-nissa Bibi for Rs. 300, but the vendor

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* Application No. 80 of 1884, for revision under s. 622 of the Civil Procedure Code of an order of F. S. Bullock, Esq., Officiating Judge of the Small Cause Court of Allahabad, dated the 5th December, 1883.

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was not able to deliver possession, as the property was in the possession of Ahmad Ali. On the 16th September, 1875, Abadi Bibi brought a suit against Ahmad Ali for Rs. 700, the amount of her dower, and for the two houses. On the 9th December, 1875, this suit was compromised, it being agreed between Abadi Begam and Ahmad Ali that the latter should take the house in Daudhipur as his share of the property left by Waris Ali, and that the former should take the house in Shahganj in lieu of her share of the same, and in lieu of her dower-debt. Abadi Bibi further agreed to pay to Nazir-un-nissa Bibi the Rs. 300 she had paid for the house which had been sold to her. Abadi Bibi did not pay this money to Nazir-un-nissa Bibi and died without doing so, and on the 23rd July, 1878, the latter sued Ahmad Ali for the house in Daudhipur. She obtained a decree in that suit for possession of one-fourth of the house. Ahmad Ali being dead, his heirs brought the present suit against Nijabat Ali, the heir of Abadi Bibi, and his daughter, and his daughter's son. The nature of the claim and the reliefs sought appear in the following extract from the plaint :—

"Owing to the fault of the said Abadi Bibi, Ahmad Ali lost possession of one-fourth of the house which had fallen to his share, the value of which one-fourth is Rs. 75 ; and Ahmad Ali and the plaintiffs had to pay Rs. 111-5-7 as costs of the said suit (Nazir-un-nissa Bibi's) and mesne profits. The plaintiffs, as heirs of Ahmad Ali, are entitled to recover these sums from the defendant Nijabat Ali, the heir of Abadi Bibi, and the other defendants, who are in possession of her estate.

"Abadi Bibi having died on the 23rd December, 1875, the whole of her property, including the house in Shahganj, came into the possession of her heir, the defendant Nijabat Ali.

"The defendant Nijabat Ali has dishonestly made a nominal transfer by gift of the house in Shahganj and his other property to the other defendants, his daughter, and his daughter's son.

"The cause of action arose on or about the 5th July, 1883, when Nazir-un-nissa Bibi obtained possession of one-fourth of the house in Daudhipur in execution of her decree.

[459] "The plaintiffs pray judgment as follows :—

"(*a*) Rs. 75, the principal amount of damages being the price of one-fourth of the house in Daudhipur, which was taken out of the possession of Ahmad Ali, and Rs. 2-3-3, being interest thereon at Re. 1 per cent. per mensem—total Rs. 77-3-3—may be awarded against the defendant to the extent of his appropriation of the estate of Abadi Bibi, and also against the estate in his possession.

"(*b*) Rs. 114-9-10, principal and interest, on account of damages due to the plaintiffs, in consequence of the payment by Ahmad Ali and by the plaintiffs of the costs and mesne profits due to Nazir-un-nissa Bibi, may be awarded."

The suit was instituted in the Court of Small Causes at Allahabad. The Small Cause Court Judge dismissed the suit as barred by limitation. He observed as follows :—"This is a claim to enforce a contract entered into on the 9th December, 1875, by suing for compensation for a breach of it. The period allowed by the Limitation Act under art. 115, sch. ii, is three years from the date of the breach of contract. The contract was broken from the date of the contract apparently, and at any rate it was known to be broken from the 23rd July, 1878, when the plaintiffs' ancestor (Ahmad Ali) was sued by Nazir-un-nissa Bibi for possession after

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the death of Abadi Bibi, the contracting party. This was five years ago, and the suit is long barred by limitation."

The plaintiffs applied to the High Court for revision, contending that the Judge was wrong in holding that the suit was barred by limitation.

Lala *Lalta Prasad*, for the plaintiffs.

Munshi *Hanuman Prasad*, Pandit *Bishambhar Nath*, and Shaikh *Maula Bakhsh*, for the defendants.

The Court (STRAIGHT, Offg. C. J., and DUTHOIT, J.) delivered the following judgment :—

JUDGMENT.

STRAIGHT, Offg. C.J.—We have read the plaint, and it appears to us that the suit was one for damages for breach of the contract of the 9th December, 1875, by reason of the default of Abadi Bibi prior to her death, and of the defendants, as her representatives and in possession of her estate afterwards, to refund to Nazir un-[460] nissa Bibi the Rs. 300 paid by her for the house in Daudhipur. Such breach of the agreement was a continuing breach, and it has not ceased even now. The plaintiffs were therefore, in our opinion, not barred from bringing the present suit by art. 115 of the Limitation Act; and the Small Cause Court Judge was wrong in holding that they were. We accordingly allow this application for revision, and, reversing his order, direct that the suit be restored to the file and disposed of according to law.

Application allowed.

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6 A. 460 = 4 A.W.N. (1884) 173.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

DURGA SINGH (*Defendant*) *v.* MATHURA DAS (*Plaintiff*).*
[25th June, 1884.]

Registration—Order for registration under s. 24 of Act III of 1877 (Registration Act)—Finality of order—Refusal to register—Application to establish right to registration—Suit for registration—Act III of 1877 (Registration Act), ss. 73, 74, 75, 76, 77.

Where an application for registration of a sale-deed had been presented after the expiry of the period prescribed by law for registration, and had been dealt with under s. 24 of the Registration Act, and the Registrar had passed an order under that section directing that the document should be registered on payment of the prescribed fine, and such fine had been paid,—*held* that the requirements of the law had been complied with, and that it was not competent for the successor in office of the Registrar, dealing with the document under s. 74 of the Registration Act, to go behind the order of his predecessor, nor was it for the Court, in a suit instituted under s. 77, to question the propriety of that order, which was given in pursuance of a discretionary power allowed to a Registrar to accept documents for registration after the time prescribed.

[F., 21 B. 69 (74); 21 B. 724 (729); R., 30 B. 304 (310) = 7 Bom. L.R. 742.]

THE defendant executed a deed of sale of the property in suit in favour of the plaintiff on the 20th December, 1880, for a sum of Rs. 250. On the 18th August, 1881, the plaintiff presented an application to the Sub-Registrar to have the deed registered. The Sub-Registrar treated

* First Appeal No. 41 of 1883, from an order of Babu Kashi Nath Biswas, Subordinate Judge of Benares, dated the 1st March, 1883.

the application as made with reference to the provisions of s. 24 of Act III of 1877, relating to the registration of a document presented for registration after the expiration of the period allowed by law for registration, and forwarded it to the Registrar, who, on the 20th August, 1881, **[461]** directed that the document should be accepted for registration, on payment of the fine prescribed. The document was then presented to the Sub-Registrar, when, in consequence of the defendant denying having executed it, registration was refused. The plaintiff then, under the provisions of s. 73 of the Act, applied to the Registrar (the successor in office of the Registrar above mentioned) to establish his right to have it registered, and the Registrar held that the document had been executed, but that it was not a document which should be registered, inasmuch as it had not been presented for registration within the time allowed by law, the Registrar thus overruling his predecessor's order of the 20th August, 1881, who had directed registration on payment of the prescribed fine.

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The plaintiff then brought this suit against the defendant, under the provisions of s. 77 of the Act, praying for a decree directing registration. The defendant contested the claim on various grounds, *inter alia*, that the order of the Registrar of 20th August, 1881, was illegal, and that his successor had properly refused registration. The Court of first instance (Munsif) allowed this contention, and dismissed the suit, without going into the merits. On appeal by the plaintiff the lower appellate Court (Subordinate Judge) held that the order of the 20th August, 1881, was a final and binding order in the matter of registration to which it related, and could not be disturbed; and that in regard to the contention of the defendant, and on which the Court of first instance proceeded, there was nothing to prevent registration. The Court remanded the suit to be tried on the merits.

The defendant appealed to the High Court, the appeal raising the following points:—(1) Whether the suit was one contemplated by s. 77 of the Registration Act; (2) Whether the order of the Registrar refusing registration under s. 73 and following sections, was a proper order, or, on the contrary, it was invalid as opposed to the order of his predecessor in office, dated the 20th August, 1881.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and Pandit *Ajudhia Nath*, for the appellant.

[462] The *Senior Government Pleader* (Lala *Juala Prasad*), and Munshi *Hanuman Prasad*, for the respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—On the first point, there can be no doubt that the suit is maintainable, as it is one to contest an order of refusal to register a document made under s. 76.

The second question has reference to the duties of a Registrar under ss. 73, 74 and 75. It is the Registrar's duty to inquire (s. 74) (*a*) whether the document has been executed; (*b*) whether the requirements of the law for the time being in force have been complied with on the part of the applicant or person presenting the document for registration as the case may be, so as to entitle the document to registration: and (s. 75) if the Registrar finds that the document has been executed, and that the said requirements have been complied with, he shall order the document to be registered.

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In this case the Registrar found the document to have been executed, but that the requirements of the law had not been complied with, inasmuch as the applicant had not presented it for registration within the time allowed, and he treated the order of his predecessor, dated the 20th August, 1881, as *ultra vires*, and void.

It appears to us, however, that when an application for registration had been presented to his predecessor in office, which had been dealt with under s. 24 of the Act, and an order had been passed under that section directing that the document should be registered on payment of the prescribed fine, and such fine had been paid, the requirements of the law had been complied with, and that the Registrar, dealing with the document under s. 74, should so have held, and that it was not competent for him to go behind the order of his predecessor, dated the 20th August, 1881, nor is it for us in this suit to question the propriety of that order. It was an order given under s. 24 of the Act, and in pursuance of a discretionary power allowed to a Registrar to accept documents for registration after the time prescribed.

[463] In this view we affirm the order of the lower appellate Court and dismiss the appeal with costs.

Appeal dismissed.

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6 A. 463=4 A.W.N. (1884) 174.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

SUBHAGI AND OTHERS (*Plaintiffs*) *v.* MUHAMMAD ISHAK AND OTHERS (*Defendants*).* [25th June, 1884.]

Pre-emption—Wajib-ul-arz—Offer of property—Notification that property is for sale and offers will be received—Acquiescence.

In order to entitle a co-sharer to assert a right of pre-emption based on the *wajib-ul-arz*, there must, as a condition precedent to such assertion, be a sale of a share already negotiated with a stranger, and a price fixed with the stranger by the co-sharer desiring to sell. The only mode in which a pre-emptive claim can then be defeated is by proof of a distinct intimation to the co-sharer seeking to maintain such claim, of the contemplated sale, and of the price agreed to be paid by the stranger, of an offer to him (the co-sharer) at such price, and of his refusal to purchase.

Where the sale in respect of which the pre-emptive claim was raised was one made by the Collector as Manager of the Court of Wards, and the Collector, before selling the property, issued a proclamation through the tahsildar, notifying to all the shareholders that the property was for sale, and that sharers intending to purchase should make offers—*held* that such a notification was not a sufficiently distinct and definite notice of a negotiated and intended sale to a stranger, so as to estop co-sharers failing to make an offer to purchase from subsequently asserting their pre-emptive rights.

[R., 7 A. 442 (445); 4 A.L.J. 444 (N); 1 O.C. 254 (257).]

THE plaintiffs in this suit claimed to enforce a right of pre-emption. The sale in respect of which they claimed was one of fractional shares in two villages, made by the Collector as manager on behalf of the Court of

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* Second Appeal No. 1551 of 1883, from a decree of H. D. Willock, Esq., District Judge of Azamgarh, dated the 12th June, 1883, reversing a decree of Muhammad Amin-ud-din, Munsif of Muhammadabad Gohna, dated the 23rd December, 1882.

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Wards of the estate of a Mrs. Wilson, the proprietor of the shares. The plaintiffs claimed under the terms of the *wajib-ul-arz*, as near co-sharers, the defendants-vendees being strangers. The clause in the *wajib-ul-arz* relating to pre-emption was to the following effect:—"When any sharer desires to make an absolute or conditional sale of his share, he shall first sell to a near sharer, then to a sharer in the *thoke*, and after him to a sharer in another *thoke*. When none of these purchase, he may sell to a stranger. Should a sharer not act according to this, the near sharers and the sharers in the order given above have [464] the right to purchase by virtue of pre-emption." It appeared that before selling Mrs. Wilson's shares to the defendants-vendees, the Collector had issued a proclamation in the villages through the Tahsildar, notifying to all the shareholders that the property was for sale and that sharers intending to purchase should make offers. The Court of first instance (Munsif) gave the plaintiffs a decree. On appeal by the defendants-vendees, it was contended on their behalf that, as notwithstanding the notification to sharers to come forward and make offers for the property, the plaintiffs did not make any offer, it must be taken that they consented to the transfer to the defendants, and their suit should therefore be dismissed. The lower appellate Court (District Judge) allowed this contention, observing as follows:—"The plaintiffs made no offer and gave a tacit consent to the transfer to the appellants (defendants). It is shown that a brother of the plaintiffs, a member of the joint family and the head of it, purchased a portion of other properties sold by the Court of Wards belonging to the original owner of the property in suit, and yet the plaintiffs have the audacity to assert that they knew nothing of the sale for a year after."

In second appeal the plaintiffs contended, *inter alia*, that the notification by the Collector was not an offer in the sense of the *wajib-ul-arz*, which contemplated an individual offer, and not a general notification that the property was for sale.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Mr. *W. M. Colvin*, for the respondents.

JUDGMENTS.

STRAIGHT, Offg. C.J.—It seems to me that the Judge failed to appreciate the rules by which the exercise of a right of pre-emption based upon the *wajib-ul-arz* is to be controlled. In order to entitle a co-sharer to assert such a right, there must, as a condition precedent to its assertion, be a sale of a share already negotiated with a stranger, and a price fixed with the stranger by the co-sharer desiring to sell. The only mode in which a pre-emptive claim can then be defeated is by proof of a distinct intimation to the co-sharer seeking to maintain it, of the contemplated sale and of the price agreed to be paid by the stranger, of an offer to him (the co-sharer) at such price, and of his refusal to purchase. In the present case, it was not, in my opinion, a suffi-[465]cient compliance with these well-recognized rules that the Collector caused a notification to be published in the village to the effect that he was prepared to sell the shares in suit, and was open to receive offers generally, for *non constat* but that the plaintiffs might have thought that no one would have come forward to purchase, or that a co-sharer would buy as against whom they could have no preferential rights. Until the negotiations for sale to a stranger were perfected and a price fixed the capacity of the plaintiffs to assert their pre-emptive claim did not spring

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into existence, and I think that the Judge's view, that they were bound to come forward in response to the notification and make an offer, altogether reverses the natural and well understood order of things in such matters. For it is obvious that though a co-sharer may be in disposed to volunteer to purchase a particular share, yet when he either learns that it is proposed to sell it, or that it has been sold to a stranger, he may nevertheless be prepared, under the pressure of such a circumstance, to find the necessary funds to keep such stranger out of the co-parcenary. I do not consider that a notification like that in the present case was a sufficiently distinct and definite notice of a negotiated and intended sale to a stranger, so as to estop the plaintiffs by reason of their failure to make an offer to purchase from now asserting their pre-emptive rights. The main ground therefore upon which the Judge's decision proceeds cannot in my opinion be supported.

As regards his other point that Baldeo Sahai Singh, the *karta* of the joint family to which the plaintiffs belong, "purchased, at the time of the defendant's purchase, a portion of other properties sold by the Court of Wards belonging to the original owner of the property in suit," and so knew of the sale to the defendants, it does not appear to me to carry the case further, or to place the plaintiffs under any disability to come into Court with their present claim. I would therefore decree the appeal, and, reversing the decision of the Judge, would restore that of the Munsif, amending his decree so far by declaring that the sum of Rs. 622 be deposited in Court within one month from the date of the receipt of our decree by the lower appellate Court. The plaintiffs should have their costs in all the Courts.

BRODHURST, J.—I concur.

Appeal allowed.

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[466] APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

MANRAJ KUARI (*Plaintiff*) *v.* MAHARAJAH RADHA PRASAD SINGH AND ANOTHER (*Defendants*).* [26th June, 1884.]

Suit to obtain a declaratory decree—Suit to set aside a summary order—Attachment of property—Suit to establish right—Act VII of 1870 (*Court Fees Act*), *s.* 7 (viii), and *sch. ii, No.* 17 (i) *and* (iii).

Certain immoveable property having been attached in execution of two Rent Court decrees, the wife of the judgment-debtor, under s. 178 of the N.-W.P. Rent Act (XII of 1881), objected to the attachment, on the ground that the property had previously been conveyed to her by her husband under a deed of gift. The objection was disallowed, and she thereupon brought a suit, with reference to the provisions of s. 181 (*b*) of the Rent Act, (1) to establish her right to the property, (2) to set aside the order passed on her objection.

Held that, looking at the nature of the reliefs sought, cls. (i) and (iii) art. 17, sch. ii of the Court Fees Act, 1870, were applicable, and that the plaintiff should pay a ten rupee stamp on each of her claims. *Fatima Begam* v. *Sukh Ram* (1), followed.

[N.F., 13 C. 162 (163) ; R., 31 C. 511 (512).]

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* First Appeal No. 95 of 1884, from a decree of Babu Mrittonjey Mukarji, Subordinate Judge of Ghazipur, dated the 29th March, 1884.

(1) 6 A. 341.

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APPELLATE CIVIL.

6 A. 466 = 4 A.W.N. (1884) 175.

THIS was a reference by the Registrar of the High Court under s. 5 of the Court Fees Act, 1870, which was laid before a Divisional Bench. The Registrar stated the case as follows :—

"I feel obliged to make this reference to the Court, because of the conflicting rulings which exist on the question of court-fees payable in such suits. The facts of the case are as follow :—The defendant Maharajah held two Rent Court decrees against the husband of the plaintiff-appellant. He took out execution of the same, and attached certain immoveable property consisting of shares in certain villages. Under s. 178 of the Rent Act (XII of 1881) plaintiff intervened and claimed the attached property as having been conveyed to her by her husband under a deed of gift, dated 6th April, 1874. Her objection was disallowed, and she has brought this suit with reference to the provisions of s. 181, cl. (*b*) of the Rent Act, (1) to establish her right to the property, (2) to set aside the order passed on her objection.

The point for determination is whether the court-fees payable by her are to be calculated (*a*) (1) under sch. ii, art. 17 (iii), Rs. 10 for the declaratory decree establishing her right, *plus* (2) under sch. ii, art. 17 (i) Rs. 10 for a decree setting aside the order passed **[467]** on her objection, or (*b*) *ad valorem* in accordance with s. 7, para. viii, Court Fees Act.

In favour of the latter view the office has produced three exactly similar cases, two of which are still pending because the deficiency has not been made up as ordered. They are First Appeals Nos. 120 of 1881, 135 and 136 of 1883. In all three cases the Court directed, in accordance with the office report, that the court-fees should be calculated *ad valorem* in accordance with s. 7, para. viii.

These cases are submitted. In favour of the former view there are the following reported rulings :—

(1) *Dayachand Nemchand* v. *Hemchand Dharamchand* (1).

(2) *Gulzari Mal* v. *Jadaun Rai* (2).

(3) *Fatima Begam* v. *Sukhram* (3), in which the two former rulings were followed.

The wording of s. 7, para. viii is "suit to set aside an attachment of land," so that paragraph does not apply to "houses," nor to the converse case, where the suit is to restore the attachment, the intervenor's objection having been allowed. I am inclined to think paragraph viii is meant to apply not to suits like the present, where an objection has been filed and decided, and where a summary order is sought to be set aside, but to cases where, without filing an objection, a third party claiming the property attached proceeds at once to file a suit. (*Vide* remarks of WESTROPP, C.J., in the Bombay case above referred to, at pages 523-5).

If, in cases like the present, a plaintiff adds to his plaint any claim for consequential relief, such as a prayer that he be delivered possession of the property or be maintained in possession of the same and enjoyment of the same be secured in the way of protection from sale, no doubt s. 7, cl. iv (*c*), would apply. The case of *Ram Prasad* v. *Sukhdai* (4) is a case in point. But when, as in the present case, no consequential relief is asked for, I think the correct view is that laid down in the reported cases referred to. I would call upon appellant to pay Rs. 10 on each of her claims under sch. ii, art. 17 (iii) and (i)."

[468] Mr. *G. T. Spankie*, for the appellant (plaintiff).

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(1) 4 B. 515.
(2) 2 A. 63.
(3) 6 A. 341.
(4) 2 A. 720.

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APPELLATE CIVIL.

6 A. 466 = 4 A.W.N. (1884) 175.

The Court (STRAIGHT, Offg. C. J., and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—We approve the view of the Registrar expressed above, which is in accordance with our ruling in a kindred case reported in I.L.R., 6 All. 341 [*Fatima Begam* v. *Sukh Ram*].

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6 A. 468 = 4 A.W N. (1884) 248.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Mahmood and Mr. Justice Duthoit.

ROHILKHAND AND KUMAON BANK, LIMITED (*Plaintiffs*) *v.* ROW AND ANOTHER (*Defendants*).* [5th May, 1884.]

Civil Procedure Code, s. 575—Rules made by High Court—Reference of appeal to other Judges of same Court—Composition of Bench hearing referred appeal—Presence of referring Judges necessary.

The only Bench which can legally deal with an appeal which has been referred under the provisions of s. 575 of the Civil Procedure Code is one which includes the Judges who first heard the appeal, and whose difference in opinion on a point of law necessitated the reference. *Khelut Chunder Ghose* v. *Tara Churn Koondoo Chowdhry* (1), *Mahomed Akil* v. *Asad-un-nissa Bibi* (2) and *Brand* v. *Hammersmith and City Railway Company* (3), referred to.

The word "judgment" as used in Rule II of the Rules made by the High Court, North-Western Provinces, to regulate references under s. 575 of the Civil Procedure Code, must not be understood in its strict sense, but merely as an expression of opinion containing reasons for a contemplated or proposed judgment.

[**Appl.**, 7 A. 523 (528) = A.W.N. (1885) 139; **R.**, 6 Bom. L.R. 131 (209); 9 A. 625 (644) (F.B.).]

THIS was a suit instituted by the plaintiffs to recover a sum of money from Lieutenants G. R. Row and E. B. Fraser, who were respectively the indorsee and the drawer of a cheque cashed by the plaintiffs' Bank for defendant No. 2, and subsequently dishonored by the firm to whom it had been sent for acceptance and payment. The Court of first instance (Judge of Bareilly) dismissed the claim against defendant No. 1, on the ground that, at the time when he indorsed the cheque, he was a minor, being under twenty years of age. An *ex-parte* decree for the sum claimed was recorded against defendant No. 2.

[469] The plaintiffs appealed to the High Court against so much of the Judge's decree as was unfavourable to them.

The appeal was first heard by OLDFIELD and BRODHURST, JJ. Those learned Judges differing in opinion on a point of law, the appeal was referred by them under s. 575 of the Civil Procedure Code, to STRAIGHT, Offg. C.J., and MAHMOOD and DUTHOIT, JJ.

Mr. *C. H. Hill*, for the appellants.

Mr. *A. H. S. Reid*, for the respondent, Lieutenant Row.

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* First Appeal No. 60 of 1883, from a decree of T. B. Tracy, Esq., Officiating District Judge of Bareilly, dated the 27th February, 1883.

(1) 6 W.R. 269. (2) Wyman's Rep. Vol. v, p. 69. (3) 36 L.J. Q.B. 137.

The Court (STRAIGHT, Offg. C. J., and MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

JUDGMENT.

MAHMOOD, J.—This appeal was originally heard by a Division Bench of this Court, consisting of OLDFIELD and BRODHURST, JJ., who, differing on an important point of law, have recorded dissentient opinions, and, in consequence of such difference of opinion, the appeal has been referred to us under s. 575 of the Civil Procedure Code. The case having thus come on for hearing before us, we are met with a preliminary difficulty as to whether, having regard to the language of s. 575, we have jurisdiction to hear the appeal referred to us, in the absence of the two learned Judges before whom it was originally heard, and whose difference in opinion has necessitated the reference. This difficulty arises first from the wording of the section itself, and next, because the practice of this Court hitherto, though not absolutely uniform, favours a view of this provision of the Code which is at variance with that we feel ourselves constrained to take of it. Under the last clause of the section, Rules regulating such references were made by this Court on the 30th March, 1878, and are to be found at page 74 of the printed collection of Rules published by the Registrar under the authority of the Court. The *first* of these lays down that "when an appeal is heard by a Bench of two Judges, and the Judges composing the Bench differ on a point of law, the appeal shall be referred, if either of the Judges be of opinion that such reference should be made." The *second* provides that "the Judges so differing shall each record his judgment on the appeal, and the Judge or Judges desiring that the appeal be referred shall record an opinion to that effect." The *third* goes on to direct that "the appeal shall thereupon be laid before the Chief Justice, who **[470]** shall direct what other Judge or Judges shall hear and decide the appeal in accordance with the provisions of the Code of Civil Procedure." It is clear that these Rules do not meet the difficulty that now presents itself, nor, if our interpretation of s. 575 is correct, has this or any other Court power to frame rules at variance with the provisions of the law. We think we are therefore entitled to deal with the question as hitherto unsettled by any definite ruling of this Court, and we may add that we are unaware of any reported case in which any other High Court has specifically considered and determined it. By s. 332 of the old Civil Procedure Code (Act VIII of 1859) it was provided that "if the appeal lie to the Sudder Court, it shall be heard and determined by a Court consisting of three or more Judges of that Court;" but no provision was made for difference of opinion among the Judges. The Code came into force in the Presidency of Bengal, (*vide* s. 387) from the last day of July, 1859, and many months did not elapse before the omission was supplied by the Amending Act IV of 1860, which was passed on the 23rd January, 1860. S. 1 of that Act repealed the clause of s. 332 just quoted, and in lieu thereof substituted three clauses, the first of which rendered appeals determinable by a Bench consisting of only *two* or more Judges, instead of *three* or more, and the last clause provided that "if in a Court so constituted there is a difference of opinion upon a point of law, *the Judges shall state the point upon which they differ*, and the case shall be *re-argued upon that question* before one or more of the other Judges, and shall be determined according to the opinion of the majority of the Judges of the Sudder Court by whom the appeal is heard." Act IV of 1860 was, in its turn, repealed by Act XXIII of 1861, but the

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ipsissima verba of the clause just quoted re-appeared in s. 23 of the latter Act, which continued in force till replaced by the provisions of s. 575 of Act X of 1877, which last section has remained intact in the present Civil Procedure Code (Act XIV of 1882).

We have considered it necessary to trace these successive alterations in the law, in order to ascertain whether they afford any indications such as will assist us in answering the question now before us. It seems obvious to our minds that, in framing s. 332 of the Code of 1859, the Legislature contemplated that the opinion **[471]** of the majority of the three Judges who would usually hear appeals should prevail, and, in the absence of any specific provision for differences of opinion, this seems to be the only alternative, otherwise the section would have been virtually inoperative. Nor can there be any doubt that the section contemplated that all the three or more Judges should form members of one and the same Bench, hear the case together, and give their judgments, whether concurrent or dissentient, after having conferred with each other. Such then was the law as it stood on the 23rd January, 1860, when the amending Act IV of 1860 was passed, and it is therefore important to determine whether the change introduced by that Act altered the law so as to split up the jurisdiction possessed by one tribunal or one set of Judges into two jurisdictions to be exercised by different sets of Judges, on different occasions, on hearing separate arguments, and without the necessity of the two tribunals or the two sets of Judges conferring with each other. By s. 1 of Act IV of 1860 the minimum number of Judges constituting a Bench was reduced from three to two, and it is intelligible that this circumstance necessitated and accounts for the provision for difference of opinion among the Judges.

Neither in s. 1 of Act IV of 1860 nor in s. 23 of Act XXIII of 1861 are the provisions relative to the difference of opinion on questions of law very clearly or comprehensively expressed, but there is nothing in the wording of the clause, common as it is to both Acts, to indicate that the splitting up of jurisdiction was intended by excluding the dissentient Judges from the Bench of which the Judge or Judges to whom the case is referred would necessarily be members. Nor can we place any such interpretation upon the terms of s. 575 of the present Civil Procedure Code, in which the same subject has found clearer expression. The clause of that section with which we are immediately concerned runs thus:—"If the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, the appeal may be referred to one or more of the other Judges of the same Court, and shall be decided according to the opinion of the majority (if any) of all the Judges who have heard the appeal, including those who first heard it."

[472] As the determination of the question now before us depends, in a great measure, upon the interpretation of the clause which we have quoted, it is important to notice the exact points in which the wording of the clause has made an alteration in the law. Under s. 23 of Act XXIII of 1861 the differing Judges were bound to "state the point upon which they differ," but this provision is noticeably absent from the corresponding s. 575 of teh present Code. So that, as far as the express words of the statute itself are concerned, the referring Judges, beyond intimating that they cannot agree upon a legal point, are not bound to define it, or to state the reasons for their difference of opinion—a contingency which would leave the Judges to whom the case is referred wholly unaware of

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the exact cause which necessitated the reference. Again, whilst s. 23 of Act XXIII of 1861 laid down that "the case shall be re-argued upon *that question* (*viz.*, the point of reference), the present Code authorizes that the "*appeal* may be referred," "and shall be decided"—an alteration in the law which distinctly authorizes the Judge or Judges before whom it goes to enter fully into the law and merits of the whole case. The other points of difference which the comparison of the two sections suggests are that the expression "*all*" and the phrase "*including* those who first heard it," have been added, and that the penultimate clause of s. 575 has a more comprehensive operation than the corresponding clause of the previous law, which applied only to "difference of opinion upon the evidence," and did not expressly provide for the contingency of equal division of opinion on a question of law even after the reference to other Judges of the Court has been made.

Whether the alterations which we have thus noticed have materially changed the law or not, they all tend to show that the Legislature took it for granted that the Judges to whom the case is referred should sit with those who, in consequence of difference of opinion, have found it necessary to refer the case under s. 575, and that a tribunal so constituted should go into the whole case and finally decide the appeal. To hold a contrary view involves anomalies which the Legislature could not have contemplated, and we cannot believe intended. The provisions of the last paragraph of s. 575 of the Civil Procedure Code, as to the framing of rules for **[473]** regulating references under that section, are not imperative, and therefore in a Court which had framed no such rules, a Division Bench consisting of two Judges, without specifying the point upon which they differ, without stating the reasons why they differ, by merely intimating that they cannot agree, might refer an appeal to their brother Judges, who would then have to discharge functions analogous to those of an appellate Court without even having an opportunity of hearing the views of the Judges who referred the appeal. But even in a Court like this whose rules have been framed, difficulties might arise hardly less anomalous. For it is clear that the Judge or Judges to whom an appeal is referred have the power to go into the whole appeal, and it is perfectly possible that such Judge or Judges may take a view of the case which neither occurred to nor was considered by either of the referring Judges. Such view might involve a point going to the very root of the case, which had never presented itself, or had escaped attention, and rendering the consideration of the question or questions referred unnecessary. Cases are readily conceivable in which this might happen, and it is difficult to say in what way such a contingency could be met if our interpretation of s. 575 of the Code is incorrect. For it is clear that there is no provision in the law to enable the Judges to whom the appeal is referred to remand the case to the referring Judges in order to ascertain their views on a point, whether of law or as to the merits, which was never urged before them, and in regard to which they have expressed no opinion. If their opinions cannot be so ascertained, how then is the "*majority*" contemplated by s. 575 to be arrived at, and how is the appeal to be "*decided?*"

We cannot hold that the words of the proviso to s. 575 of the Civil Procedure Code contemplate that the majority therein referred to means a mere arithmetical process of casting up, after the fashion of parliamentary or municipal elections, the votes of the Judges as declared by so many pieces of paper, the opinions appearing in which are neither

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contemporaneous nor arrived at after an opportunity of hearing the same arguments or of conferring with each other. If such a view were to be entertained, judicial acts requiring the concurrence of two or more persons could be performed by each of such persons hearing different argu-[474]ments, at different times, and giving their votes also on different occasions. In the present case, we have had no opportunity of conferring with our brother Judges who have referred it to us, nor have they had any opportunity of knowing what points seem to us to deserve weight, and it may be that the arguments employed before them were either not the same as those employed before us, or it may be that they were less cogently put before them than before us, or *vice versa*. These considerations lead us to the conclusion that, in the absence of specific and express words in the statute importing a contrary meaning, the interpretation which should be placed upon s. 575 of the Civil Procedure Code should accord with the fundamental principles that regulate the discharge of judicial functions. In the case of *Khelut Chunder Ghose* v. *Tara Churn Koondoo Chowdry* (1) PEACOCK, C.J., made observations which apply in principle to the question before us:—"I apprehend that all acts of a judicial nature to be performed by several persons ought to be performed when they are all present together, and that a final decision ought not to be pronounced in a case in which they differ, until by conference and discussion of the points in difference they have endeavoured to arrive at a unanimous judgment." Such a rule is clearly laid down with regard to arbitrators, and it is equally, if not more specially, necessary to be acted upon by a Court consisting of two or more Judges, with power to decide on matters of the greatest importance. But the question was even more fully considered by the same eminent authority in the case of *Mahomed Akil* v. *Asad-un-nissa Bibi* (2), in which a Full Bench consisting of nine Judges concurred in the opinion that the point "is not a mere technical objection, but is founded upon a fundamental principle essential to the due administration of justice, that every judicial act which is done by several Judges ought to be completed in the presence of the whole of them......If after discussion, and after deliberately weighing the arguments of each other, the Judges cannot agree, their several judgments ought to be delivered in open Court in the presence of the others." Indeed, the reasons which form the basis of this principle are not dissimilar to those which render the recorded opinion of the Judges who have ceased to be members of a Court ineffectual for purposes[475] of calculating the majority of opinions in cases disposed of in their absence. In *Brand* v. *Hammersmith and City Railway Company* (3) relied upon by Sir Barnes PEACOCK, which was a case in the Exchequer Chamber, in England, the Court, after hearing arguments, took time to consider and the Chief Justice of the Common Pleas prepared a written judgment to be delivered, but other members of the Court were not then ready to give judgment, and, before judgment was delivered, the Chief Justice resigned. The other Judges subsequently differed in opinion, but the intended judgment of the Chief Justice, though a most elaborate and valuable exposition of the law on the question involved, had no part in the decision of the case, by reason of the fact that he had ceased to be a member of the Bench.

The real test seems to be whether the statement of his reasons and conclusions recorded by a Judge has reached the point at which he has

(1) 6 W.R. 269. (2) Wyman's Rep., Vol. V, 69. (3) 36 L. J. Q.B. 137.

no further power to alter his opinion without a formal review of judgment—a rule which, we may observe, appears to be the foundation of the provisions of s. 202 of the Civil Procedure Code.

This leads us to the consideration of another aspect of the question now under discussion. It is clear from what we have said that the opinions of OLDFIELD and BRODHURST, JJ., which are now before us, need never have been recorded so far as the express language of s. 575 of the Civil Procedure Code is concerned, and it is also obvious that they were recorded in consequence of the second Rule framed by this Court which we have already quoted. It seems to us that the word "judgment" as used in that Rule must not be understood in its strict sense, but merely as an expression of opinion containing reasons for a contemplated or proposed judgment. For if we are to regard the opinions recorded by the referring Judges to be judgments in the strict sense of the term, it may often be that the appeal heard by them would be disposed of, *ipso facto*, by reason of those judgments, under the penultimate paragraph of s. 575 itself. And in such cases, no appeal being pending, it could not be referred to other Judges under s. 575, for that section clearly contemplates *pending* appeals, and not appeals already determined and disposed of. But it is clear to us in this case, from [476] the wording of the order passed by the learned Judges themselves, referring the case to us, that they did not mean their recorded opinions to be more than statements of reasons which made them unable to concur in determining and disposing of the appeal with the same result. That appeal therefore has not yet been "*decided*," there has been no judgment passed thereupon, and it follows that it cannot be disposed of without a *judgment*. That judgment, the law requires, must now represent "the opinion of the majority of *all* the Judges who have heard the appeal, including those who first heard it." But can such a judgment be arrived at under conditions which preclude us from conferring with those learned Judges, with one of whom all or some of us must necessarily agree or differ, or it may be that some of us will take a view inconsistent with the view of either of them?

For the reasons which we have stated at length, we have no hesitation in answering the question in the negative. The recorded opinions of the two learned Judges who have referred this case not being judgments, cannot, on the one hand, be incorporated in our judgment, nor, on the other hand, could we dispose of the appeal by simply signing one of the two opinions recorded and signed long before we had an opportunity of hearing the appeal. Not being judgments, they cannot be counted as representing judicial votes such as can be taken into account in determining the majority contemplated by s. 575 of the Civil Procedure Code. Any other view would practically amount to assigning to the conclusions of the referring Judges the *status* of a decree or order such as the penultimate paragraph of s. 575 assigns to the decree of a lower Court, which prevails if the opinion of the appellate Court is equally divided. But it is impossible to hold that such a provision of the law intended to confer upon the presiding Judge of a lower tribunal a judicial vote in the Court of appeal, of which he is not a member, and in the deliberations of which he can take no part.

We therefore hold that a Bench consisting only of ourselves has no jurisdiction to decide this appeal under s. 575 of the Civil Procedure Code, and that the only Bench which can legally deal with it must

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include the two learned Judges who first heard the appeal, and who, in consequence of difference of opinion, have referred it to us for decision.

[477] [The appeal was accordingly heard by a Bench consisting of the learned Judges who had referred the appeal, together with those to whom the reference had been made. Their Lordships remanded an issue under s. 566 of the Civil Procedure Code for a finding by the lower Court, and their judgments upon the merits of the appeal will be reported upon the return of the finding.]

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CRIMINAL REVISIONAL.

Before Mr. Justice Duthoit.

RAMSUNDAR *v.* NIROTAM AND OTHERS. [7th June, 1884.]

Magistrate of the 2nd class—Power to commit for trial—Case triable by Court of Session and Magistrate of the 1st class—Discharge of accused—Criminal Procedure Code, s. 206, *and sch.* III, *arts.* II, III (7).

A complaint of an offence made punishable by s. 392 of the Penal Code was brought in the Court of a Magistrate of the second class, who had been invested with the powers described in s. 206 of the Criminal Procedure Code. The Magistrate passed an order directing that the inquiry should be held in his Court, and accordingly an inquiry was held under the provisions of Chap. XVIII of the Criminal Procedure Code, and the accused was discharged.

Held that powers conferred under s. 206 of the Criminal Procedure Code convey authority to carry into effect any of the provisions of Chap. XVIII of the Code; that the procedure to be adopted under Chap. XVIII is not confined to cases exclusively triable by a Court of Session, but is also applicable to cases which, in the opinion of the Magistrate concerned, ought to be tried by such Court; that the order of the Magistrate in the present case, directing inquiry to be held in his Court, must be taken to mean that, in his opinion, the case referred to was one which ought to be tried by a Court of Session; and that his order discharging the accused was therefore legal.

THE facts of this case are sufficiently stated in the order of the Court.

JUDGMENT.

DUTHOIT, J.—This is a reference by the Magistrate of Mirzapur, under the provisions of s. 438 of the Code of Criminal Procedure.

By orders of Government, dated the 7th December, 1883, Shaikh Muniruddin Ahmad was invested with the powers of a Magistrate of the second class, and with the powers described in s. 206 of the Code of Criminal Procedure.

By an order of the Magistrate of the Mirzapur District, dated the 11th December, 1883, Shaikh Muniruddin Ahmad was directed to exercise the criminal jurisdiction so conferred upon him within the limits of certain police divisions of the Mirzapur district: [478] by the same order he was directed to transfer to the Court of Babu Balbhadr Singh "all cases triable only by a Magistrate of the first class which might be brought in his Court."

On the 18th March, 1884, a complaint of an offence made punishable by s. 392, Penal Code, was brought into Shaikh Muniruddin's Court, and the following order was passed by that officer:—

"As the complainant brings a charge under s. 392, which is cognizable by a first class Magistrate only, it is ordered that the case be laid before Babu Balbhadr Singh, first class Magistrate."

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CRIMINAL REVISIONAL.

6 A. 477 = 4 A.W.N. (1884) 205.

The papers were thereupon laid before Babu Balbhadr Singh, who returned them to Shaikh Muniruddin with a verbal message to the effect that the case was one triable by a Court of Session, and that Shaikh Muniruddin could make the inquiry himself.

On the return of the papers, Shaikh Muniruddin, on the 19th March, 1884, recorded the following order :—

"Let the case be retained in this Court; and after process-fees have been paid, let the accused be summoned for the 2nd April of the current year."

An inquiry was held under the provisions of Chap. XVIII of the Code of Criminal Procedure; and on the 14th April, 1884, Shaikh Muniruddin discharged the accused.

The Magistrate of the Mirzapur District is doubtful whether this order of discharge was legal. The Magistrate writes :—

"The offence described in s. 392, Indian Penal Code, is triable by a Court of Session and the Presidency Magistrate and first class Magistrate; it is therefore not *exclusively* triable by a Court of Session. Had, then, Muniruddin power to discharge the accused in this case? Was he not arrogating to himself in doing so the powers of a first class Magistrate? It seems to me that he was, and that therefore his proceedings were irregular and *ultra vires*. It is clear that he conducted the inquiry all through on the supposition that it was an inquiry into a charge of robbery with a view to subsequent committal. He could have committed the accused for trial, but I do not see how, having determined not to commit them, he had, as a second class Magistrate, power to dispose of the case otherwise than by a committal."

[479] Upon this I remark (1) that (*cf.* sch. iii, Act X of 1882) the powers with which Shaikh Muniruddin Ahmad was invested by Government Notification No. 2 F. C., dated the 7th December, 1883, were the ordinary powers of a Magistrate of the second class (art. II of the schedule), *plus* No. (7) of the powers of a Magistrate of the first class (art. III of the schedule); that powers conferred under s. 206 of the Code of Criminal Procedure convey authority to carry into effect any of the provisions of Chap. XVIII of the Code; and that either all the action taken by Shaikh Muniruddin Ahmad subsequently to the 19th March, 1884, in the case under reference, was void, or it was all good and effectual; (2) that the procedure to be adopted under Chap. XVIII of Act X of 1882 is not confined to cases exclusively triable by a Court of Session, but is also applicable to cases which, in the opinion of the Magistrate concerned, ought to be tried by such Court; (3) that the order of Shaikh Muniruddin Ahmad, dated the 19th March, 1884, must be taken to mean that, in the opinion of that Magistrate, the case referred to was one which ought to be tried by a Court of Sessions.

I decline, therefore, to interfere.

Let the record be returned.

1884
JUNE 10.

APPELLATE CIVIL.

6 A. 479= 4 A.W.N. (1884) 185.

6 A. 479=4 A.W.N. (1884) 185.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

SIBT ALI AND OTHERS (*Defendants*) *v.* MUNIR-UD-DIN (*Plaintiff*).* [10th June, 1884.]

Dhardhura—Regulation XI of 1825, *ss.* 2, 4 (ii).

The question whether the custom of *Dhardhura* applies to lands gained by gradual accretion only, or also to lands which have been separated from a mauza by a sudden change of stream, must be determined in each case on the evidence ; for although the Court would be disposed to scrutinize with care evidence in regard to a custom which would have the effect of passing from one owner to another lands long held and enjoyed, and of which the character is in no way altered by river action, yet it cannot be said that such a custom can in no case be established and given effect to. *Ranee Katiyanee* v. *Mahomed Shurfoodeen* (1), *Ishri Singh* v. *Mirza Shurfoodeen* (2) and *Rajendur Pertab Sahee* v. *Laljee Sahoo* (3), referred to.

[480] THE facts of this case were as follows:—The plaintiff, one Munir-ud-din, was owner of 8 biswas in mauza Utampur, and the defendants were owners of mauza Gurita. The river Ghangan formerly separated the two mauzas, but the plaintiff alleged that, by a sudden change in its course, in September, 1880, certain lands which were originally in his possession, passed to the defendants' side of the river and were taken possession of by the defendants. He instituted the present suit to recover possession of the said lands, and for mesne profits.

The defendants' material plea was that they were entitled to the lands by the custom of *Dhardhura*. The plaintiff, on the other hand, while admitting the existence of a custom of *Dhardhura*, alleged that it did not extend to change ownership in lands cut off from a mauza by a sudden change of the river's course, and capable of identification. The defendants further pleaded that the lands had not been cut off by any sudden change of the river's course, but had gradually accreted to their mauza.

The Court of first instance (Munsif) refused to recognize any such distinction in the custom of *Dhardhura* as the plaintiff set up, and was of opinion also that the lands had not been shown to have been suddenly separated from the rest of the plaintiff's mauza by a change of the stream. The Court therefore dismissed the suit.

The lower appellate Court (District Judge) held that the lands sued for were the same which had long been in the plaintiff's possession unaltered in character by the change of the river's course, and that the custom of *Dhardhura* serves to determine the ownership of accretions of mud on rivers, and in no way applies to the alteration of the course of a river ; and that the lands in suit were separated from the plaintiff's mauza by the change of the stream about two years ago, as the plaintiff alleged. He therefore decreed the claim.

In second appeal, it was contended on behalf of the defendants that the learned Judge had not given effect to the custom of *Dhardhura*.

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* Second Appeal No. 1565 of 1883, from a decree of C. J. Daniell, Esq., District Judge of Moradabad, dated the 30th July, 1883, reversing a decree of Pandit Ratan Lal, Munsif of Haveli, Moradabad, dated the 28th March, 1883.

(1) N.W.P.H.C.R. (1868) 189. (2) N.W.P.H.C.R. (1869) 142.
(3) 20 W.R. 427.

1884 JUNE 10.

APPELLATE CIVIL.

6 A. 479 = 4 A.W.N. (1884) 185.

Messrs. *T. Conlan* and *Simeon*, for the appellants.
Mr. *G. T. Spankie* and Shah *Asad Ali*, for the respondent.

[481] The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J.—We are of opinion that the Judge must be taken to have decided against the defendants on the point that the lands in dispute had gradually accreted to their mauza, and to have held that they were, as plaintiff asserts, suddenly separated from his mauza by a change of the river's course, leaving them unaltered in character; but the Judge's decision appears to us to be insufficient as to the nature and effect of the custom of *Dhardhura*, for he seems to think that the custom can necessarily only apply to gradual accretions by fluvial action, and that no custom can be recognized to affect the ownership in lands of the character of those in suit; but this is scarcely the case, for although we should be disposed to scrutinize with care evidence in regard to a custom which would have the effect of passing from one owner to another lands long held and enjoyed, and of which the character is in no way altered by river action, yet it cannot be said that such a custom can in no case be established and given effect to. In *Ranee Katiyanee* v. *Mahomed Shurfooddeen* (1), this Court observed that there is no well-established definition of the extent of the custom of *Dhardhura*. In that case, it was contended that such a custom extended to transfer ownership in old formations suddenly severed by fluvial action, and the Court remanded the case in order that the extent of the custom might be tried.

The above case and that of *Ishri Singh* v. *Mirza Shurfooddeen* (2), show that this Court has hesitated to admit the applicability of such a custom to lands such as those in suit, as opposed to equity, in extreme cases, but at the same time has left the issue whether such a custom does exist to be determined in each case on the evidence, although requiring very adequate proof in its favour before permitting its recognition. In *Rajendur Pertab Sahee* v. *Laljee Sahoo* (3), where the subject of dispute consisted of lands found to have been separated from a mauza by a sudden change of stream, their Lordships of the Privy Council held that the plaintiffs were entitled to follow the lands across the stream under cl. ii, s. 4, Regulation XI of 1825, unless they were prevented from doing so by a clear and definite usage within the meaning of s. 2 of the Regulation, [482] thus recognizing that a custom of *Dhardhura* might apply to such lands. The question therefore in this suit cannot be decided on any general assumption that a custom of *Dhardhura* cannot apply to the lands in suit, but it is necessary that the precise nature and extent of the custom as prevailing in the neighbourhood should be determined on evidence, and we shall expect the defendants, who set up a custom of this kind as extending to lands such as those in dispute, to establish it satisfactorily by instances, the more especially as they assert that the lands in suit were at one time part of their mauza, and had passed to the plaintiffs in past years by a sudden change of the course of the stream, under the operation of the custom which they set up.

We remand the case in order that the Judge may try and determine the issue, whether the custom of *Dhardhura* applies to lands gained by

(1) N.W.P.H.C.R. (1868 189.
(2) N.W.P.H.C.R. (1869) 142.
(3) 20 W.R. 427.

1884 JUNE 10. — APPELLATE CIVIL. — 6 A. 479 = 4 A.W.N. (1884) 185.

gradual accretion only, or to lands which have been separated from a mauza by a sudden change of the stream.

Ten days will be allowed for objections on return of the finding.

Issue remitted.

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6 A. 482 = 4 A.W.N. (1884) 213.

CRIMINAL REVISIONAL.

Before Mr. Justice Duthoit.

QUEEN-EMPRESS *v.* DIN ALI. [14th June, 1884.]

Act VI of 1864, ss. 5, 10—*Whipping*—"*Juvenile offender*"—*Criminal Procedure Code*, s. 392.

By the term "juvenile offender" in s. 5, Act VI of 1864 (Whipping Act) is meant an offender under the age of sixteen years. *R.* v. *Muhammad Ali* (1), referred to.

[F., 7 C.P.L.R. 32 (33); L.B.R. (1893—1900) 79.]

THE facts of this case are sufficiently stated in the judgment of the Court.

JUDGMENT.

DUTHOIT, J.—This case has been called for on perusal of the Sessions Statement of the Basti District for the first quarter of 1884.

The Judge has convicted of an unnatural offence a young man, who, to judge from the injury caused by his act to the object of his lust, must have fully attained puberty, whose age is stated in his examination before the Magistrate, and in the calendar and Sessions' Statement as twenty years, and whom the Judge des-[483]cribes in his English note as being sixteen or seventeen years of age; and the Judge has sentenced the convict "in consideration of his youth, to receive 30 stripes."

The punishment has already been inflicted, and I abstain therefore from setting aside the sentence, and passing one conformable to law.

But I wish to draw the Judge's attention to what I conceive to be the illegality of the sentence passed by him. S. 5 of Act VI of 1864 provides that "any juvenile offender who commits any offence which is not by the Indian Penal Code punishable with death, may, whether for a first or any other offence, be punished with whipping, in lieu of any other punishment to which he may for such offence be liable under the said Code." The Court of Sadr Nizamat Adalat, Agra, ruled, on the 3rd of May, 1864, on a reference from the Sessions Judge of Mirzapur, that by the term "juvenile offender" in s. 5 of Act VI of 1864, was meant an offender under the age of sixteen years. The opinion was based upon a comparison of the terms of s. 83 of the Indian Penal Code with those of s. 433 of Act XXV of 1861.

The High Court of Bombay, in the case of *R.* v. *Muhammad Ali* (1), held that "the accused, being described on the record as eighteen years of age, could not be legally treated as a juvenile offender. S. 433 of the Criminal Procedure Code, which provides for the punishment of youthful offenders in reformatories, declares this class of offenders to be persons under the age of sixteen."

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(1) 8 B.H.C. Cr. C. 9.

The Bombay case just cited seems to be the only published authority on the subject; but the Legislature has recently indicated its own interpretation of the law, by substituting in its re-enactment of s. 10, Act VI of 1864, in s. 392 of Act X of 1882 (s. 10 of Act VI of 1864 being still retained in the Statute Book), for the words "juvenile offender" the words "a person under sixteen years of age." Unless, therefore, an accused person is found to be under sixteen years of age, he cannot be punished as a "juvenile offender" under the provisions of s. 5, Act VI of 1864.

In case of doubt the evidence of the Civil Surgeon should be taken upon the point.

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6 A. 484 = 4 A.W.N. (1884) 206.

[484] CRIMINAL REVISIONAL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

QUEEN-EMPRESS *v.* ALA BAKHSH AND ANOTHER.
[23rd June, 1884.]

Appeal by Local Government—Application for revision by Local Government—Delay—High Court's powers of revision—Criminal Procedure Code, ss. 417, 439.

It is not an inflexible rule that where either Government on the one side or an accused on the other has a right of appeal, and does not exercise it, the powers of the High Court under s. 439 of the Criminal Procedure Code cannot be exercised: but, in such cases, these powers should be sparingly used, and, save in very exceptional circumstances, not at all in reference to questions of fact.

Where an application was made by the local Government to the High Court for revision of an order of acquittal, under s. 439 of the Criminal Procedure Code, nearly ten months after the Sessions trial, and upwards of twelve months after the commission of the alleged crime, and where there was, upon the face of the Judge's judgment, no error in law, and no appeal had been preferred upon a question of fact,—*held* that, under such circumstances, the Court did not feel called upon to enter into the case at large upon the merits, under a petition for revision.

[R., 14 B. 331 (342); 16 Cr. L.J. 122 = 19 C.W.N. 184 = 21 C.L.J. 53 = 27 Ind. Cas. 186; 16 Cr. L J. 352 = 2 O.L.J. 190 = 28 Ind. Cas. 736; 16 Cr. L J. 558 = 28 M. L.J. 690 = (1915) M.W.N. 411 = 17 M.L.T. 457 = 29 Ind. Cas. 830 (831); 16 Cr. L.J. 600 = 28 M.L.J. 692 = (1915) M.W.N. 540 = 39 M. 505 = 30 Ind. Cas. 152; 17 C.P.L.R. 75 (84); L.B.R. (1893—1900) 41; 5 N.L.R. 4 (5).]

THIS was an application by the Local Government for revision of a judgment of acquittal by the Court of Session at Azamgarh. The facts of the case are sufficiently stated for the purposes of this report, in the judgment of the Court.

The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

The accused were not represented.

The Court (STRAIGHT, Offg. C. J., and DUTHOIT, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C. J.—This is an application by Government for revision by this Court, in pursuance of the powers conferred upon it by s. 439 of the Criminal Procedure Code, of an order of acquittal passed by the Sessions Judge of Azamgarh, upon the 28th of August, 1883. It was frankly admitted by the learned Public Prosecutor, when the case came on for hearing, that the object of the petition was to obtain a fresh

1884 JUNE 23. — CRIMINAL REVISIONAL. — 6 A. 484 = 4 A.W.N. (1884) 206.

magisterial inquiry and a new trial in the Sessions Court, in respect of the circumstances which led to the death of one Khuda Bakhsh upon the 19th of June, 1883. There is, however, at the outset a matter of difficulty to our entertainment of the application, which we ourselves suggested, by reason of the circumstances that, although the decision of the Judge, which is now sought to be impeached, might have been made the subject of appeal by Government under s. 417 of the Code, no [485] such appeal has ever been preferred, and that, Government having failed to avail itself of its right in that respect, it would, to say the least of it, be unusual for this Court to interfere in revision. Moreover, had the petition now before us been of appeal instead of revision, we should not have been predisposed in its favour by the fact that it was presented upon the last day but one of the six months allowed by law, unless such delay in presenting it was satisfactorily explained. It is no part of our duty to discuss the propriety of the advice upon which Government acts in such matters, but we cannot help feeling in the present case that action, if it was to be taken at all, should have been taken long ago. If the judgment of the Judge, given so far back as the 28th of August last year, was, as is now asserted, bad in law and mistaken in fact, it should at once have been attacked by an appeal, which would have opened up the whole question of the soundness of his conclusions, and have presented the case for our consideration in its broadest aspect. We do not lay it down as an inflexible rule that, where either Government on the one side or an accused on the other has a right of appeal and does not exercise it, the powers of this Court, under s. 439 of the Code cannot be exercised; but we do say that in such cases they should be sparingly used, and, save in very exceptional instances, not at all in reference to questions of fact. It was explained to us by the Public Prosecutor that the cause of the delay which has taken place, was that the Government had waited for the result of certain other proceedings in an inquiry connected with the death of Khuda Bakhsh, held by the Assistant Magistrate of Azamgarh in November last year. That inquiry was closed on the 13th of November, and the petition before us was not presented until the 27th of February last. This petition does not impeach the Assistant Magistrate's order of discharge, nor have any steps been taken with regard to it under ss. 436 and 437 of the Code; but it invites us, despite the interval of nearly ten months since the Sessions trial, and of upwards of twelve months since the commission of the alleged crime, to re-open the whole matter and to direct an inquiry *de novo*, as against Ala Bakhsh and Wajid Husain, their committal to the Sessions and a new trial there. We entirely sympathise with the motives that have led to the application being preferred that is now before us, [486] and it is no doubt a serious matter that the persons who caused the death of the unfortunate man Khuda Bakhsh should escape punishment; but looking to the circumstances of the case, we entertain very grave doubts whether, in seeking to avoid this latter contingency now, after so long a period of time has elapsed since the occurrence took place, we should not encourage the production of a great deal of evidence which for many reasons might be most unreliable and misleading. Though we are not prepared to say that the judgment of the Judge was in all respects a satisfactory one, yet, even had we had to deal with it in appeal, it might possibly be difficult to say that it was open to objection within those rules which it has been our habit to apply in dealing with appeals from acquittals. This, however, is not the form in which it is presented for our consideration. If failure of justice there has

been, it seems to have largely originated in the circumstance that the original inquiry was not conducted, as in so grave a case it ought to have been, by a European officer of experience; but it was held by a Deputy Native Magistrate, who was scarcely equal to the responsibility, and whose procedure was certainly extraordinary. We have already had occasion to animadvert upon instances of a like course adopted in former cases, and we have reason to believe that Government issued orders on the subject. That these have been neglected in the present instance is unfortunately too obvious, and we cannot but think that to this circumstance the result of the proceedings now sought to be revised is largely due. Upon the face of the Judge's judgment, there is no error in law, and as it was not appealed on a question of fact, we do not feel ourselves called upon, after so long an interval from the date of its delivery, and of the alleged crime, to enter into it at large upon the merits, under a petition for revision.

The application is refused.

Application rejected.

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6 A. 487 = 4 A.W.N. (1884) 214.

[487] CRIMINAL REVISIONAL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

QUEEN-EMPRESS *v.* SHEODIHAL RAI. [25th June, 1884.]

Criminal Procedure Code, ss. 4 (d), 88, 89—Attachment of property belonging to persons absconding—Proceedings of Magistrate under s. 88 of Criminal Procedure Code—"Judicial proceedings."

There is no provision of law requiring a Magistrate who has attached property under s. 88 of the Criminal Procedure Code to investigate the claims of third persons to the ownership of such property. *Queen* v. *Chumroo Roy* (1), followed.

The proceedings of a Magistrate under s. 88 of the Criminal Procedure Code are therefore not "judicial proceedings" in the sense of s. 4 (*d*) of that Code.

[F., 4 L.B.R. 109; R., 9 P.R. 1908 (Cr.) = 29 P.W.R. 1908 (Cr.) = 8 Cr. L.J. 260; D., 34 P.R. 1916 (Cr.) = 36 Ind. Cas. 171.]

THE facts of this case, which was a reference to the High Court under s. 438 of the Criminal Procedure Code, by the Sessions Judge of Ghazipur, are sufficiently stated in the judgment of the Court.

Mr. *A. H. S. Reid*, for the applicant, Sheodihal Rai.

Mr. *Amir-ud-din*, for the legal representative of Kamman Khan, deceased.

The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

The Court (STRAIGHT, Offg. C.J., and DUTHOIT, J.) delivered the following judgment:—

JUDGMENT.

DUTHOIT, J.—The Magistrate of the District of Ghazipur has attached, under the provisions of s. 88 of the Code of Criminal Procedure, certain immoveable property as belonging to three persons who have by this Court been convicted of murder, and sentenced to transportation for life; and the Magistrate has refused to discharge that order on the application of Sheodihal Rai, the father of those persons. With reference to

(1) 7 W.R. Cr. R. 35.

1884 JUNE 25. — CRIMINAL REVISIONAL. — 6 A. 487= 4 A.W.N. (1884) 214.

the report of a *kanungo* and to other documents, the Sessions Judge is of opinion that, according to the principles of the Hindu law of inheritance and partition, the property which has been attached by the Magistrate does not actually belong to the persons who have absconded, and he has referred the matter for the consideration of this Court by an order, the material portions of which are as follows :—

"The Government Pleader contends that the Magistrate's inquiry into the ownership of the property attached was one for his own satisfaction ; that there is no provision of law by which he was required to make any such inquiry ; and that consequently his [488] orders on the subject are not open to revision. The Government Pleader also appears disposed to throw upon the applicant the burden of proof to a greater extent than the applicant admits. It appears to me that the contentions of the Government Pleader cannot hold good. When the law empowers the Magistrate to attach the 'property belonging to' an absconder, it requires that there should be *prima facie* reasons from admissions, or uncontradicted assertions, or actual evidence on the record, to show that such and such property belongs to such and such an absconder. That the matter is one for debate is assumed by the Magistrate's proceeding subsequent to the objection. Consequently it must be one in which revision is admissible."

The provisions of ss. 88 and 89 of the Criminal Procedure Code are, so far as the matter now before us is concerned, the same as those of ss. 184 and 185 of Act XXV of 1861 ; and with reference to those sections it was held by PEACOCK, C.J., and NORMAN, J., in *Queen* v. *Chumroo Roy* (1) that the law makes "no provision for the investigation by a Magistrate of the claims of third persons to property which has been attached." This view of the law we follow and approve; and we must therefore hold that the proceedings of a Magistrate under s. 88 of the Criminal Procedure Code are not "judicial proceedings" in the sense of s. 4 (*d*) of that Code.

We decline to interfere. Let the record be returned.

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6 A. 488=4 A.W.N. (1884) 179.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

HAFIZ AHMAD AND OTHERS (*Defendants*) *v.* SOBHA RAM AND ANOTHER (*Plaintiffs*).* [27th June, 1884.]

Pre-emption—Suit to enforce a right of pre-emption—Appeal by purchaser—Court-fee—Act VII of 1870 (*Court Fees Act*), s. 7 (i) *and* (vi).

Where, in a suit to enforce a right of pre-emption, a decree was passed against the vendees-defendants, and they appealed from the same on the grounds that they were entitled to receive from the plaintiffs-pre-emptors a sum larger than that found by the Court of first instance to have been the purchase-money, and also that the plaintiffs had estopped themselves from asserting the right by [489] refusing to purchase,—*held* that the nature of the suit was not changed in appeal, and that, on the contrary, the subject-matter of the dispute between the parties was the right of pre-emption, the value of which, for the purposes of court-fee,

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* Second Appeal No. 1157 of 1883, from a decree of A. F. Millett, Esq., District Judge of Shahjahanpur, dated the 20th March, 1883, modifying a decree of Maulvi Nasr-ulla-Khan, Offg. Subordinate Judge of Shahjahanpur, dated the 27th June, 1882.

(1) 7 W.R. Cr. R. 35.

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was to be determined in manner directed by s. 7, cl. (vi) of the Court Fees Act, VII of 1870. *Ram Lakhan Rai* v. *Bandan Rai* (1), distinguished.

Where an appeal is preferred in a suit for pre-emption, on the ground that the right to pre-empt has or has not been established, as the case may be, no matter what other pleas may be taken, the value of the subject-matter in dispute, for the purposes of the Court Fees Act, must be determined as in terms provided in art. (vi) of s. 7 of the Act.

Where the question in appeal relates solely to the amount to be paid by the pre-emptor, the court-fee should be calculated *ad valorem* on the difference between the amounts alleged as the sale-price on the one side and the other.

[Appl., 2 O.C. 87 (90); R., 9 O.C. 153 (154) (F.B.).]

THIS was a reference to BRODHURST, J., under s. 5 of the Court Fees Act, which was ordered by him to be laid before a Divisional Bench. It appeared that the plaintiffs in a suit to enforce a right of pre-emption came into Court, alleging that the amount entered in the sale-deed as the price of the property, *viz.*, Rs. 2,000, was not the real price of the property, but that the real price was Rs. 1,216. The vendees-defendants set up as a defence that they had purchased the property after it had been offered to, and refused by, the plaintiffs; that they had actually paid Rs. 2,000 for the property, and also a further sum of Rs. 1,155-3-3 to a mortgagee; and that the plaintiffs were not entitled to take the property without payment of both these sums, as also of a sum of Rs. 30 paid by the defendants for the expenses of the conveyance to them of the property. The Court of first instance (Subordinate Judge) held that it was not proved that the property had been offered to, and refused by, the plaintiffs; that it was proved that the defendants had actually paid Rs 2,000 for the property; that it was proved that the defendants had paid Rs. 1,155-3-3 to a mortgagee of the property, but that they were not entitled to receive this sum from the plaintiffs, as it could not be considered a part of the purchase-money; and that it was not proved that the defendants had expended Rs. 30 on the conveyance of the property. The Court accordingly gave the plaintiffs a decree for possession of the property on payment of Rs. 2,000. The defendants appealed from this decree to the District Judge, on the ground that they were entitled to receive from the plaintiffs Rs. 1,155-3-3 over and [490] above the amount found by the Court of first instance to be the purchase-money, and that it was proved from the evidence that the plaintiff had refused to purchase. They paid on the memorandum of appeal court-fees computed according to s. 7 (vi), Court Fees Act 1870, prescribing the court-fee payable in a suit to enforce a right of pre-emption. The question raised by the reference was, whether the efendants should have paid on the memorandum of appeal in the lower appellate Court an *ad valorem* fee on Rs. 1,155-3-3, or whether they, in computing the court-fee as they had done, had properly computed it. In the office report it was urged that the nature of the suit was changed in appeal, and that therefore an *ad valorem* fee on Rs. 1,155-3-3 was payable.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the defendants.

The Court (STRAIGHT, Offg. C.J., and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—The appeal of the defendants from the decision of the Subordinate Judge, was not confined merely to his

(1) Legal Remembrancer, H.C. Series, 162.

1884 JUNE 27. — APPELLATE CIVIL. — 6 A. 488 = 4 A.W.N. (1884) 179.

disallowance of the Rs. 1,155-3-3 alleged by them to be chargeable to the plaintiffs, as part of the consideration they should be called upon to refund, but assailed their capacity to assert their right of pre-emption at all on the ground that they had estopped themselves from doing so by refusing to purchase. We do not agree with the office report, therefore, that the nature of the suit changed in appeal; on the contrary, the subject-matter of the dispute between the parties was the right of pre-emption, the value of which was to be determined in manner directed by s. 7, cl. (vi) of the Court Fees Act. We are referred by the Treasury Officer to a ruling of PEARSON and STRAIGHT, JJ.—*Ram Lakhan Rai* v. *Bandan Rai* (1), but there the question in appeal was simply whether the appellant was bound to pay so much money, and the right to pre-empt was not impeached. It is therefore inapposite to the present question. We are of opinion that where an appeal is preferred in a suit for pre-emption, on the ground that the right to pre-empt has or has not been established as the case may be, no matter what other pleas may be taken, the value of the subject-matter in dispute, for the purposes of the **[491]** Court Fees Act, must be determined as in terms provided in art. (vi) of s. 7 of the Act. But when the question in appeal relates solely to the amount to be paid by the pre-emptor, then we think that it should be calculated *ad valorem* on the difference between the amounts alleged as the sale-price on the one side and the other.

In reply to this reference we would therefore say that there was no deficiency in the fee paid by the defendants as appellants in the lower appellate Court.

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6 A. 491 = 4 A.W.N. (1884) 251 = 9 Ind. Jur. 119.

APPELLATE CRIMINAL.

Before Mr. Justice Straight, Offg. Chief Justice.

QUEEN-EMPRESS *v.* MATHURA DAS AND OTHERS. [27th June, 1884.]

Act XLV of 1860 (*Penal Code*), s. 111—*Abetment—Knowledge of abettor—Probable consequence of abetment.*

M and *C* were proved to have connived at a robbery in which excessive violence was used, resulting in the death of the persons robbed. The Sessions Judge convicted *M* and *C* of abetment of murder, on the ground that the death was "a probable consequence of the intention known and abetted" by them.

Held that the test of guilt in charges of abetment must always be whether, having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one which, according to ordinary experience and common-sense, the abettor must have foreseen as probable; and that, having regard both to the strictness of the tests which should be applied to the interpretation of a penal statute, and especially of a section such as s. 111 of the Penal Code, and also to the necessary difficulty of questions as to the state of a man's mind at a particular moment, it could not, in the present case, be said that, because the accused knew of and connived at the intended robbery, they must be presumed to have foreseen that such excessive violence as was used was probable.

[R., U.B.R. (1897—1901) 249 (251).]

IN this case, three persons, Pheran Singh, Mathura Das, and Chatarjit were tried and convicted by the Sessions Judge of Jhansi, the first under s. 302 of the Penal Code, of murder, and the two latter, under

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(1) Legal Remembrancer, H.C. Series, 162.

1884 JUNE 27. — APPELLATE CRIMINAL. — 6 A. 491 = A.W.N. (1884) 251 = 9 Ind. Jur. 119.

ss. 109-302 of abetment of murder. The murdered persons were one Hira Singh and his servant Basora, and it was proved that, on the 29th January, 1884, Hira Singh came to Jhansi, and that, on the 31st January, he was paid from the public Treasury the sum of Rs. 196, which had been decreed to him against the accused Mathura Das, under the Jhansi Encumbered Estates Act (XVI of 1882), Mathura Das having obtained a loan [492] from Government under that Act. It was also proved that Mathura Das came to Jhansi with one Gajraj Singh on the 29th January, and stayed at the same place as the deceased. On the next day, Pheran Singh and two men named Jhangi and Lalli, and also one Musammat Nai Bahu, came to Jhansi, and stayed at the house of Chatarjit, accused No. 3, who was the father of Jhangi.

Hira Singh and Basora, left Jhansi on the morning of Friday the 1st February, 1884, and, on the 2nd February, they were found lying dead in a field at a distance of some twenty-five miles from Jhansi.

On the 4th February, Mathura Das was arrested at the place where the murder had occurred, and on him was found a purse containing a considerable sum of money. On the 5th February, he made a statement which was taken down in the presence of the tahsildar, and which was duly certified to have been freely made. In this statement, Mathura Das admitted that he had known of a design on the part of Jhangi, Lalli, and Pheran Singh to rob Hira Singh, that he gave them information of the departure of the deceased from Jhansi with the money, that he arranged with them that they should return to Jhansi after the robbery in order to divide the spoil, that they did return, and that he took his share of the money. It was proved that Mathura Das and Chatarjit, on Sunday morning, the 3rd February, changed a considerable sum of money from Government rupees to rupees of a kind used in their village Evidence was given by Musammat Nai Bahu that, immediately after arriving at Jhansi, Pheran Singh was sent to fetch Mathura Das, and that the five men, *i.e.*, Mathura Das, Pheran Singh, Jhangi, Lalli and Chatarjit had a conversation which she did not overhear. She further stated that, on Friday the 1st February, Pheran Singh, Jhangi and Lalli left together at about noon, and returned next day at the same hour, but that Mathura Das remained, and was in Jhansi on the Friday evening. Gajraj Singh also deposed that he met Mathura Das just outside the city at sunrise on the morning of Saturday, the 2nd February.

The learned Sessions Judge was of opinion that, having regard to the evidence of Nai Bahu and Gajraj Singh, the accused Mathura Das could not have been present at the scene of the murder nor [493] actually participated in the crime. Upon the rest of the case, the learned Judge observed as follows:—"Mathura Das has admitted, both before the tahsildar and before the Magistrate, that he knew of the design to rob Hira Singh, and that he shared in the proceeds of the robbery. The latter fact is confirmed by the discovery of a large sum of money on his person (he having only a few days before received the assistance of Government as an insolvent to redeem his land), and by the evidence of the money-changers who changed his Government rupees into those in use in his village.........Mathura Das is, on his own showing, guilty of the offence of abetment of murder, since the murder was a probable consequence of the intention known and abetted by him."

Upon the case of Chatarjit, accused No. 3, the learned Judge observed:—"The evidence against Chatarjit consists mainly of the statement of Nai Bahu, and of the fact of his having changed the money acquired

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by murder. Nai Bahu states that, on two occasions, once before the murder and once after it, Chatarjit and the other four men had long conversations which she was not permitted to hear. He is the father of Jhangi, who has absconded. He denied having changed any money for Mathura Das until the fact was proved against him, and, after admitting it, gave a very lame explanation of the fact. The three men who were engaged in the murder were evidently housed by him before the murder, and returned to him after it, and he shared in their spoil. Pheran Singh, in his first confession, stated that Chatarjit was a party to the original plot, and there seems no reason why he should have gratuitously mentioned his name. On these grounds I believe that Chatarjit also is guilty of abetment of the murder."

The accused appealed to the High Court. They were not represented by counsel.

The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

JUDGMENT.

STRAIGHT, Offg. C.J. (after holding that Pheran Singh had rightly been convicted of murder, continued) :—With respect to the other two men, Mathura Das and Chatarjit, it is not so easy to arrive at a conclusion, and I entertain doubts, of which they are entitled to the benefit, as to there being sufficient evidence to warrant their conviction for abetment of the offence under s. 302 of [494] the Code. As to Mathura Das, I concur with the Judge that there is no reliable proof to establish his presence at, and actual participation in, the killing of the two unfortunate deceased; and I agree with him that the testimony of Nai Bahu and Gajraj Singh goes far to show it was impossible that he could have been at the spot when the crime was committed. With regard to Chatarjit, it was not suggested or charged against him by the prosecution that he had a direct hand in the murders. Indeed, there is not a particle of evidence to show that he had. The question then that I have to ask myself with respect to those two last-mentioned accused, Mathura Das and Chatarjit, is: Can I properly adopt the Judge's view that both these persons must be held guilty of abetment of murder, since the murder was a probable consequence of the intention known and abetted? I do not think I can, and I will explain why. It seems to me that the Judge has scarcely appreciated how close and strict are the tests that should be applied to the interpretation of a penal statute, and specially of a section such as s. 111 of the Penal Code, for, construed loosely, it is difficult to see to what limits it might not be stretched. Now, it is clear law that if one man instigates another to perpetrate a particular crime, and that other, in pursuance of such instigation, not only perpetrates that crime, but, in the course of doing so, commits another crime in furtherance of it, the former is criminally responsible as an abettor in respect of such last-mentioned crime, if it is one which, as a reasonable man, he must, at the time of the instigation, have known would, in the ordinary course of things, probably have to be committed in order to carry out the original crime. For example, if *A* says to *B* :—"You waylay *C* on such and such a road and rob him, and if he resists, use this sword, but not more than is absolutely necessary;" and *B* kills *C*, *A* is responsible as an abettor of the killing, for it was a probable consequence of the instigation. To put it in plain terms, the law virtually says to a man :—"If you choose to run the risk of putting another in motion to do an unlawful act, he, for the time being, represents you as much as he does himself; and if, in order

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to effect the accomplishment of that act, he does another which you may fairly from the circumstances be presumed to have foreseen would be a probable consequence of your insti-[495]gation, you are as much responsible for abetting the latter act as the former." In short, the test in these cases must always be whether, having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one which, according to ordinary experience and commonsense, the abettor must have foreseen as probable. The determination of this question as to the state of a man's mind at a particular moment must necessarily always be a matter of serious difficulty, and conclusions should not be formed without the most anxious and careful scrutiny of all the facts. Approaching the cases of Mathura Das and Chatarjit in this spirit, and having perused and re-perused the whole of the evidence more than once, I find it impossible to say that it is so cogent and convincing as to leave no room for doubt as to the guilt of these two persons of the abetment of the murder of Hira Singh and Basora. I do not think it follows as a necessary consequence that because they knew of, and connived at, the intended robbery, they must be presumed to have foreseen that such excessive violence as was used was probable, and though they must have known it was likely that some force would have to be resorted to, I cannot say there are any satisfactory materials from which I ought to infer that they must have known that the employment of such force would be likely to result in death or even in bodily injury likely to cause death. At any rate the matter is left sufficiently doubtful to make it incumbent upon me to give them the benefit of the doubt.

[The learned Judge directed that the record should be amended so as to alter the convictions of Mathura Das and Chatarjit under ss. 109-302 of the Penal Code, and the sentences of transportation for life passed upon them, to convictions under ss. 109-392, with sentences of twelve years' transportation and ten years' rigorous imprisonment respectively.]

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6 A. 495 = 4 A.W.N. (1884) 215.

CRIMINAL REVISIONAL.

Before Mr. Justice Duthoit.

QUEEN-EMPRESS *v.* SALIG RAM. [27th June, 1884.]

Act V of 1861, *s.* 29—*Police officer withdrawing from the duties of his office without permission—Police officer overstaying leave.*

A Police officer obtained leave of absence for one month, a substitute being appointed, and overstayed his leave twenty-nine days.

[496] *Held* that such absence without leave did not amount to "withdrawal from the duties of his office without permission," within the meaning of s. 29 of Act V of 1861.

[D., Rat. Un. Cr. C. 279.]

THIS was a case referred to the High Court for orders under s. 438 of the Criminal Procedure Code, by the Sessions Judge of Cawnpore. The accused, Salig Ram, was a constable. He obtained leave of absence for one month, from the 1st April, 1884, a substitute being appointed, and overstayed his leave twenty-nine days. For this he was sentenced by the Deputy Magistrate of Fatehpur to one month's rigorous imprisonment under s. 29 of Act V of 1861 for "withdrawing from the duties of his office without permission." The Sessions Judge, in making the reference,

1884 June 27. — Criminal Revisional. — 6 A. 495 = 4 A.W.N. (1884) 215.

observed: "I cannot believe that it was ever intended that cases of this description should fall under s. 29. When a man simply overstays his leave, having at the same time provided a substitute, it seems to me hardly correct to say that he is withdrawing from the duties of his office without permission. The object of the law I imagine to be simply to guard against any prejudice to the public interest that may arise from a police officer's sudden desertion of his post, or abandonment of his duties, and it is putting a most harsh construction upon it to consign a man to imprisonment under such circumstances as this case seems to reveal."

JUDGMENT.

Duthoit, J.—The Sessions Judge was right in making this reference. S. 29 of Act V of 1861 may be looked upon as the "Articles of War" for the police force of these Provinces. But the *Police Manual* which is issued by the authority of Government (ed. 1863, p. 20), and the Orders of the Inspector-General of Police, dated the 27th October, 1866 (*Police Gazette*, 1st December, 1866, p. 164) do not treat as "withdrawal from service" such absence as that with reference to which the accused in this case has been convicted. The *Police Manual* (*loc. cit.*) says:—"Absence without leave is punishable by dismissal or forfeiture of pay. If such leave, however, is taken with design to further commission of crime, or to frustrate justice, the absentee is punishable under the Penal Code, or under s. 29, Act V of 1861." And para. 2 of the Inspector General's Circular runs thus:—"In case of a man to whom leave has been granted overstaying his leave a few days, if he can give good and sufficient excuse, it will be sufficient to fine him to the [497] extent of the number of excess days' pay he was absent. Should he not be able to give sufficient excuse, he should be fined double pay. If the number of days exceeds one month, and he has given no notice by writing of his inability to join, he should be treated as a deserter."

The conviction and sentence are set aside. Let the record be returned.

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6 A. 497 = 4 A.W.N. (1884) 186 = 9 Ind. Jur. 82.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

Ashraf Ali (*Defendant*) *v.* Jagan Nath and others (*Plaintiffs*).*
[30th June, 1884.]

Holi—Muharram—Suit to restrain the use for tazias of land used for the purposes of the Holi—Cause of action—Easement—Customary right.

A, a Muhammadan, purchased a house adjacent to a piece of waste land, on which, after such purchase, he caused a tazia to be erected, at the time of the Muharram. *J* and others, Hindus, instituted a suit against *A*, alleging in their plaint that, for a long time previously, they had been in the habit going upon the land at the time of the Holi festival, for the purpose of burning the Holi and celebrating the ceremonies incident thereto, and praying that the defendant "be restrained from improper interference, and that the plaintiffs be put in possession, by maintaining the observance of the Holi rights, according to the ancient

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* Second Appeal No. 1141 of 1883, from a decree of A. F. Millet, Esq., District Judge of Shahjahanpur, dated the 1st May, 1883, modifying a decree of Maulvi Abdul Ghafur, Munsif of Tilhar, dated the 14th March, 1883.

usage, on the land." It was found that the plaintiffs had, for a period of twenty years prior to the institution of the suit, exercised the right of going on to the land at the time of the Holi festival, without interruption or interference. It was also proved that neither the plaintiffs nor the defendant had any proprietary right in the land, and that it belonged to the zamindars of the *kasba*, who did not appear to object to its use by the defendant and other Muhammadans at the time of the Muharram, for the erection of tazias.

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Held that the plaintiffs' claim appeared to be a claim to a right by custom of the nature described in *Mounsey* v. *Ismay* (1) and *Abbot* v. *Weekly* (2), and could not strictly be regarded as for an easement, the right not being set up in respect of any dominant tenement to which it was appurtenant, over a servient tenement subject to it.

Held further, that inasmuch as the nature of the right claimed was to come on the land for a few days at one period of the year, it by no means followed that the plaintiffs were entitled to object to the defendant's use of the land at [498] another period; and that, looking to the extent and nature of the said right, and to the form in which the plaint was shaped, the laying of a tazia upon the land at the Muharram could not be held to be any interference with such right sufficient to afford a cause of action on which to come into Court.

[R., 12 A.L.J. 963 = 26 Ind. Cas. 122 (123).]

THIS was an appeal from a decision of the Judge of Shahjahanpur, passed on the 1st May, 1883, by which he modified a decree of the Munsif of Tilhar, in favour of the plaintiffs-respondents, of the 14th March preceding. The allegations upon which the plaintiffs came into Court were, in substance, that a plot of land, measuring 33 yards in length from north to south, and 27 yards 8 giras in breadth, or 970 square yards 8 giras in area, had, for a long time prior to the institution of the suit, been used at the time of the Holi festival for burning the Holi and celebrating the ceremonies incident thereto, by the inhabitants of mohalla Hindu Patti in the town of Tilhar; that adjacent to such land, and upon the north thereof, there was a house which, on the 19th July, 1880, had been purchased by the defendant Ashraf Ali, and that, after such purchase by him, the Holi had been burnt upon the land and the ceremony celebrated without objection on his part; that on the 21st November, 1882, Ashraf Ali and the other defendants "caused a tazia to be laid for the first time on the land held and used from of old by the Hindus, and this they did without any right whatever, in order to prevent the performance of the old rites. They caused the earth which had been burnt to be removed and replaced it with new earth, and they are now interfering with the plaintiffs' possession. The plaintiffs, in order to prevent the improper interference on the part of the defendants, brought an action in the Criminal Court, but that Court, holding that the placing of the tazias would not inconvenience the plaintiffs, struck off their complaint on the 23rd December, 1882. But the placing of the tazias is likely to give rise to disturbances at any time, and may, under certain contingencies, prevent the performance of the old established rites of the Holi. The cause of action accrued on the 21st November, 1882, the day on which the placing of the tazias commenced." Upon these grounds the plaintiffs prayed the following relief:—"That the defendants be restrained from improper interference, and that the plaintiffs be put in possession, by maintaining the observance of the Holi rights, according to the ancient usage, on the land measuring 970 square yards 8 giras, as before described." All the defendants filed written statements, [499] but the only one which need here be referred to is that of the defendant Ashraf Ali, which was to the effect that "tazias had been placed and Muharram

(1) 34 L.J. Ex. 52. (2) 1 Levinge 176.

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meetings held on the land for upwards of twenty years; that such land belonged to his house, and was the chabutra thereof; that the Holi never had been burnt on such land, but on the roadway; that he was the owner of such land and the plaintiffs had no right thereto; that he had not interfered with the land on which the Holi was burnt; and that they had no cause of action." The Munsif found that the "chabutra lying to the north of the door of the defendant Ashraf Ali's house has been used for the Holi ceremony, and that therefore the plaintiffs' community has acquired a right over it. They have, however, no right whatever to the portion of it that lies immediately in front of the door or towards the south." He further found that the tazias had never been placed upon that portion of the land which was in the habit of being used by the plaintiffs for the Holi; but from personal inspection of the spot he came to the conclusion that earth had been thrown by the defendant Ashraf Ali upon such portion; that this "was resorted to solely with a view to future encroachment, and that the plaintiffs had thus been given a cause of action against him." The Munsif also held that the plaintiffs were entitled to possession of that portion of the land which lay to the north of the door of Ashraf Ali by removal of the earth thrown thereon. All the defendants with the exception of Ashraf Ali were exempted. Upon these findings the Munsif passed a decree "for so much of the land of the chabutra No. 1229, situate in Hindu Patti, as lies to the north of the defendant Ashraf Ali's door facing the east. That the plaintiffs are to set fire to the Holi at a distance of four yards from the wall of the defendant's house; that the rest of their claim is dismissed."

From this decision both parties appealed: the plaintiffs as to the part of their claim dismissed, the defendant as to that part of it which had been decreed. The Judge found, in disagreement with the Munsif, that the plaintiffs had used the whole of the area of the land to the east of the defendant Ashraf Ali's house for the Holi festival; that they had failed to establish any right to an exclusive use of the land at all times of the year; and "except in so far at most as the *taziadari* may fall at the same time as the [500] Holi, I do not see that the plaintiffs make out any case at all for interference with the defendant's use of the land for tazias." He was further of opinion that the "lower Court should have passed an order preventing the use of the plot for tazias at the time of the Holi." The Judge did not determine any question as to the proprietorship of the land; but in the result he declared that the "plaintiffs are entitled to use the whole of the plot in dispute, No. 1229 of the *khaisra abadi*, for the celebration of the Holi, the fire being placed not less than four yards from defendant's house, and it is further declared that at the time the land is being used for celebration of the Holi, the defendants have no right to place or keep tazias on any part of the plot."

From this decree the present appeal was preferred by the defendant Ashraf Ali, and cross-objections thereto were filed on behalf of the plaintiffs.

The contentions for the appellant in substance were that the right set up by the plaintiffs-respondents was not an easement, and that their plaint disclosed no cause of action; that a relief had been granted them which they had not asked; and that the Judge should have determined the appellant's proprietary claim to the land. The plaintiffs objected that the Judge should have ordered that no tazias should be placed upon the land in question at any time of the year. The case finally came on for

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hearing before a Division Bench consisting of STRAIGHT and TYRRELL, JJ., who, under an order of the 20th March, 1884, remanded certain issues under s. 566 of the Code for findings. These need not be set out at length, but, in reply thereto, the Judge found that "the plaintiffs do not profess to represent the Hindu community of the entire *kasba*, but they do profess to represent the Hindu community of the whole Hindu Patti mohalla; that the defendant Ashraf Ali had failed to prove his proprietary title; and that the plaintiffs had, for a period of twenty years prior to the institution of the suit, exercised the right of going on to the land at the time of the Holi festival without interruption or interference." To these findings objections were filed by the defendant Ashraf Ali.

Mr. *Amir-ud-din*, for the appellant.

Pandits *Ajudhia Nath* and *Nand Lal*, for the respondents.

[501] The Court (STRAIGHT, Offg. C.J. and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C. J. (after stating the facts, and observing that the findings of the lower appellate Court must be accepted, so far as they determined the questions of fact remitted, continued):—

We now proceed to deal with the case as it presents itself to us, and we cannot help saying it appears to us that this litigation might well have been spared. For if any rights possessed by the plaintiffs had been infringed or seriously interfered with by the defendant, the magisterial authorities could have been invoked at the proper time to exercise their powers, and they would, on sufficient cause being shown, have taken all necessary steps to protect the former. It has taken much space and time to set out the circumstances of the case and the course of litigation, but the matter now presents itself in the following simple form:—Neither the plaintiffs nor the defendant have any proprietary title in respect of the land in suit, and the right of the former as claimed by them in their plaint was limited to a claim to go thereon at the time of the Holi festival for the purpose of burning the Holi. We assume—and such now appears to be the combined effect of the findings below—that the land is waste, which belongs to the zamindars of the *kasba*. The question has not been raised by the defendant as to the competency of the plaintiffs to maintain the suit on behalf of the whole of the Hindus of mohalla Hindu Patti, and we are therefore not called upon to determine that point. We are so far with the appellant, that we think the claim the plaintiffs put forward cannot, strictly speaking, be regarded as for an easement, and as such governed by the law relating to easements: for the right which they assert cannot be said to be set up in respect of any dominant tenement to which it is appurtenant over a servient tenement, which is subject to it. On the contrary, it appears to be a right by custom of the description asserted in the case of *Mounscy* v. *Ismay* (1), and in *Abbot* v. *Weekly* (2). It is regarding it in this light that we must look to see whether upon the face of the plaint or the findings of fact recorded by the lower Courts, we can properly hold that the laying of a tazia on the land on the 21st November, 1882, and the causing earth which had been "burnt to [502] be removed and replaced with new earth," constituted a cause of action upon which the plaintiffs were entitled to maintain a suit.

(1) 34 L.J. Ex. 52. (2) 1 Levinge 176.

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82.

Now it is to be observed that the zamindars, who are the owners of this waste land, and who are most injuriously affected if any encroachment thereon or any serious interference therewith by the defendant has taken place, are no parties to the suit, nor, as far as we are aware, have they offered any objection to his proceedings. For anything that appears to the contrary, they do not object to the defendant and other Muhammadans using the land at the time of the Muharram for the erection of tazias.

Seeing, then, that the nature of the right asserted by the plaintiffs is to come on the land for a few days at one period of the year, it certainly by no means follows that they are entitled to object to the defendant using it at another. For it is not asserted in the plaint, nor is there any proof upon the record, that by the act of the defendant, which is charged as affording the cause of action, the land had been thereby desecrated and rendered incapable of use by the plaintiffs. On the contrary, the relief sought was in substance, that the plaintiffs' right to celebrate the Holi be protected by maintaining their possession of the land for that purpose, and that the defendant be restrained from improperly interfering therewith.

Looking to the extent and nature of the right asserted by the plaintiffs and proved, and to the form in which the plaint is shaped, we cannot hold that the laying a tazia upon the land on the 21st November, 1882, was any interference with such right sufficient to afford a cause of action on which to come into Court. But as the Munsif, who had the advantage of a personal inspection of the locality, seems to have thought that the defendant Ashraf Ali had made some encroachment on the land, a point upon which the Judge has expressed no opinion, we are reluctantly compelled to remit the following issues for findings under s. 566 of the Code:—

Did the defendant place fresh earth on the land in such a way as to present an obstruction; what was the form and size of such obstruction; was it capable of being easily removed; and, if maintained until the period of the Holi festival in 1883, was such fes-**[503]**tival celebrated on the land; and if it was, did the presence of the earth interfere with the plaintiffs' use of the land while performing the Holi ceremonies according to custom; if such festival was not celebrated there, would it, if it had been?

The findings when recorded will be returned into this Court within ten days for objections.

Issues remitted.

6 A. 503=4 A.W.N. (1884) 176.

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6 A. 503=4 A.W.N. (1884) 176.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

BITHAL DAS AND OTHERS (*Defendants*) v. HARPHUL (*Plaintiff*).*
[30th June, 1884.]

Muafidar—Government revenue, assignee of—Mahal not charged where the revenue is assigned—Act XII of 1881 (*N.-W.P. Rent Act*), *ss.* 93 (*i*), 171, 177—*Act XIX of* 1873 (*N.-W. P. Land-Revenue Act*), *s.* 167.

Maufidars or assignees of Government revenue are not in precisely the same position as Government itself would have been, and possessed of identical rights and powers, in respect of the recovery of arrears of revenne due to them. An arrear of assigned revenue is not a prior charge on the property in respect of which it is payable, against all the world. The effect of the provisions of ss. 93 (i), 171 and 177 of the N.-W. P. Rent Act (XII of 1881) is to show that what the Legislature contemplated was to place the revenue assigned to a muafidar upon the same footing as rent; that therefore, in order to recover an arrear of revenue, a muafidar must bring a suit in the Revenue Court: that, upon obtaining a decree, he may apply for execution against the immoveable property of the judgment-debtor; that, where such property is a mahal, the Collector may make certain arrangements for discharge of the debt; and that, failing such arrangements, such immoveable property may be sold, subject to any incumbrances there may be upon it.

[R., 23 A. 5 (7)=A.W.N. (1898) 73.]

THE defendants in this suit were the muafidars of a village called Artoli, of which one Har Narain was a zamindar. On the 19th February, 1880, they obtained a decree against Har Narain for arrears of revenue for 1286 fasli, and applied for the sale of the judgment-debtor's rights in the village. The plaintiff in this suit, one Harphul, who had purchased these rights at a sale in execution of a decree against Har Narain, subsequently to the passing of the defendants' decree, objected. His objection was disallowed, and he paid the amount of the defendants' decree into Court, and brought the present suit to protect the property from sale in execution of that decree, and to recover the money he had paid. The decree in execution of which the plaintiff had purchased was one enforcing a lien created prior to 1268 fasli, the year to which the decree of the [504] defendants related. The defendants set up as a defence to the suit that their decree being one for arrears of revenue, the payment thereof was a charge on the rights of Har Narain in Artoli, and that such charge was entitled to priority over the lien enforced by the decree in execution of which the plaintiff had purchased. The Court of first instance (Munsif) disallowed this contention, and gave the plaintiff a decree. On appeal, the Subordinate Judge affirmed the decree, observing that "the law makes a distinction between a sale for arrears of revenue due to Government and a sale for arrears of revenue due to a muafidar. In the former case, under s. 167 of the Land Revenue Act, the property is sold free of all incumbrances. In the latter case, under s. 177 of the Rent Act, it is sold subject to the incumbrances that may exist on it. A charge on the estate for revenue due to a muafidar, has, therefore, no priority over incumbrances which may already exist on the estate from a prior date."

* Second Appeal No. 1607 of 1883, from a decree of Babn Pramoda Charan Banarji, Subordinate Judge of Agra, dated the 1st August, 1883, affirming a decree of Maulvi Nazar Ali, Munsif of Mahaban, dated the 26th March, 1883.

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The defendants appealed to the High Court, raising the same contention as they raised in the lower Courts.

Mr. *T. Conlan* and Munshi *Hanuman Prasad*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Pandit *Nand Lal*, for the respondent.

The Court (STRAIGHT, Offg. C. J., and BRODHURST, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—The only question raised by the pleas before us in appeal is, whether the defendants at the time of the plaintiff's purchase of Har Narain's share in Mauza Artoli had a lien on such share for the arrears of revenue in respect of which they had obtained the decree of the 19th February, 1880? In other words, were they as assignees of the revenue of such share in precisely the same position as Government itself would have been, and possessed of identical rights and powers? We concur with the learned Subordinate Judge that they were not, and we approve the reasoning by which he arrives at that conclusion. Clause (*i*), s. 93 of the Rent Act, 1881, in terms provides for "suit by muafidars or assignees of the Government revenue for arrears of revenue due to them as such," while no provision of any kind is to be found in the Revenue Act, XIX of 1873, empowering them to resort to the summary machinery by which Government is authorized to recover **[505]** an arrear of revenue from a defaulter. It is easy to understand why it would be most inexpedient to entrust any private person or number of persons with such powers as those which are vested in the Collector under Chapter V of the Revenue Act, and we do not think it was ever intended to do so. The presence of cl. (*i*) of s. 93 in the Rent Act, which provides for "suits by muafidars or assignees of the Government revenue for arrears of revenue due to them as such," conveys to our minds that what the Legislature contemplated was, to place the revenue assigned to a muafidar upon the same footing as rent, and to make it recoverable by the ordinary process of a suit in the Revenue Court, with subsequent enforcement of the decree, if obtained, in the manner provided in Chapter VII of the Act. If this be the correct view, then the notion of an arrear of such assigned revenue being a prior charge on the share in respect of which it was payable, against all the world, seems effectually disposed of by the language of ss. 171 and 177 of that Act. S. 171 provides that "in the execution of any decree for the payment of arrears of rent or *revenue*, or of money, under this Act, if satisfaction of the judgment cannot be obtained by execution against the person or moveable property of the debtor, the judgment-creditor may apply for execution against any immoveable property belonging to such debtor, &c." S. 177 says:—"If it appear to the Board that the debt cannot be recovered under s. 174, or if the sale of the property appear to it advisable on other grounds, it shall order the property to be sold, in which case the sale shall be made under the rules in force for the sale of land for arrears of land-revenue, *but without prejudice to the incumbrances* (if any) to which such property may be subject." This latter provision is the direct opposite of that to be found in s. 167 of Act XIX of 1873, which declares that where the Collector sells a patti or mahal for an arrear of Government revenue, "it shall be sold free of all incumbrances." The effect of the provisions of the Rent Act above set out appears to us to be, that in order to recover an arrear of revenue a muafidar must bring a

suit in the Revenue Court; that, upon obtaining a decree, he may apply for execution against the immoveable property of the judgment-debtor; that where such property is a mahal, the Collector may make certain arrangements for discharge of the debt; that, failing such arrangements, such immove-[506]able property may be sold subject to any incumbrances there may be upon it.

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We consider it unnecessary to enter into the matter at greater length, and, approving of the decision of the Court below, we dismiss the appeal with costs.

Appeal dismissed.

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6 A. 506 = 4 A.W.N. (1884) 177.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

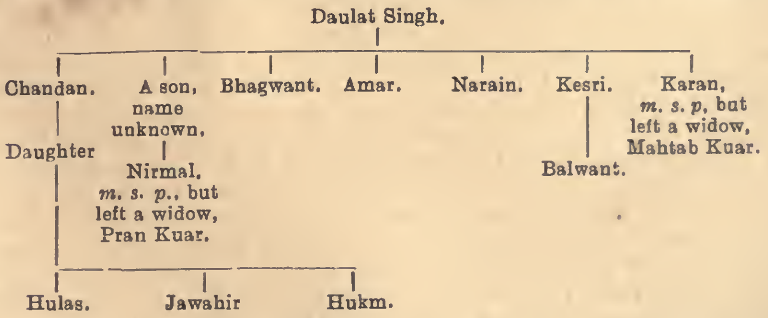
HUKM SINGH AND OTHERS (*Defendants*) *v.* ZAUKI LAL (*Plaintiff*).* [30th June, 1884.]

Civil Procedure Code, s. 13—Vendor and purchaser—Purchase "pendente lite"—Res judicata.

Certain persons, claiming by right of inheritance to *C*, sued *B*, *N*, *A*, *K*, and others for possession of certain immoveable property, and, on appeal to the High Court, in August, 1876, their claim was decreed in full. In the course of the litigation which ended in that decree, *Z* purchased certain immoveable property from *B*, *N*, *A*, and *K*. *Z* was subsequently dispossessed of such property in execution of the decree of August, 1876. He thereupon sued the holders of that decree for possession of the same, alleging that his vendors had inherited it from *D*, that the figures of the total of *C*'s property given in the plaint in the former suit were erroneous, that the property now in suit was not affected by that decree, and that he had been improperly dispossessed of it. It appeared that there was in fact a mistake in the total of the extent of *C*'s property as stated in the plaint in the former suit.

Held that the plaintiff, having purchased *pendente lite*, was bound by the decree of the High Court against the persons through whom he claimed, that the claim in the former suit having been decreed in full, the property now in suit was then decreed to the present defendants, and that the claim of the plaintiff to go behind that decree could not be entertained.

THE subjoined pedigree will show the relative positions of the various persons to whom reference is necessary in stating the facts of the case:—



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* Second Appeal No. 1482 of 1883, from a decree of Mirza Abid Ali Khan, Subordinate Judge of Shahjahanpur, dated the 7th June, 1883, affirming a decree of Maulvi Muhammad Jafar Husain, Munsif of Sahaswan, dated the 20th March, 1883.

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[507] Chandan died in 1866, and was succeeded by his widow, Jasodha. She died in 1872, and, soon after her death, disputes arose as to the succession to Chandan's estate. On the 8th September, 1875, Hulas, Jawahir and Hukm, together with Balmukand, purchaser of one-third of the property sought to be recovered, brought, in the Court of the Subordinate Judge of Bareilly, against Bhagwant, Amar, Narain, Balwant, Pran Kuar, and Mahtab Kuar, a suit for the establishment of their right by inheritance to, and for possession of, (*a*) certain ancestral, and (*b*) certain self-acquired property left by Chandan. The property was described as situated in ten villages; but the only property to which the present suit related was that situate in mauza Parauli. That property was thus described in the plaint:—

(*a*) ANCESTRAL SHARE.					(*b*) SELF-ACQUIRED SHARE.					TOTAL.				
Biswas.	Biswansis.	Kachwansis.	Nanwansis.	Taswansis.	Biswas.	Biswansis.	Kachwansis.	Nanwansis.	Taswansis.	Biswas.	Biswansis.	Kachwansis.	Nanwansis.	Taswansis.
	2	4	8	6¾	1	19	16	17	9½	1	2	4	8	6¼

The Subordinate Judge, on the 24th November, 1875, decreed the plaintiffs' claim so far as (*b*) was concerned, and dismissed the rest of it. Details of the property decreed were set out in the decree. The defendants appealed to the High Court against so much of the decree of the Subordinate Judge as was favourable to the plaintiffs, and the plaintiffs filed cross-objections under s. 348, Act VIII of 1859. On the 18th August, 1876, the defendant's appeal was dismissed, and the plaintiffs' objections were decreed by the High Court. In January, 1877, the decree-holders obtained possession, in execution of the decree in their favour of the 24th November, 1875, of the 1 bigha, 19 biswansis, 16 kachwansis, 17 nanwansis, 9½ taswansis, the self-acquired property of Chandan. In 1878 they took out execution of the decree of the High Court for the remaining portion (ancestral) of the property. Execution was resisted by Zauki Lal on the ground that the property of which the decree-holders sought to obtain possession was part of a 14 biswansis, 9 kachwansis, 16 nanwansis, ¼ taswansis share which he [508] had, on the 21st February and the 30th May, 1876, purchased from Bhagwant, Amar, Narain, and Mahtab Kuar, as being their own patrimony, and distinct from Chandan's estate. The Court executing the decree (Subordinate Judge of Bareilly) refused, on the 27th April, 1878, to entertain the objection, on the ground that, although there was plainly a mistake in the total of the extent of Chandan's property as stated in the plaint of the 8th September, 1875, the Court was not competent to go behind the decree, but was bound to deliver possession in accordance therewith. It therefore disallowed Zauki Lal's objection, and directed delivery to the decree-holders of possession of the 8 biswansis, 17 kachwansis, 13 nanwansis, 6¾ taswansis awarded to them by the High Court's decree of the 18th August, 1876. On the 27th April, 1881, Zauki Lal sued Jawahir and Hukm and the heirs of Hulas in the Court of the Munsif of Sahaswan for

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possession of an 8 biswansis, 17 kachwansis, 13 nanwansis, 7 taswansis share in mauza Parauli, on the allegation that the defendants had fraudulently and illegally obtained possession of it in execution of an erroneous decree. The cause of action was stated to have arisen on the 27th April, 1878, on which date the plaintiff's objection to delivery of possession had been disallowed by the Subordinate Judge of Bareilly. This was dismissed by the Munsif of Sahaswan, and by the Subordinate Judge of Shahjahanpur in appeal, on the ground that it was barred by the prohibition of s. 244, Act X of 1877. On second appeal to the High Court it was held (1) that the suit was not so barred.

The suit was now heard on its merits, and the plaintiff Zauki Lal obtained a decree from the Court of the Munsif of Sahaswan, which was affirmed in appeal by the Subordinate Judge of Shahjahanpur.

It was contended in second appeal that the plaintiff's (respondent's) claim was barred by the provisions of s. 13 of the Code of Civil Procedure.

Pandit *Ajudhia Nath*, for the appellants.

Mr. *J. Simeon*, for the respondent.

[509] The Court (STRAIGHT, Offg. C.J., and DUTHOIT, J.) delivered the following judgment:—

JUDGMENT.

DUTHOIT, J.—We are of opinion that the appeal must prevail. The memorandum of appeal from the decree of the Subordinate Judge of Bareilly, dated the 24th November, 1875, was presented on the 21st February, 1876. The respondent therefore purchased *pendente lite*, and is bound by the decree of this Court against the persons through whom he claims. There was clearly a mistake in the figures of the total of Chandan's share in Parauli, as stated in the plaint of the 8th September, 1875; but the decree of the Subordinate Judge of Bareilly, dated the 24th November, 1875, in terms gave to the then plaintiffs (the now defendants-appellants) a decree for 1 biswa, 19 biswansis, 16 kachwansis, 17 nanwansis, 9½ taswansis, and the decree of this Court, dated the 18th August, 1876, affirmed the decree of the Subordinate Judge of Bareilly so far as it decreed the plaintiffs' claim, reversed so much of the decree of the Subordinate Judge as dismissed any portion of the plaintiffs' claim, and decreed the plaintiffs' claim in full. The 8 biswansis, &c., share, possession of which has now been decreed to the respondent before us, was therefore plainly decreed to the appellants by the decree of this Court, dated the 18th August, 1876; by that decree the plaintiff is bound, and his present claim to go behind it cannot be entertained.

The appeal is decreed with costs to the defendants in all the Courts.

Appeal allowed.

(1) 5 A. 94.

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FULL BENCH.

Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood and Mr. Justice Duthoit.

QUEEN-EMPRESS *v.* BABU LAL AND ANOTHER. [30th June, 1884.]

Confession made to a Police officer—Act I of 1872 (*Indian Evidence Act*), ss. 25, 26, 27.

B and *R*, accused of offences under s. 414 of the Penal Code, gave information to the Police which led to the discovery of the stolen property. This information was to the effect that the accused had stolen a cow and calf, and sold them to a particular person at a particular place.

[510] *Held* by the Full Bench (MAHMOOD, J., *dissenting*) that s. 27 of the Indian Evidence Act is a proviso not only to s. 26, but also to s. 25; and that, therefore, so much of the information given by the accused to the Police officer, whether amounting to a confession or not, as related distinctly to the facts thereby discovered, might be proved. *Empress* v. *Kuarpala* (1), dissented from.

Per MAHMOOD, J., that s. 27 of the Indian Evidence Act is not a proviso to s. 25, but only to s. 26; and that, therefore, the statements in question were wholly inadmissible in evidence.

Empress v. *Pancham* (2), referred to by STRAIGHT, Offg. C.J., and MAHMOOD, J.

Per STRAIGHT, Offg. C.J., that where a statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding.

Observations by STRAIGHT, Offg. C.J., as to the mode in which the testimony of witnesses should be recorded in cases where two persons are being tried.

Observations by STRAIGHT, Offg. C.J., and DUTHOIT, J., upon the nature of confessions by accused persons in India, and the circumstances in which such confessions are made.

[F., 11 C. 635 (641); 4 L B.R. 116 (119); 5 L.B.R. 131=11 Cr. L.J. 153=4 Ind. Cas. 1028; R., 10 B. 595=Rat. Un. Cr. C. 285 (286); 14 B. 260 (265); 2 L.B.R. 168; Rat. Un. Cr. C. 245 (249); Rat. Un. Cr. C. 254 (257); 7 P.R. 1916 (Cr).]

THIS case was referred to the Full Bench by OLDFIELD and BRODHURST, JJ. The facts and the question of law which they raised are sufficiently stated in the order of reference as follows:—

"The two accused, Babu Lal and Raghubar, have been convicted of three offences under s. 414, Indian Penal Code. The first had reference to a cow stolen from one Lachman Teli, the second to a cow and calf stolen from one Sukhni, and the third to a goat stolen from one Gobardhan.

They were arrested on the first charge, and gave information to the police which led to the discovery of the stolen property which is the subject of the other charges.

This information is to be found in the deposition of Hafiz ullah, constable, to the effect that they stated that they had stolen the cow and calf, and sold them in mauza Madanpur to one Abdul Rahman, and had stolen the goat in Belupur, and sold it.

The question we refer to the Full Bench is, whether these confessions made to the police officer are admissible in evidence against them under s. 27 of the Indian Evidence Act.

(1) A.W.N. (1882) 225. (2) 4 A. 198.

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We think it desirable to make the reference, as we find a case decided by this Court, reported in *Weekly Notes*, 1882, p. 225, to [511] the effect that such confessions are inadmissible, and we have doubts as to the correctness of the view of the law there taken, which is opposed to other rulings."

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

The accused were not represented.

The following judgments were delivered by the Full Bench:—

JUDGMENTS.

OLDFIELD, J.—S. 27 of the Indian Evidence Act is as follows:—"Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact discovered may be proved;" and the question we have to determine is whether it is intended by the section that information amounting to a confession may be proved when such information is received by a police officer, or only when it is received by some person other than a police officer.

In my opinion, the section refers to information whether received by a police officer or by other persons.

I can find nothing in the language of the section to justify any distinction in respect of the person to whom the information is to be given. The section itself makes no such distinction, which could only be given effect to by adding words to it. S. 25 is to the effect that "no confession made to a police officer shall be proved against a person accused of any offence;" and s. 26, "no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person." And then follows s. 27, which is in the way of a proviso, and appears to me intended to govern both the preceding sections, and to have a general application to information received from an accused person in custody of the police, and to allow proof of information amounting to a confession received from an accused person in custody of the police, whether given to a police officer or not. Had the proviso been intended to be a proviso to s. 26 only, it would not have been put in the form of a separate section, but as part of s. 26.

[512] These sections were embodied in the Indian Evidence Act with some alteration from the Criminal Procedure Code, and, in examining the changes in the sections, I can find nothing to show that the Legislature intended s. 27 of the Indian Evidence Act not to apply to information received by a police officer from an accused person in custody of the police. The sections in Act XXV of 1861 are as follow:—

"148. No confession or admission of guilt made to a police officer shall be used as evidence against a person accused of an offence.

"149. No confession or admission of guilt made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be used as evidence against such person.

"150. When any fact is deposed to by a police officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence."

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It cannot be said that this section will not apply to information received by a police officer.

S. 150 was thus altered by Act VIII of 1869:—"Provided that when any fact is deposed to in evidence as discovered in consequence of information received from a person accused of any offence, or in the custody of a police officer, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered, may be received in evidence."

It will be seen that s. 150, Act XXV of 1861, referred to depositions by a police officer as to a fact discovered by him in consequence of information received from a person accused of an offence, whereas the amended section so far enlarged the proviso as not to restrict its operation to depositions by police officers only, or to information received from a person accused of an offence, but to extend it to information received from a person in custody [513] of a police officer; but there is nothing in the amended section to render the proviso inapplicable to information received by a police officer. In fact, s. 150 was intended to govern both the preceding ss. 148 and 149.

These sections were re-embodied in ss. 25, 26, 27, Indian Evidence Act, with very slight alterations of language.

Ss. 25 and 26 make no material changes.

The only alterations in s. 27 are the omission of the words "in evidence," the omission of the word "or" before "in custody," and the substitution, in the last line, of the words "may be proved" for "may be received in evidence."

The only alteration on which any stress can be laid is the omission of the word "or;" but this only shows that the operation of the proviso is restricted to information from an accused person in custody of the police, and does not apply to information from accused persons not in custody of the police. It in no way touches the point we are concerned with, namely, to what person the information is given.

S. 162 of the Criminal Procedure Code affords a ground for assuming that no such distinction as is contended for was contemplated by the legislature. That section, after declaring the rule that no statement, other than a dying declaration, made by any person to a police officer in course of an investigation under the chapter, shall be used in evidence against the accused, goes on to provide that "nothing in the section shall be deemed to affect the provisions of s. 27, Indian Evidence Act," evidently on the assumption that s. 27 contemplates information received by a police officer, otherwise the proviso would have been out of place in a section like 162, which deals with statements made to a police officer.

The broad ground for not admitting confessions made to a police officer is to avoid the danger of admitting false confessions, but the necessity for the exclusion disappears in a case provided for by s. 27, when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given.

[514] There seems no advantage to be gained by drawing a distinction between information amounting to a confession received by a police officer, and by some person other than a police officer, and excluding proof of the former while admitting it of the latter; for while an accused person is in custody of a police officer, the confession in both cases would be liable to distrust.

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It would be easy to show that, in practice, information received by a police officer has been allowed to be proved, under the provisions of s. 27, without any question being raised hitherto that the section did not contemplate such information. Only so much of the information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved, and, in the case referred, proof will be confined to the statement of Hafiz-ullah, that the accused told him they had sold a cow and calf at Madanpur to Abdul Rahman.

BRODHURST, J.—The object of this reference is, in fact, to obtain a ruling of the Full Bench as to whether the proviso contained in s. 27 of the Indian Evidence Act is applicable to s. 26 of the Act only, or applies to both ss. 25 and 26.

It is important, then, to see how ss. 25, 26 and 27 have been introduced into the Evidence Act (I of 1872). These three sections have, with very slight alterations, been brought into the latter Act from Act XXV of 1861, the first Code of Criminal Procedure. They are to be found in ss. 148, 149 and 150 of that Code. They there stand in the same order towards each other as do ss. 25, 26 and 27 in the Evidence Act, and neither the preceding nor the following section has been transferred along with them. So that from this fact, as well as from their contents, these three sections are strongly connected one with the other.

Up to the time that Act XXV of 1861 came into force, a confession made to a police officer could be used as evidence against a person accused of an offence, but ss. 148 to 150 of the latter Act effected an entire change of procedure. By s. 148 it was enacted that "no confession or admission of guilt made to a police officer shall be used as evidence against a person accused of any offence;" and by s. 149, "no confession or admission of guilt [515] made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be used as evidence against such person." But notwithstanding the provisions of the two preceding sections, it was in s. 150 enacted that "when any fact is deposed to *by a police officer* as discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence."

It is obvious that s. 150 governed the general rule laid down in s. 148, and that, under its provisions, a police officer was competent to give in evidence so much of any statement or confession made to him by the accused person as related distinctly to a fact thereby discovered. Ss. 148 and 149 remained intact for eleven years, or so long as Act XXV of 1861 continued in force; but s. 150, after being tested by an experience of about eight years, was re-enacted in s. 150 of Act VIII of 1869, under a slight modification, as follows:—"Provided that when any fact is deposed to in evidence as discovered in consequence of information received from *a person accused of any offence* or *in the custody of a police officer*, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered, may be received in evidence."

There is nothing whatever to show that the Legislature by this modification intended that a police officer should be excluded from deposing to the fact therein referred to; on the contrary, from the words "a person accused of any offence" and "or in the custody of a police officer," adopted from ss. 148 and 149 of Act XXV of 1861 respectively, it is

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apparent that s. 150 still governed both of the two preceding sections, and the result of the amendment was to render all persons, inclusive of police officers, competent to depose to facts therein referred to.

Act XXV of 1861 was repealed by Act X of 1872. The provisions of ss. 148, 149 and 150 of the repealed Act were not introduced into the new Code of Criminal Procedure, but were, as has already been observed, brought, with very slight modifications, into the Indian Evidence Act (I of 1872), ss. 25, 26 and 27.

[516] I here place ss. 148, 149 and 150 of Act XXV of 1861, s. 150 of Act VIII of 1869, and ss. 25, 26 and 27 of Act I of 1872 in juxtaposition, so that it may, at a glance, be seen to what extent these important sections differ.

Act XXV of 1861.	*Act VIII of* 1869.	*Act I of* 1872.
S. 148. No confession or admission of guilt made to a police officer shall be used as evidence against a person accused of any offence.		S. 25. No confession made to a police officer shall be used as evidence against a person accused of any offence.
S. 149. No confession or admission of guilt made by any person whilst he is in custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be used as evidence against such person.		S. 26. No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.
S. 150. When any fact is deposed to by a police officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence.	S. 150. Provided that when any fact is deposed to in evidence as discovered in consequence of information received from a person accused of any offence, or in the custody of a police officer, so much of such information whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered, may be received in evidence.	S. 27. Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Paragraph 1 of s. 162 of the Criminal Procedure Code now in force is to the effect that statements to the police are not to be signed or admitted in evidence; and para. 2 is as follows:—"Nothing in this section shall be deemed to affect the provisions of s. 27 of the Indian Evidence Act, 1872." Unless s. 27 is applicable, not only to s. 26, but also to s. 25 of Act I of 1872, the meaning of the last paragraph of s. 162, Act X of 1882, is not apparent.

Mr. Taylor, in s. 791 of his "Treatise on the Law of Evidence," remarks:—"Indeed, all reflecting men are now generally agreed that deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in the law; their value depending on the sound presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. Such confessions, there-[517] fore, so made by a prisoner to

any person, at any time and in any place, are at common law receivable in evidence, while the degree of credit due to them must be estimated by the jury according to the particular circumstances of each case.

"793. Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or in Court; this term embracing not only express confessions of crime, but all those admissions and acts of the accused from which guilt may be implied. All voluntary confessions of this kind are receivable in evidence, on being proved like other facts.

"824. Where, in consequence of information unduly obtained from the prisoner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact, has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement as to his knowledge of the place where the property or other article was to be found, being thus confirmed by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement. It is therefore competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found; but it would not be competent to inquire whether he confessed that he had concealed it there. Lord Eldon has laid down the rule somewhat more strictly, saying, in *Harvey's Case* (1), that, where the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession from being given in evidence, he should direct an acquittal, unless the fact proved would itself have been sufficient to warrant a conviction, without any confession leading to it. But the sounder doctrine seems to be that so much of the confession as relates distinctly to the fact discovered by it may be given in evidence, as this part at least of the statement cannot have been false."

From the language used it is clear that s. 150 of Act XXV of 1861 and s. 27 of the Evidence Act were framed on the four lines last quoted from Mr. Taylor's work.

I am under the impression that the Indian Legislatures endeavour to clothe their Acts in clear and simple language, so that **[518]** they be understood by all who read them; that they also keep themselves acquainted with the rulings of the High Courts; and that when they see occasion to make important changes in any Act, they let their intentions be known by publishing in the *Government Gazettes* the objects and reasons of the Bill, and the discussions in Council on the various sections of the Bill, and that they finally make the requisite modifications in language which should admit of no mistake. The meaning of the three ss. 25, 26, and 27 of the Evidence Act, appears to me to be open to no doubt. During the twelve years that have elapsed since Act I of 1872 came into force, a very large number of cases must have been disposed of by Magistrates and Judges with reference to the provisions of s. 27, and I think I may correctly say that a considerable number of such cases has come before myself; but, prior to the judgment that has occasioned the present reference, I do not remember to have heard even a doubt expressed that, when any fact was deposed to by a police officer as discovered in consequence of information received from an accused person in custody of a police officer, so much of such information, whether it amounted to a

(1) 2 East P.C. 658.

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confession or not, as related distinctly to the fact thereby discovered, might be proved. It is, I hold, impossible that the Legislature can have intended that the language of s. 27 should have any other meaning than that which has generally been placed upon it, and I find it equally difficult to believe that the Legislature would not ere this have altered the language of s. 27 had they seen reason to think that, owing to its being misinterpreted, convictions were constantly being based on evidence that was legally inadmissible.

Amongst the judgments that support my view of the case are the following rulings of the High Courts:—Calcutta, 19 W. R., p. 51 (Criminal Rulings), KEMP and GLOVER, JJ.; Bombay H. C. Rep., 1874, p. 242, WEST and PINHEY, JJ.; Allahabad, I. L. R., Vol. 4, p. 196, STUART, C J. No difference is noticeable in these rulings as to the extent to which statements or confessions of the accused person can be proved by a police officer under the provisions of s. 27 of the Evidence Act.

I can best express my own opinion as to the meaning of s. 27 by stating a case as follows:—The chaukidar of mauza Rampur gives information at the neighbouring police-station that Zalim [519] Singh, of the said village, is missing, and that fears are entertained that he has been murdered. The sub-inspector, immediately on receiving this report, repairs to Rampur, and on his arrival there, and whilst he is standing close to a well, Gobind Kahar comes up to him and says, "I give myself up; I am guilty," and then makes a voluntary and full confession, stating the particulars of the crime and the reason for committing it, and concluding by saying, "the knife with which I committed the murder is, together with the body, in this well." The well is thereupon searched, and a knife and the body of Zalim Singh with a knife-wound through the heart, are thence recovered.

The entire confession made to the sub-inspector cannot, with reference to s. 25 of the Evidence Act, be used as evidence against Gobind Kahar, but the sub-inspector, when giving evidence in Court as to the discovery of the corpse and the knife, is, under the provisions of s. 27 of the Act, competent to depose that he had searched the well, and had found the body of Zalim Singh and a knife, owing to Gobind Kahar having given the following information, *viz.*, "the knife with which I committed the murder is, together with the body, in this well."

I have had cases before me in which a man, immediately after committing a murder, went to the police-station and gave himself up to a police officer, made before that officer and his subordinates a full and voluntary disclosure of the whole facts, pointed out the body of his victim, and gave up the weapon with which he had committed the murder. In one or more of these cases there was not a single eye-witness, but the circumstances as disclosed to the police were so remarkably clear as to leave not a particle of a doubt as to the guilt of the accused. It is frequently the case that persons who confess their guilt when first arrested plead not guilty when brought into Court. Under such circumstances, it is quite possible that, in a case such as I have stated above, were a police officer incompetent to depose, under s. 27 of the Evidence Act, to the extent I have mentioned, no sufficient legal proof for a conviction would be obtainable, although there would be no room for doubt as to the guilt of the accused.

For the reasons I have now stated, I am clearly of opinion that s. 27 of the Evidence Act governs both of the two preceding [520]

sections; and the above remarks contain, I think, a sufficient reply to the reference that has been made to us.

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MAHMOOD, J.—I understand the question referred to the Full Bench to be whether, under s. 27 of the Evidence Act, a *confession* made by the accused *to a police officer* is admissible in evidence, if it leads to the discovery of the stolen property.

The reference has arisen on account of certain observations made by me in *Empress* v. *Kuarpala* (1) wherein I held that "s. 27 cannot be regarded as governing the general rule laid down in s. 25, but only that contained in s. 26" of the Evidence Act. In that case, I stated briefly the reasons which led me to that conclusion, but as the correctness of the law has been doubted on account of rulings of this Court, and the question has, in consequence, been referred to the Full Bench, I feel called upon to state the reasons for my view more fully than I had considered it necessary to do in the case of *Kuarpala* (1).

The question raised by this reference is one of interpretation of the statute, and it may be briefly stated to be, whether the proviso contained in s. 27 of the Evidence Act governs only the last preceding section, or also s. 25. In order to arrive at a satisfactory conclusion upon this point, it seems to me advisable to trace the history of the rules contained in ss. 25, 26 and 27 of the Evidence Act, and to ascertain how these provisions find a place in the Code of Evidence for India. I take it as an undoubted proposition relating to the administration of justice in British India, that before the passing of the Indian Evidence Act (I of 1872), this country did not possess any uniform law on the subject of evidence. In the Presidency towns, the rules of the English law of evidence were followed, subject to such modifications as certain Acts of the Indian Legislature had introduced. Of these enactments, Act II of 1855 may be said to be the most important, but that Act, even taken with the others, was far too inadequate to supply a substantial code of the rules of evidence. In the Mufassal, where the English law did not prevail, there were scattered rules of evidence based upon the practice of the Courts, which had never assumed any definite or systematic form. The practice had grown probably on the basis of the Muhammadan law, which continued [521] to govern the administration of justice for many years, even after the advent of the British rule in India. That law was therefore more or less followed, especially in criminal cases, till express enactments prohibited its operation. Act II of 1855, whilst laying down certain isolated rules of evidence, did not prohibit the adoption either of the English law or of the rules of Muhammadan law which, by custom or practice, had been followed by the Courts. Indeed, s. 58 of the Act expressly laid down that "nothing in this Act contained shall be so construed as to render inadmissible in any Court any evidence which, but for the passing of this Act, would have been admissible in such Court." The Act, therefore, did not operate to repeal the rules of evidence which existed before, and, although it did not require the Courts to follow the English law or any other particular system of evidence, it did not at the same time preclude them from adopting the English rules of evidence where they appeared to be the most equitable. And I have no hesitation in saying that, in the vast majority of cases, where difficulties as to the admissibility of evidence arose, the Mufassal Courts, guided as they were

(1) A.W.N. (1882) 225.

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by Judges of the English race, usually and naturally adopted the English rules of evidence as their guide.

Such was the state of things found by the Legislature when the Indian Evidence Act was undertaken as a legislative measure having for its object the consolidation of the rules of evidence and repeal of all others that had prevailed before. This appears from the express words of s. 2 of the Act; and the saving clause contained in the last paragraph of that section may be taken, in fact, to have an extremely limited operation. The Act became law on the 15th March, 1872, at a time when the Legislature had also in hand an equally important measure connected with the consolidation of the rules of Criminal Procedure. The Criminal Procedure Code (Act X of 1872) became law on the 25th of April, 1872.

I have stated these facts as introductory of the observations which I am about to make, that the rules contained in ss. 25, 26 and 27 of the Evidence Act were not originally treated in British India as, strictly speaking, rules of evidence, but rather as rules governing the action of police officers, and as matters of criminal [522] procedure. I may take it that no such rules existed either in the Muhammadan Law or in the English law of evidence—the only two systems to which the Courts resorted for guidance on questions of evidence in criminal matters. How, then, have the rules found a place in the Statute-book of British India?

As far back as the year 1817, the Legislature, repealing the older rules upon the subject, passed Regulation XX of that year, which, *inter alia*, had for its object the consolidation of the rules for the guidance of police officers. Clause (1) of s. 19 of the Regulation laid down that "whenever any person may be apprehended and brought before a darogah, or other police officer, under the provisions of this Regulation, the examination of the prisoner shall be taken, without oath, in the presence of three or more credible witnesses, who are to attest the examination; and the police officer presiding at the inquiry shall question the prisoner fully regarding the whole of the circumstances of the case, the persons concerned in the commission of the crime, and, if any property may have been stolen or plundered, the persons in possession of such property, or the place where it has been deposited. In the event of the prisoner's making free and voluntary confession, it shall be immediately written down, if practicable, in the language best understood by the person confessing, and in the presence of three or more credible witnesses, who can sign their names, and are not officers of the police or connected with the *thana* establishment. If no persons can be found who may be able to read or write, the most respectable persons in the village shall be required to bear witness, and to affix their marks in attestation of the writing. The party confessing, as well as the witnesses, shall be allowed to read the same when finished, or, if unable to read, the police officer recording the confession shall invariably read it over in the presence of the party and witnesses, before it is signed and attested, and shall state, at the foot of the paper, the day of the week, date, hour, and place at which it may be taken; the original confession, bearing the signatures of the party and witnesses, shall invariably be transmitted to the Magistrate, and not a copy; and the police officer presiding at the inquiry, as well as the person by whom the confession may be taken down in writing, shall subscribe their [523] signatures to the papers in attestation of its authenticity." Again, cl. (2) of the same section provided that "no compulsion shall be used either towards parties or witnesses for the purpose of obtaining any

information whatsoever; and police officers are strictly enjoined not, on any occasion or under any pretext whatever, to encourage a prisoner apprehended upon a criminal charge to confess the same, or to excite the hopes or fears of a prisoner by holding forth a prospect of pardon, or using threats, or otherwise persuading or intimidating the prisoner with the view of inducing him to confess: any species of maltreatment inflicted on a prisoner or witness by a police officer, landholder or farmer, or by any other person whatever, whether with a view to extort a confession or to procure information, will subject the offender to exemplary punishment, on conviction, before the Magistrate or *Court of Circuit*. After laying down these stringent rules, cl. (3) of the section goes on to say: "whenever a confession may be taken at night, or at any other place than the police *thana*, the special reasons for its having been so taken shall be stated in the darogah's report."

These legislative provisions leave no doubt in my mind that the Legislature had in view the malpractices of police officers in extorting confessions from accused persons in order to gain credit by securing convictions, and that those malpractices went to the length of positive torture; nor do I doubt that the Legislature, in laying down such stringent rules, regarded the evidence of police officers as untrustworthy, and the object of the rules was to put a stop to the extortion of confession, by taking away from the police officers the advantage of proving such extorted confessions during the trial of accused persons.

That the extortion of confessions by torture continued to be a rampant evil in India is further shown by the fact that the Legislature, in framing the Indian Penal Code (which became law on the 16th October, 1860), provided two special sections (330 and 331), directed especially against such malpractices; and it is very significant that out of the four illustrations appended to s. 330, two contemplate torture by a police officer, one describes torture to obtain a confession, and the other relates to torture for procuring discovery of stolen property.

[524] The provisions of Regulation XX of 1817 remained undisturbed in the Statute-book up to a very recent time, when they were expressly repealed by Act XVII of 1862. Soon after the Indian Penal Code, on the 25th of September, 1861, the Legislature consolidated the rules of Criminal Procedure in Act XXV of 1861. That enactment, although it did not expressly and immediately repeal s. 19 of Regulation XX of 1817, reproduced the rules contained in the first two clauses of that section, but modified and reversed them in some important and essential details, so as to render them even more stringent—a circumstance which shows that the checks placed by the Regulation on the malpractices of police officers had proved inadequate. S. 98 of the Act adopted the spirit of cl. (2), s. 19 of the Regulation, and, whilst prohibiting police officers from preventing the accused person "from making any disclosure which he may be disposed to make of his own free will," laid down the rule that "no police officer or other person shall offer to the person arrested any inducement, by threat or promise or otherwise, to make any disclosure." Again, s. 146 of the Act, repeating the rule, provided that "no police officer or other person shall offer any inducement to an accused person, by threat or promise or otherwise, to make any disclosure or confession." The next section (147) of the Act, markedly reversing the law as it stood in cl. (1) of s. 19 of the Regulation, laid down the rule that "no police officer shall record any statement, or any admission or confession of guilt, which may be made

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before him by a person accused of any offence." The rule was rendered subject to a proviso allowing a police officer to reduce into writing any statement or admission or confession "for *his own* information or guidance." But the most important change consisted in the introduction of a *new* rule, contained in s. 148, which, in the most imperative terms, laid down that no "confession or admission of guilt made to a police officer shall be used as evidence against a person accused of any offence." As if these safeguards against the extortion of confessions were not adequate, the next section (149), going even further in the same direction, laid down that "no confession or admission of guilt made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be used as evidence against such person.' Then followed a *distinct* proposition of law con-[525]tained in a separate section (150), which was thus worded:—"When any fact is deposed to by a police officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence."

Before proceeding any further, it is important to analyse the five sections which I have quoted, in order to ascertain what the exact law was under Act XXV of 1861, upon the question which we are now considering. Ss. 146 and 147 were purely administrative prohibitions to police officers against employing any inducement, threat, or promise for obtaining any disclosure or confession, and against reducing to writing any statements or confessions made by accused persons. The next three sections (148, 149 and 150) contained even more important rules, which perhaps did not properly belong to the province of Criminal Procedure, but to that of Evidence. Now, it is important to notice that ss. 148 and 149 must not be understood to contain identical propositions of law. The former section laid down a general proposition against the admissibility of confessions made to *police officers*. The next section carried the principle further by rendering similar confessions inadmissible, *even though not made to a police officer*, but made by a person "*whilst he is in the custody of a police officer*." Then came a general proposition, which extended over an area covered by both the preceding sections, and, under certain conditions, rendered such confessions admissible as would otherwise be inadmissible under those two sections. This general proposition appeared in the form of a separate and independent section (150), laying down that a police officer might "*depose to*" any confession made by an accused person, so far as such confession led to discovery of some fact, whether such confession was made *to a police officer*, or to a third person, whilst the accused was in the *custody of a police officer*. The words of the section are general, and must be understood to govern confessions contemplated by both the preceding two sections. For example, suppose the accused to have said to the policeman:—"I concealed the articles which I got in the dacoity *A* under my stack of straw, and those which I got in dacoity *B* under the floor of my cow-house." As long as the information related distinctly to [526] the fact discovered in consequence of it, it might be received in evidence under s. 150 of the Criminal Procedure Code of 1861, even though the confession was made to a police officer and by a person in his custody (1). But an essential feature of the section was, that the

(1) 8 W.R. 16 Cr. Letters.

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confession must be proved by the deposition of the police officer himself to render it admissible in evidence. In the case of *Bishoo Manjee* (1) JACKSON, J., observed:—" The police officer to whom the statement was made was not examined at all, and, therefore, it seems that the admission, so far as it was an admission, is not taken out of the general terms of s. 148, which exclude such admissions generally." But in that case another important rule was also laid down, which has a bearing upon the interpretation of s. 150, as it originally stood in the Code of 1861. It was held that an admission obtained by a police officer from a prisoner by persuasion and promises of immunity in contravention of s. 146 was not admissible in evidence, even though it led to the discovery of facts. The rule had already been previously adopted by a Division Bench of the Calcutta High Court in the case of *Queen* v. *Dharum Dutt Ojha* (2), and these two cases, therefore, are distinctly authorities for the proposition that, notwithstanding the general terms of s. 150, it was never taken to qualify the prohibition contained in s. 146.

Such was the law in 1869, when Act VIII of that year was passed. The Act repealed s. 150 of the Code of 1861 and substituted in its place a section in which the change of language is noticeable. The new s. 150 ran as follows:—" Provided that, when any fact is deposed to in evidence as discovered in consequence of information received from a person accused of any offence, or in the custody of a police officer, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered, may be received in evidence."

What was the exact change of language introduced by the new section? Why was it introduced? What was its effect? These are questions which must be considered with reference to the point now before us. It seems clear to me that the change of language [527] limited the operation of s. 150 of Act XXV of 1861, by taking away from it the force of a separate and independent proposition of law, and by reducing it to a mere proviso. But a proviso to what proposition of law? Surely not to all the propositions contained in the four preceding sections. The change of language consisted in the introduction of the words "*provided that*" as the opening words of the section. Further, after the words " *when any fact is deposed to*," the words " *by a police officer* " were removed, and the words " *in evidence* " substituted; the words " *by him* " which referred to the police officer, were absolutely removed; after the words " *a person accused of any offence* " the words " *or in the custody of a police officer* " were inserted, and instead of the words " *by it*," the words " *thereby discovered* " were substituted. All the changes of language thus introduced are not, of course, important for the present question; but the introduction of the opening words in the new section, and the removal of all such words as refer to the evidence of a police officer, are very significant indeed. They leave no doubt in my mind that the Legislature was conscious of the fact that the general rule laid down in s. 148, prohibiting the admission of confessions made to police officers, was defeated by the rule contained in s. 150 of the same Act. The new section by its change of language allowed the imperative rule laid down in s. 148 to stand supreme, by rendering the language of s. 150 a mere proviso to the rule contained in

(1) 9 W.R. 16 Cr. R. (2) 8 W.R. 13 Cr. R.

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the immediately preceding s. 149, which was expressly limited to confessions made by a person "whilst he is in the custody of a police officer"—confessions which, if made to the police officer himself, would not, as I shall presently show, be admissible under the provisions of s. 148.

I am of opinion that the comparison of the language of s. 150 of Act XXV of 1861 with the language of modification introduced by Act VIII of 1869 leaves no doubt upon the question. For if the rule contained in s. 150 was intended to govern the confessions which fell under *both* the two preceding sections, it seems difficult to conceive why the Legislature transformed it into a proviso. The exigencies of drafting did not absolutely require it, unless, indeed, the object was, as I take it, to have been to limit the operation of the section only to cases falling under s. 149, *viz.*, confessions made by a person whilst in the custody of a police officer. This inter-[528]pretation is borne out by the circumstance that, in changing the language of s. 150, the Legislature removed the words which empowered a police officer to depose to confessions made by accused persons. Why were these words removed if the Legislature intended that the new s. 150 should allow *confessions* made *to police officers* to be proved in cases where such confessions led to discovery sections? Again, what explanation can there be for the insertion of the words "*or in the custody of a police officer*," other than the view that s. 150 being converted from an independent rule into a proviso, it was desirable to render the language of the proviso uniform with, and suitable to, the language employed in the main proposition which it qualified? It has been suggested that the language of the new section contains the words "*a person accused of any offence*," which are common to s. 148; that the words "*in the custody of a police officer*" occur also in s. 149; that between the two phrases the disjunctive word "*or*" has been employed; and that these circumstances supply a reason for interpreting s. 150 as a proviso to both the preceding sections. I am unable to see any force in this view, for the "confession or admission of guilt made by any person" contemplated by s. 149 covers both the phrases of s. 150, to which the argument relates; and I cannot understand it to furnish any reason for extending the operation of the proviso to the rule contained in s. 148. To extend the operation of the proviso beyond the immediately preceding s. 149 would involve the logical consequence that it not only governed s. 148, but also ss. 147 and 146. So that a police officer who, in contravention of s. 146, obtained a confession by inducement, threat or promise, and, in contravention of s. 147, recorded such confession, might prove it, if such confession led to discovery. I have already said that such an interpretation was never placed upon these sections—an interpretation which, if adopted, would go far to defeat the policy which the Legislature had obviously in view. I take it, therefore, that the law as it stood in the Criminal Procedure Code of 1861, as amended by Act VIII of 1869, prohibited the admission in evidence of all confessions made by the accused *to police officers*, whether such confessions led to discovery or not. And it follows from this that the confessions contemplated by s. 149 were those made to persons, other than police officers, by the accused whilst in the custody of the police.

[529] Such then, according to my view, was the law as it stood when the Evidence Act (I of 1872) and the Criminal Procedure Code Act X of that year, were under the consideration of the Legislature. Both the Acts were framed with reference to each other, so far as the question now before us is concerned. The Legislature decided—and

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decided rightly—that whilst the rules contained in ss. 146 and 147 of Act XXV of 1861 fell properly under the category of the rules of Criminal Procedure, to reappear as ss. 120 and 121 of the proposed Criminal Procedure Code of that year, the rules contained in ss. 148, 149, and 150 of the Act were misplaced in the Code of Criminal Procedure. Those were rules relating to the *admissibility* of evidence, whatever the policy may have been on which they were based; and it is intelligible that the Legislature considered it only fit and proper that they should find a place in the consolidated Code of Evidence which it was then framing. Accordingly, we find that ss. 148, 149, and 150 of Act XXV of 1861 were exiled from the region of Criminal Procedure: they found no place in the new Code, Act X of 1872, but appeared in their proper place as ss. 25, 26, and 27 of the Evidence Act, under the category of admissions. They have been imported bodily in the same order as they existed in the Code of 1861; they are identical in the rules which they lay down, though the language has been improved by some verbal alterations which require no special mention, except the omission of the word "*or*" from the clause "a person accused of any offence *or* in the custody of a police officer." In the place of the omitted word "*or*" a comma has been substituted, rendering the words "in the custody of a police officer" a parenthetical clause forming the qualification of the person whose confession would fall under the section. The removal of the disjunctive word is remarkable, and, if it has any effect, it is that of limiting the scope of the proviso.

There is no question that the admissions which we are now considering were confessions of guilt made *to a police officer*, and that they led to discovery. Nor is it doubted that, unless they fall under the purview of s. 27 of the Evidence Act, they are wholly inadmissible in evidence, by reason of the imperative rule contained in s. 25 of that Act. The only question then is, whether s. 27 contemplates such confessions.

[530] Having heard the argument of the learned Public Prosecutor, and having had the advantage of conferring with my learned brother Judges, I adhere to the rule which I laid down in the case of *Kuarpala* (1). It appears to me, and indeed it is conceded, that the difficulty has arisen solely by the circumstance that the proviso contained in s. 27 appears as a separate section: that is to say, if the numerals "27" were obliterated, the view which I take would be absolutely correct. But the figures stand in the statute, and, on this ground, it is contended that the proviso governs, not only the immediately preceding section, but also s. 25, and the learned Public Prosecutor conceded at the hearing that the logical result of his argument is to render s. 24 also subject to the proviso.

I am unable to accept this contention, as I hold that, in interpreting these sections, the history of their origin, and the changes which they have from time to time undergone, cannot be lost sight of. I have already endeavoured to show that it would be impossible to place the interpretation advocated by the learned Public Prosecutor on these sections as they stood in Act XXV of 1861 after their amendment by Act VIII of 1869. And, if I am right so far, it seems to me that there is absolutely nothing to show that the Legislature, in transferring them from one Act to the other, intended them to undergo any such change in their operation as would extend the scope of the proviso. But, irrespective of the reasons based upon their position in the Code of 1861, I am

(1) A.W.N. (1882) 225.

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of opinion that these sections, even if taken by themselves in their place in the Evidence Act, do not justify the construction sought to be placed upon them by the learned Public Prosecutor. So far as his argument is based uopn the fact that the proviso contained in s. 27 stands as a separate section and not as a part of s. 26, I have only to say that the division of statutes into sections is a matter of comparatively recent growth, and that such division does not affect the principle of construction that each clause of the statute should be read with reference to the other, and with due regard to its own language. S. 27 is obviously not a separate rule independent of the other sections; it is not a main proposition of law, as it originally was in Act XXV of 1861, before the repeal by Act VIII of 1869. The section is a proviso to some [531] main proposition or propositions which precede it, and the accident that it has been numbered as a separate section has in itself no significance as a matter of interpretation. "A proviso is of great importance when the Court has to consider what cases come within the enacting part of a section, and it is always to be construed with reference to the preceding parts of the clause to which it is appended. The mere fact, indeed, that a proviso was printed as part of any one section did not, at the time when statutes were not divided into sections upon the roll, limit the effect or construction of the proviso." To use the words of HOLROYD, J.—" the question whether a proviso in the whole or in part relates to, and qualifies, restrains or operates upon the *immediately* preceding provisions only of the statute, or whether it must be taken to extend in the whole or in part to all the preceding matters contained in the statute, must depend upon its words and import, and not upon the division in sections that may be made for convenience of reference in the printed copies of the statutes" (Wilberforce on Statute Law, pp. 302-3). I therefore hold that no argument, one way or the other, can be based on the mere fact of the proviso in question being framed as a separate section. The real question is, whether the words of the proviso itself can be taken to extend to any proposition in the Evidence Act other than that contained in s. 26. Before proceeding to consider this question, it may be premised that "where an enacting clause, which is general in its language and objects, is followed by a proviso, that proviso must be construed strictly; it cannot enlarge the words of the enacting clause." (Wilberforce on Statute Law, p. 303). I have already pointed out that, in importing the section from the Code of 1861, the Legislature has omitted the word "*or*," and that such omission, if it has any effect, must be taken to have restricted the application of the proviso. Analysing the section carefully, it seems to me that the confessions which fall under its purview must possess every one of the following qualifications:—

(i) The person making the confession must be "a person accused of any offence."

(ii) He must be "in the custody of a police officer whilst making the confession.

(iii) The confession must "relate distinctly to the fact thereby discovered."

[532] And I shall presently give my reason for holding that, by necessary implication, it must be held as an additional condition that—

(iv) The confession must not be a "confession made to a police officer" within the meaning of s. 25, nor must it have been "caused by any inducement, threat, or promise" within the meaning of s. 24.

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The first step in considering this question is to realise the fact that ss. 25 and 26 do not overlap each other, for then there would obviously be no necessity for framing two separate sections to lay down one and the same proposition of law. On the other hand, s. 26 cannot be treated as an exception or proviso to s. 25, there being no words to justify such an interpretation. The two sections laid down two clear and definite rules. In s. 25, the criterion for excluding the confession is the answer to the question—To whom was the confession made? If the answer is that it was made to a police officer, the law says that such confession shall be absolutely excluded from evidence, because the person to whom it was made is not to be relied on for proving such a confession, and he is moreover suspected of employing coercion to obtain confessions. On the other hand, the criterion adopted in s. 26 for excluding confession is the answer to the question—Under what circumstances was the confession made? If the answer is that it was made whilst the accused was in the custody of a police officer, the law lays down that such confession shall be excluded from evidence, unless it was "made in the immediate presence of a Magistrate." The reason of the rule seems to be that the custody of a police officer provides easy opportunities of coercion for extorting confessions. Now, it seems to me that a comparison of these two sections leaves no doubt that confessions *to a police officer*, even though made in the presence of a Magistrate, would be wholly inadmissible, for the simple reason that the saving clause contained in s. 26 does not exist in s. 25. Such was the view taken of the law, as contained in the corresponding s. 149 of Act XXV of 1861, by a Division Bench of the Calcutta High Court in the case of *Queen* v. *Domun Kahar* (1). Here, then, is a marked difference between the incidents of a confession made *to a police officer* and a confession made *not* to a police [533] officer, but to a third person, by the accused "whilst he is in the *custody* of a police officer." To dispute this proposition is to say that the words in s. 26 preceding the saving clause are wholly superfluous, and that the saving clause should have properly found place in s. 25. I cannot credit the Legislature with such verbiage. And if s. 26 does not contemplate and include within its scope confessions made to a police officer within the meaning of s. 25, it seems to follow, *a fortiori*, that such confessions do not fall within the purview of s. 27. For both the sections, so far as this point is concerned, depend exactly upon the same principle. It seems to me that the opposite view implies three propositions which are wholly opposed to what I regard as a fundamental rule of interpreting statutes. The *first* of these propositions would be that the words occurring in s. 26, "unless it be made in the immediate presence of a Magistrate," should be inserted in s. 25. The *second* proposition would be that the words "in the custody of a police officer," occurring as they do as an *essential condition* of the rule contained in s. 27, should be treated as meaningless or superfluous. The *third* proposition would be that the words "whether such confession was made to a police officer or not" must be read as forming a part of s. 27. I am wholly unable to hold that the Legislature intended these sections to be read in this manner. Indeed, there is ample reason to show that this was not what the Legislature intended. I have already pointed out that these rules owe their origin to the safeguards which the Legislature intended to provide against torture being employed by police officers for the purpose of extorting confession

(1) 12 W.R.Cr.R. 82.

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and enforcing disclosures. This appears from Regulation XX of 1817, which I have quoted, and the history of the various changes which these sections have undergone shows a steady tendency in the direction of excluding confessions which are liable to the suspicion of having been extorted. Now, if this is a true interpretation of the policy of the Legislature, it seems to me that the interpretation which the learned Public Prosecutor seeks to place upon these sections would lead to the most anomalous results. As an illustration of this:—A confession made to a police officer by a person who is *not* in the custody of the police, even though such confession led to discovery, would not be admissible in evidence, because it could not fall under the purview [534] of s. 27, which is restricted to persons "*in the custody of a police officer.*" But if that same confession were made to a police officer whilst the accused is in the custody of that officer, such confession would, according to the contention of the learned Public Prosecutor, be admissible under s. 27 of the Act. In other words, a confession made to the police officer by the accused, whilst he is entirely under the power and control of such officer, may be admitted in evidence, but that same confession, if made before arrest, and whilst the accused is free, cannot be admitted in evidence, even though it led to discovery, what, then, becomes of the principle that the obvious policy of these sections was to check torture of prisoners for extortion of confessions? It seems clear to my mind that the confession contemplated by s. 27 must have been made to some person *other than a police officer.* This view seems to be the only one which does not clash with the policy of the law—the presence of a third person to whom the confession is made being a check upon maltreatment of the prisoner, the discovery which takes place in consequence of the confession being a guarantee of its truth. In other words, under this view a confession *must not*, and *cannot*, depend for its proof solely upon the testimony of the police officer in charge of the prisoner. If the rule were otherwise, as advocated by the learned Public Prosecutor, the prohibition contained in s. 25 would be ineffective. It would certainly not have the effect of preventing torture for extorting confessions. For such malpractices would still continue on the part of the police, in the hope of discovery, which hope, if realised, would render the confession admissible under s. 27: the policeman to whom the confession was made being the only witness to say whether it was extorted or not. I can readily conceive cases in which discovery has actually taken place, either by accident or owing to information received from sources other than any confession made by the accused. Now, if s. 27 be taken to include confession made *to the police officer*, it may be that the only evidence to connect the discovery with the alleged confession of the accused would be the evidence of the policeman, and of no one else. Indeed, such seems to be the case now before us. That the policy of the law is intended to obviate such a contingency, is apparent from other cognate provisions. S. 103 of the present Criminal Procedure Code, which reproduces much older [535] law, lays down that every search to be made by the police shall be made in the presence of witnesses, who must obviously be persons other than police officers. The reason is that the uncorroborated testimony of the police officer alone is not accepted, for it is not an uncommon plea raised by the accused that the stolen property or other thing affording evidence of crime, and said to have been found in his house, was brought there by the police themselves. It seems to me that the analogy of the rules which imperatively require the presence of witnesses at a search by the

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police is very strong with the rule now under consideration; and if the fact that stolen property was found in the house of the accused person needs proof by testimony of persons other than the police officer, *a fortiori* an alleged confession by the accused must need independent testimony also.

The learned Public Prosecutor has attempted to support a portion of his argument by comparing the sections in question with the rules of evidence adopted by the Courts of Justice in England, in regard to confessions caused by inducement, threat, or promise, when such confessions distinctly relate to facts discovered in consequence. He contends that it is a settled rule of law in England that such confessions are admissible so far as they relate to the discovery of facts, and, as an authority for this proposition, he relies on Mr. Justice Stephen's *Digest of the Law of Evidence*, art. 22. And, on this ground, he contends that the proviso contained in s. 27 must be taken to govern not only ss. 26 and 25, but also s. 24. The question arises in this case only indirectly, but I am prepared to hold that the contention is unsound. In the case of *Kuarpala* (1), I expressed the opinion that in no case could confessions obtained under the circumstances described in s. 24 be admitted in evidence, whether they led to discovery or not, unless indeed they fell under s. 28 of the Evidence Act, but *then* the question of discovery would be immaterial. In that case I also observed that "the rule upon this point adopted in the Indian Act seems to be more stringent than, and at variance with, that of the English Law of Evidence as explained in ss. 824 and 825 of Taylor's celebrated work. But the difference between the state of things in England and in this country amply accounts for the difference which [536] the legislature has thought fit to make. Even in England, Lord Eldon, in *Harvey's case* (2), cited by Taylor, laid down the rule by saying that when the knowledge of a fact was obtained from a prisoner under such a promise as excluded the confession from being given in evidence, he should direct an acquittal, unless the fact proved would itself have been sufficient to warrant a conviction without any confession leading up to it."

I still hold the same view, and may here add some reasons for it. In England the rules excluding confessions caused by any inducement, threat, or promise proceeding from a person in authority are based upon a consideration that such confessions are valueless in evidence, and do not afford safe *data* for arriving at the truth. I am not aware that there is any other reason assigned for the rule; and it is therefore intelligible that when facts are discovered in consequence of confessions improperly obtained, so much of such confessions as distinctly relate to such facts may be proved—the reason of the rule being that the discovery of the facts affords a guarantee that the confessions were true. Now, it appears from what I have already said that the rule has, in India, an additional policy as its basis, *viz.*, the check which the Legislature has thought fit to impose upon the extortion of confessions. Ss. 98 and 146 of Act XXV of 1861, ss. 120 and 184 of Act X of 1872, and, finally, s. 163 of the present Criminal Procedure Code obviously proceed upon the policy to which I have referred; and it must be remembered that all these sections are meant to be prohibitions addressed not only to police officers, but also to all other persons. The last of these sections, which has consolidated the rules upon the subject, lays down that "no police officer or

(1) A.W.N. (1882) 225. (2) 2 East P.C. 658.

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person in authority shall offer or make, or cause to be offered or made, any such inducement, threat, or promise as is mentioned in the Indian Evidence Act, 1872, s. 24." There is thus a statutory prohibition in the most positive language against the employment of inducement, threat, or promise for the purpose of obtaining confession from the accused. I am not aware that such statutory prohibitions exist in England. They were probably not called for by the conditions of life in that country. Therefore, in interpreting statutory rules peculiar to India, it cannot be [537] altogether safe to deduce any conclusions by following the rule in *pari materia* in England. But I think I may safely say that, even in England, confessions to the police are received with especial caution: the police officer being invariably taken to be a person in authority, any tangible inducement, threat, or promise from him of the nature described in s. 24 of our Evidence Act, would render the confession inadmissible, unless it led to discovery. But in this country the prohibitions existed long before the Evidence Act was passed, and they were understood by the Courts to exclude confessions obtained in contravention of the rule, even though such confessions led to the discovery of facts—*Queen* v. *Dharum Dutt Ojha* (1); *Queen* v. *Bishoo Manjee* (2). S. 24 of the Evidence Act is therefore only a reproduction of the old law, and there is nothing in that Act to show that it intended to alter the old rules. S. 27 cannot therefore be taken to govern s. 24. Indeed in the case of *Mussamat Lachoo* (3), SPANKIE, J., gave very strong effect to the section, by applying it even to a confession made to a police officer, repeated before a Magistrate, and repeated again before the Sessions Judge—a confession which the report shows had led to discovery.

But it has been suggested that the provisions of s. 162 of the present Criminal Procedure Code (Act X of 1882), which refer expressly to s. 27 of the Evidence Act, favour the contention of the learned Public Prosecutor regarding the scope of the latter section. Upon this point, I wish to observe that no such reference to s. 27 of the Evidence Act existed in the corresponding s. 119 of the Code of 1872, which was enacted contemporaneously with the Evidence Act, and that the wording of a statute passed in 1882 cannot be a safe guide to the interpretation of another statute passed ten years before. But, apart from this consideration, I am unable to see any force in the view thus desired to be deduced from a comparison of s. 27 of the Evidence Act with the saving clause of s. 162 of the present Criminal Procedure Code. It is obvious to my mind that s. 27 of the Evidence Act, when it speaks of "*information*," includes statements which fall short of confession as well as statements which amount to confession; and my interpretation would [538] be that the saving clause of s. 162 of the Criminal Procedure Code relates only to the former class of statements. There is certainly not one word in the section to warrant the inference that it contemplates "*confessions*" made to the police within the meaning of s. 25 of the Evidence Act. And it is needless to say that this reference to the Full Bench relates only to such *confessions*, and not to statements in general.

But there are some other considerations also in favour of the view which I have taken of ss. 24, 25, 26, 27 and 28 of the Evidence Act. The principle of relevancy is a doctrine relating to evidence which may be said to be based upon a consideration of the question—What facts afford sufficiently safe *data* for arriving at the truth? The principle,

(1) 8 W.R. Cr. R. 13. (2) 9 W.R. Cr. R. 16. (3) N.W.P.H.C.R. (1873) 86.

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which is an essential law of the human mind, is universal to all mankind, though, in adopting it as a rule of judicial investigation, various nations, according to the exigencies of their position and the stage of civilization at which they have arrived, have made differences in matters of detail. The Indian Evidence Act in s. 5 lays down clearly that evidence may be given only in respect of "*relevant* facts, and of no others." Now s. 24 declares that confessions caused by inducement, threat, or promise are "*irrelevant*," unless, as s. 28 provides, they are made "after the impression caused by any such inducement, threat, or promise has been fully removed." The rule thus laid down is, speaking strictly, a rule of *relevancy*; and the Legislature might have stopped there, if it had no further object in view. But it did *not* stop there. It went on to lay down three other rules contained in ss. 25, 26 and 27, which are not, strictly speaking, rules of *relevancy* called forth by the abstract principles of evidence. They are positive prohibitions necessitated by the exigencies of the situation in British India. Accordingly, we find that none of these three sections refers to *relevancy* or *irrelevancy* of confessions to the police, and the re-adoption of the expressions "*relevant*" and "*irrelevant*" in ss. 28 and 29 is significant. Indeed, upon the general principles of evidence, it would be erroneous to describe such confessions as "*irrelevant*," because there is no reason, as a matter of abstract principle, why a confession *properly* made to *A* should be relevant if he is not serving in the police, and the same confession irrelevant if *A* happens to be a police officer. These considerations alone **[539]** appear to me to be sufficient to justify the conclusion that the rule contained in ss. 24, 28, and also s. 29 belong to a species different to that under which ss. 25, 26, and 27 fall, and they might perhaps have been better arranged if the former set of sections were grouped together. But the circumstance that they are not so grouped would not alter the principle which should guide their interpretation. To hold, then, that s. 27 is a proviso to s. 24 also is to mix up two different principles altogether. It might, indeed, be that a person whose case would otherwise fall under s. 27, has made a confession which was "caused by any inducement, threat or promise," such as is contemplated by s. 24. Under such circumstances, s. 27 would be available, and I would hold, as SPANKIE, J., actually held in the case of *Mussamat Luchoo* (1) that such confession was "*irrelevant*" within the meaning of s. 24, and therefore not provable in evidence under s. 5, even though it may have led to discovery.

I have dwelt upon this question at such length because I am not aware of any reported case decided by this or any other High Court in which the exact question now before us has been fully considered and decided. And in order to guard against being misunderstood, I wish to say that I must not be taken to lay down any such rule as would ignore the distinction between statements which amount to confessions and those which fall short of them. The expression "*confession*" has not been defined in the Evidence Act. It, however, occurs under the category of admissions, and, to make my meaning clear, I adopt the definitions given by Mr. Justice STEPHEN in art. 21 of his *Digest of the Law of Evidence*, by saying that "confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime."

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(1) N.W.P. H.C.R. (1873) 86.

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Having thus explained the exact scope of the rule which I lay down, I consider it unnecessary to discuss the rulings in the case of *Jora Hasji* (1) and in that of *Pagaree Shaha* (2), to which the learned Public Prosecutor has called our attention. I may, however, observe that I do not regard the former of these cases as opposed to my view, and that I understand the rule laid down by TYRRELL, J., in the case of *Empress* v. *Nanhe Beg* (3) to be in **[540]** full accord with my view. And it seems to me that the recognized rules of interpretation applied to the clause of the statute now under consideration, scarcely leave room for any other construction. I have already said that, as a general rule, and almost always, a proviso must be taken to govern the main proposition of law which immediately precedes such proviso, unless indeed the language of the statute shows a different intention. Indeed, an illustration of this is to be found in ss. 107 and 108 of the Evidence Act itself, the former section being the main proposition, and the latter constituting the proviso. And the illustration is especially applicable to the matter now under consideration, as s. 108 of the Evidence Act, like the original s. 150 of the Criminal Procedure Code of 1861 (corresponding to s. 27 of the Evidence Act) originally stood as a main and independent proposition of law. S. 9 of Act XVIII of 1872 did to s. 108 of the Evidence Act what Act VIII of 1869 had done to s. 150 of the Code of 1861. It reduced the section into a mere proviso by introducing the words, "*provided that*," at the beginning of the section—a change which Sir James Stephen, in a postscript to his edition of the Evidence Act, has described as having made a "substantial alteration" in the Act. What was the substantial alteration? It was simply this, that, from being an independent proposition of law, the section sank into a mere proviso to the main proposition contained in the immediately preceding s. 107. As the statute now stands, it seems obvious that s. 108 must be taken to be a proviso to s. 107 and to no other; and it appears to me that there is no more reason for holding that s. 27 governs not only s. 26, but also ss. 25 and 24, than there would be for the untenable proposition that s. 108 is a proviso, not only to s. 107, but also to the six preceding sections which relate to burden of proof. I confess I am unable to conceive how the contention of the learned Public Prosecutor can be substantiated unless he can establish the proposition that the introduction of the words "*provided that*" by Act VIII of 1869 into s. 150 of Act XXV of 1861, and by Act XVIII of 1872 into s. 108 of the Evidence Act, were equally meaningless changes of diction. I am unable to accept any such view, for it is wholly opposed to my notion of the rules by which the drafting and interpretation of statutes are governed.

[541] As a summary of my observations, I hold that the rule laid down by the Legislature in s. 24 (read with s. 28) of the Evidence Act, is a rule absolutely independent of the question of discovery or no discovery to which s. 27 relates; that the state of things in India has induced the Legislature to frame, in s. 25, an equally absolute rule in regard to confessions made to police officers, which are presumed to have been made under conditions prohibited by s. 24; that the Legislature, going further in the same direction, has prohibited the admission of *even* such confessions as are made to *third persons* by the accused whilst in the custody of a police officer; that not the two first rules, but only the last rule so

(1) 11 B.H.C.R. 242. (2) 19 W.R. Cr. R. 51. (3) A.W.N. (1883) 126.

enunciated, is made subject to the saving-clause contained in s. 26 rendering confessions admissible, if they are *not* made to the police officer, but to a third person, "in the immediate presence of a Magistrate," which affords a guarantee that the confession was not extorted; that the proviso contained in s. 27 is not intended to qualify the absolute rules contained in ss. 24 and 25, but only the rule contained in the immediately preceding s. 26, which relates to confession made, *not* to the police officer, but to third persons, whilst the person making the confession is in the custody of the police. In short, I hold that the law of India as to confessions improperly obtained is the same as the rule laid down by Lord ELDON in *Harvey's case* (1) and that *confessions to a police officer* are conclusively presumed to have been improperly obtained, so as to be subject to the same rule, unaffected by the question of discovery.

With reference to the case of *Empress* v. *Pancham* (2) which has been cited, I observe with regret that the views which I have expressed do not accord with those indicated by STUART, C.J., but they are not necessarily inconsistent with the observations made by STRAIGHT, J., in the same case.

And now I wish to add that, in considering this case, it has been my endeavour to avoid the necessity of my expressing views dissentient from those which my honourable colleagues are disposed to take, and it is not without much regret that I have left myself constrained to dissent from them upon a question of such significance.

[542] My answer to this reference must, however, be in the negative.

STRAIGHT, Offg. C. J.—I have very carefully read and anxiously considered the able and elaborate judgment prepared by my brother MAHMOOD, which may fairly be said to exhaust the subject of the reference before us. I most cordially sympathise with him in his anxiety to rigidly apply every restriction the law imposes upon police officers in this country, for—and I say it advisedly—my experience in this Court has conclusively satisfied my mind of two things: first, that in almost every case of serious gravity or difficulty, the primary object towards which the police direct their attention and energies is, if possible, to secure a confession; secondly, that such confession, if subsequently retracted, is, as an item of judicial proof, unless corroborated by strong and independent evidence, positively worthless. It requires no very vivid imagination to picture what too often takes place when two or three of these not very intellectual or highly-paid police officials are called away to a village to investigate a grave crime, of which there are no very clear traces. Naturally it is much the easier way for them to begin by endeavouring to obtain a confession from the suspected person or persons, instead of by searching out the clues to the evidence from independent sources, and seeing what extraneous proof there is. But, as I have more than once been constrained to remark from this Bench, the effect of this sanction given by s. 164 of the Criminal Procedure Code to a Magistrate recording in the course of the investigation the confessions of accused persons thus obtained, not from the hands of the police, is not so beneficial to the elucidation of guilt as is supposed, for it continually happens that, while the police have been occupying themselves in getting the confession, many of the traces of the crime, which, if at once followed up, would have produced valuable proof, have disappeared. To repeat a

(1) 2 East P. C. 658.

(2) 4 A. 198.

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phrase I used on a former occasion, instead of working *up to* the confession, they work *down from* it, with the result that we frequently find ourselves compelled to reverse convictions simply because, beyond the confession, there is no tangible evidence of guilt. Moreover, I have said, and I repeat now, it is incredible that the extraordinarily large number of confessions, which come before us in the criminal cases disposed of by this Court, either in appeal or revision, should have been voluntarily [543] and freely made in every instance as represented. I may claim some knowledge of, and acquaintance with, the ways and conduct of persons accused of crime, and I do not believe that the ordinary inclination of their minds, which in this respect I take to be pretty much the same with humanity all the world over, is to make any admission of guilt. I certainly can add, that, during fourteen years' active practice in the Criminal Courts in England, I do not remember half-a-dozen instances in which a real confession, once having been made, was retracted. In this country, on the contrary, the retraction follows almost invariably as a matter of course, and though I am well aware how this is sought to be explained by a suggestion of the influence brought to bear upon the confessor by other prisoners in *havalat*, the fact remains as an endless source of anxiety and difficulty to those who have to see that justice is properly administered. I say it in no harsh sense of disparagement, but it is impossible not to feel that the average Indian policeman, with the desire to satisfy his superiors before, and the terms of the Police Acts and Rules behind, him is not likely to be overnice in the methods he adopts to make a short cut to the elucidation of a difficult case by getting a suspected person to confess. As instances of what may be done I need only refer to the cases of *Empress* v. *Wahid Ali and others* (1), tried by my brother TYRRELL in this Court at the Sessions of January, 1883, and of *Empress* v. *Jugal Kishore and others* (2) recently decided on appeal by my brother DUTHOIT. I have made these remarks, which may seem somewhat beside the question immediately before me, out of deference to certain observations of my brother MAHMOOD, and to let him understand that I appreciate to the full and sympathise with all that he has said upon the same subject. No one scrutinizes with more closeness than I do these confessions, which are legally receivable as having been recorded under s. 164 of the Criminal Procedure Code; no one is more inclined to construe strictly the provisions of ss. 25, 26 and 27 of the Evidence Act than I am. But in interpreting the law it is necessary, for the moment, to silence one's strong feelings and impressions, as there is nothing so likely to mislead the judgment, when determining the interpretation to be placed upon the legal phraseology of a statute. My brother [544] MAHMOOD in the case of *Empress* v. *Kuarpala* (3), which has virtually brought about this reference, took occasion to refer to a decision of mine in *Empress* v. *Pancham* (4) and he again mentions it in his present judgment. In order to avoid any misapprehension, I think it right to remark here that I did not there lay down that a police officer who deposes to a fact as discovered in consequence of information received from a person accused in his custody, is prohibited from stating so much of the information received as relates distinctly to the fact thereby discovered, even though it amounts to a confession. The point upon which my judgment proceeded in that case was that no fact had been

(1) Not reported.
(2) Not reported.
(3) A.W.N. (1882) 225.
(4) 4 A. 198.

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discovered in consequence of the statement of the accused, and what I did say was—"In short, it was by his own act, and not by any information given by him, that the discovery took place." At best, Pancham's statements were declarations amounting to confessions accompanying acts by the accused himself, which, in my opinon, were inadmissible. I adhere to every word I used in that judgment, but I took pains to carefully guard myself from misconception by saying, "It is manifest that the prohibition laid down in these two sections (25 and 26) must be strictly applied, and any relaxation of it in accordance with the proviso of s. 27 should be sparingly admitted, and only to the extent of so much of the accused's statements as directly and distinctly relates to the fact alleged to have been discovered in consequence of it." Far from being an indication that I held s. 27 not to govern ss. 25 and 26, the latter portion of my remarks suggests an inference in the other direction.

My brother MAHMOOD addresses himself with much labour and skill to the discussion of the policy and intentions of the Legislature in enacting the successive provisions which have now found final embodiment in ss. 25, 26 and 27 of the Evidence Act. No doubt those whose business it was to frame the law, as time passed on, learned by experience that unauthenticated confessions made to the police were liable to be not only extorted but occasionally invented, and that grave danger was likely to be run if the Courts were allowed to attach any value whatever to them as evidence. They were accordingly, in the result, declared by s. 25 of Act I of 1872 to be incapable of proof against a person subsequently accused. **[545]** But the Legislature went even further than this and said, in effect, that if a person, while he was in the custody, and consequently under the influence, of the police, made a confession to a third person, such confession should be incapable of proof, unless made in the immediate presence of a Magistrate (s. 26). Both these provisions obviously proceeded on the assumption that confessions made to the police by accused persons while in their custody or not, or to third persons while in their custody, unless, in the latter case, they were guaranteed by the presence of a Magistrate, were valueless as evidence, because of the experience which has created an apprehension that they might not be voluntary, and consequently that they might be false. But it was never intended, and indeed such an idea could never have been carried out without absolutely disqualifying them from giving evidence at all, to debar police officers from deposing to *facts* discovered by them, no matter by what means they have obtained the information that led to discovery from the accused. Whatever the torture, or inducement, or promises, or threats that may have been applied, or made use of towards him, there is nothing in the law which forbids policemen from, at any rate, going so far as to say:—"In consequence of what the prisoner told me, I went to such and such a place, and found such and such a thing." They may have committed offences against the Penal Code for which they are punishable, but they are not prohibited from stating a fact or facts discovered, and that they did discover them owing to information given them by the prisoner. Nay more, they may repeat the words in which the information was couched, but—and it is at this point my brother MAHMOOD introduces the reservation—not if they amount to a confession. Now, it is here that I fail to appreciate the force of his argument based upon the matter of torture and the policy of the Legislature in that direction. If a police officer, no matter whether torture has been used or not, may prove that he discovered a fact, and that he did so in

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consequence of information received from the accused, and may give the words of the accused, embodying such information, so long as they do not amount to a confession, I cannot appreciate what additional harm could have been contemplated as likely to result from his being permitted to give "so much of such information, whether it amounts [546] to a confession or not, as relates distinctly to the fact discovered." It certainly seems to me that to draw such a very fine distinction would be straining at a gnat and swallowing a camel. And, after all, are not the provisions of s. 27 sufficiently stringent to obviate any serious interference with the broad rule laid down in s. 25? I say it with the deepest respect for the learned authors, that s. 27 is not perhaps as happily drawn as it might have been; but if its terms are strictly and properly construed and applied, I do not see why the interpretation I place upon them should be productive of any serious harm. It is only "so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered," that may be proved. No judicial officer dealing with such provisions should allow one word more to be deposed to by the police officer detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him. S. 27 was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion, and led to his ascertaining the fact or facts of which he gives evidence. Moreover, I am by no means sure that the Courts in this country would not too often be disposed to attach a great deal more significance and meaning to the bare phrase "from information I received" as against an accused than what he actually said to the constable would deserve. It is an expression which, standing by itself, might in certain conditions of facts and circumstances convey a great deal more than it should. As far as my memory serves me, the practice as I have always seen it followed in the Courts of England in such matters—though cases on the subject of late years have been of rare occurrence—is that described by Mr. Russell in the third volume of his admirable work on "Crimes and Misdemeanours," at page 420, in the following terms:—"But the more established rule, according to later practice and later authorities, is that so much of the confession as relates *strictly* to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been induced to say what is false; but the fact discovered shows that so much of the confession as imme- [547] diately relates to it is true. [*R.* v. *Butcher*, 1 Leach., 265, note (*a*) to *Warickshall's Case* 2 East P. C., c. 16, s. 94, p. 658.] Thus it is proper, and it is now the common practice, to leave to the consideration of the jury, where a confession has been improperly obtained, the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly, but not the acknowledgment of the prisoner having stolen or put them there, which is to be collected or not from all the circumstances of the case. (2 East, P. C., c. 16, s. 94, p. 658.) So where on an indictment for burglary it appeared that the prisoner had made a statement to a policeman, under some particular circumstances which induced the counsel for the prosecution, with the approbation of the Court, to decline offering it in evidence; but in consequence of the statement containing some allusion to a lantern, which was afterwards found in a particular place, the policeman was asked whether,

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in consequence of something which the prisoner had said, he made a search for the lantern, TINDAL, C.J., and PARKE, B., were both of opinion that the words used by the prisoner with reference to the thing found ought to be given in evidence, and the policeman accordingly stated that the prisoner told him that he had thrown a lantern into a pond in Pocock's fields. The other parts of the statement were not given in evidence. [*R.* v. *Gould*, 9 C. & P. 364.] Mr. Phillips (vol. I, p. 412) after stating this case, adds :—' But the Judge in such a case would direct the jury, and so it is understood did direct the jury in that case, that his statement must not be taken as proof that *he concealed*, but merely as evidence that he knew of, or was privy to, the concealment, from which, together with the rest of the evidence, they would consider whether it was probable that he concealed it himself.' "

It is the principles of practice thus enunciated which, in my opinion, have been incorporated in s. 27 of the Evidence Act, and, as I have already remarked, if the provisions of that section are properly used by the Courts and not abused, but are administered strictly, the damages of which my brother MAHMOOD is apprehensive should be minimised. But it is said, police officers will fabricate facts for the purpose of dragging in a damaging statement or confession by an accused, and that they will put admissions upon him which he never made, as leading to the discovery of facts. The only answer [548] I can make to this is that no legal provision short of one rendering a police officer altogether incompetent as a witness can prevent him, if he is so minded, from committing perjury. It rests with the tribunals, whose business it is to administer criminal justice, to be alert and watchful to see that they are not deceived by false testimony, and they will do well to remember, when they are called upon to apply the provisions of s. 27, even where third persons are deposing to information amounting to a confession received from an accused, that the detail of it is to be sternly limited in the manner I have already indicated. The law, as it at present stands, permits the police to give evidence of the fact discovered, and, even according to my brother MAHMOOD'S view, that they discovered it in consequence of what the prisoner told them, no matter how improperly they may have obtained the information from him. If all this is evidence, despite torture, threat, inducement, or promise, it seems inconsistent to stop short there and forbid them giving the words used by the accused, which they assert led to the discovery, simply because they contain an admission of guilt. What the Courts in dealing with such matters ought to do is to bear in mind that police evidence in this country necessarily partakes more or less of a, so to speak, professional bias, that it is frequently, if not invariably, highly coloured, and that it requires to be received and weighed with much caution and discrimination. " Their business," as I once heard the late Mr. Justice BYLES remark of English policemen, "is to catch thieves, ours to give them a fair trial." No system of evidence, however perfect, can escape occasional misuse, and it is unavoidable that much must be left to the good sense and discretion of judicial officers. If they fail in properly applying the rules of law laid down for their guidance, there are ample facilities afforded in the powers given to this Court by which their mistakes can be corrected and justice can be done. It is with no want of respect for, or appreciation of, my brother MAHMOOD'S judgment, from which I regret to differ, that I refrain from following him at length through the long and elaborate arguments which he has so exhaustively employed. It would be impertinent for me, if I thought so, which I do

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not, to say they are not deserving of the most careful attention. But they have not convinced me that my view of ss. 25, 26 and 27 of the [549] Evidence Act, as I have endeavoured to express it in the preceding remarks, is erroneous, and I therefore think that the general question raised by this reference should be answered in the affirmative.

As, however, the opinion of the Full Bench is, so I understand it, also asked particularly with regard to the so-called confessions in the case out of which the reference has arisen, I now address myself to them specifically.

It seems to me that the evidence of Hafiz-ullah, the constable, who deposes to these so-called confessions, has been most carelessly taken by the Sessions Judge, and contrary to all recognized rules as to the mode in which the testimony of witnesses should be recorded. I have more than once pointed out that it is not a proper course, where two persons are being tried, to allow a witness to state "they said this," or "they said that," or "the prisoner then said." It is certainly not at all likely that both the persons should speak at once, and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words he individually used. And, I may add, where a statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding. This was not done in the case before us, and indeed the Judge in his judgment remarks, "the police witness Hafiz-ullah gave his evidence in the vaguest possible manner." Moreover, the Judge does not appear to have had present to his mind the provisions of s. 27 of the Evidence Act, and seems to have accepted the statements of the constable wholesale, without the slightest regard to whether they were or were not admissible under that section. If he had applied as he should have done, the rule thereby laid down, he ought to have held that that portion of Hafiz-ullah's statement in which he deposed "they said they got" (I suppose this was intended to mean stole) "the cow from Lachman Teli," "they said they had stolen a cow and a calf," "they have stolen it from Sukhni Garaiyin of Jaitpur," "they had stolen a goat in Belupur and sold it," was inadmissible. The only fact about the cow and calf which was [550] admissible, as distinctly relating to the discovery of those animals at Abdul Rahman Julaha's, was that they sold it at Madan to him. As to the goat, there is nothing to show from the constable's deposition that it was in consequence of what the accused told him that he found the goat in Chelganj. In detailing statements of this kind, which are alleged to have led to discovery, it is of the essence of things that what each prisoner said should be precisely and separately stated. If the evidence was not clear upon this point, and the witness refused to be more explicit, the Judge should have paid no attention to it. It seems to me quite possible that the man Raghubar, who, unlike his companion, had never before been previously convicted, has been seriously prejudiced, and that it would be safer to order his acquittal. As to Babu Lal, there is direct evidence that he was actively dealing with property recently stolen, of the possession of which he was unable to give a satisfactory account, and, without the irregularly received so-called confession, he may have been properly convicted.

With these remarks I would return the case to the Division Bench for disposal.

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DUTHOIT, J.—In the conclusions at which the learned Chief Justice has arrived, and in the answer which he proposes to make to this reference, I entirely concur. But I am unable to agree with all that is said in the opening portion of the judgment. I place a higher value than the learned Chief Justice seems to be inclined to assign to them, upon the provisions of s. 164 of the Criminal Procedure Code. I think that if they were omitted from the Code, the interests of justice would suffer materially. And I do not think that, in the matter of confessions of crime, the tendency of humanity all the world over is the same. There is, I think, a great difference in this respect between the East and the West. The Oriental has not the same tenacity of purpose that his Western brother has, and the latter is, as a rule, no fatalist. In the parts of India with which I am acquainted, a man who has been guilty of culpable homicide not unfrequently gives in at once. He looks upon himself as the instrument of fate, and says of the victim of his malice or ungovernable rage, "his time had come." He is, for the moment, in despair, and glad to purchase immediate ease by making a confession. I believe that confessions are more [551] often induced by these motives than they are by torture and bad usage. Speaking from my own experience, I can say that, at a single sessions in the Budaon district (a bi-monthly jail delivery), I have known quite half-a-dozen instances of undoubtedly genuine confessions retracted. When a man's confession has been made and he is transferred to the Magistrate's lock-up, the petty indulgences which the police allow to a confessing prisoner cease, his mind recovers its balance, his fellow-prisoners (especially in the lock-up of a district with traditions such as those of the district to which I have referred) prove to him how foolish he has been, and the confession is retracted.

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Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood and Mr. Justice Duthoit.

SHIB LAL (*Defendant*) *v.* GANGA PRASAD (*Plaintiff*).*
[30th June, 1884.]

Suit to enforce payment of money charged upon immoveable property—Suit by a mortgagee for sale—Act XV of 1877 (*Limitation Act*), *sch. ii, Nos.* 132, 147.

A suit upon a bond for money payable on demand, by which immoveable property is hypothecated as security for the debt, wherein the relief prayed is recovery of the amount with interest by establishment of the right to enforce the hypothecation by auction-sale of the interest of the obligor in such property, is governed by art. 147, and not by art. 132, of Act XV of 1877 (Limitation Act).

[**Diss.**, 14 C. 730 (737) (F.B.); 10 M. 509 (514); **N.F.**, 9 M. 218 (222, 223); **F.**, 12 C.P. L.R. 23 (30); **Appr.**, 25 M. 220 (240) (F.B.); **R.**, 7 A. 258 (264) (F.B.); 9 A. 158 (161); 13 A. 28; 14 B. 269 (272); 20 B. 408 (418) (F.B.); 34 C. 941 (952) = 6 C.L.J. 237 = 11 C.W.N. 959; 21 M. 326 (336) (F.B.); 26 M. 686 (714) (F.B.); 14 C.P L.R. 1903; 9 Ind. Cas. 823; 3 O.C. 156 (163) (F.B.); **Disappr.**, 30 M. 426 (430) (P.C.) = 9 Bom. L.R. 1104 = 11 C.W.N. 1005.]

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* Second Appeal No. 805 of 1883, from a decree of Maulvi Muhammad Sami-ulla Khan, Subordinate Judge of Aligarh, dated the 3rd April, 1883, affirming a decree of Sayyid Zahur Husain, Munsif of Aligarh, dated the 23rd January, 1883.

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IN this case, the following question was referred to the Full Bench by STRAIGHT, Offg. C.J., and OLDFIELD J.—"Is a suit upon a bond for money payable on demand, by which immoveable property is hypothecated as security for the debt, wherein the relief prayed is recovery of the amount with interest by establishment of the right to enforce the hypothecation by auction-sale of the interest of the obligor in such property, governed by art. 147 of Act XV of 1877, or does art. 132 apply?"

Pandit *Ajudhia Nath* and Babu *Ratan Chand*, for the appellant.

The respondent did not appear.

The following judgments were delivered by the Full Bench :—

JUDGMENTS.

STRAIGHT, Offg. C.J., and BRODHURST and DUTHOIT, JJ.—The question raised by this reference is one of serious importance, [552] because, in the event of our holding art. 147 of the present Limitation Law to be applicable to suits of the kind mentioned in the referring order, they will henceforth be governed by a very much longer limitation period than has hitherto been applied to them. For the purpose of answering it, we must carefully examine the terms of arts. 132 and 147 of Act XV of 1877. The first of these relates to suits "to enforce payment of money charged upon immoveable property" for which the limitation provided is twelve years from the date "when the money sued for becomes due." Art. 147 deals with a suit "by a mortgagee for foreclosure or sale," as to which sixty years is the limitation period, and time begins to run "when the money secured by the mortgage becomes due." This latter article had no place in the old Limitation Acts of 1859 or 1871, but first made its appearance in the present Limitation Law, XV of 1877, in immediate proximity to, and directly preceding the somewhat kindred article providing sixty years' limitation for a suit by a mortgagor to redeem. So it is to be noticed that art. 132, which in the description column of the schedule to Act IX of 1871, stood "for money charged upon immoveable property," now figures as "to enforce payment of money charged upon immoveable property." Until recently it was the undeviating practice of this Court to treat suits for the recovery of money secured by simple mortgage or hypothecation of immoveable property, without any hesitation, as covered by this last mentioned article, when under the present or the preceding Limitation Law. The question as to the applicability of art. 147 thereto has now arisen, and we must determine whether it naturally and properly governs suits of such a character. As we have already remarked, the question is one of serious importance, because, at first sight, it does seem somewhat startling to allow a limitation period of sixty years to a suit by an obligee, under what is popularly spoken of in this Court as an hypothecation-bond, for enforcement of his lien, by sale of the immoveable property hypothecated. But this, after all, is only matter of first impression, because the legal *status* and responsibilities of the obligor and obligee, arising under one and the same contract, in which the immoveable property is hypothecated, there would seem to be no intelligible reason why, if there really is a mortgage of the land, the right of the one to bring to sale and of the other to pay [553] off the incumbrance, should not stand upon precisely the same footing as regards the rule of limitation by which its enforcement in Court is to be governed. An hypothecation of immoveable property for money borrowed, in the absence of anything to show the contrary, is only in name but not in its

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incidents, different from what is known as a simple mortgage. The obligor is nothing more nor less than a mortgagor: the obligee nothing other than a mortgagee. When art. 147 of the Limitation Act speaks of a suit by a mortgagee for sale, why should we go out of our way to hold that it does not cover a case in which the plaintiff in his relation towards the defendant legally, and to all intents and purposes, stands in the position of a mortgagee? In this connection it seems to us that the Transfer of Property Act may not without advantage be referred to for the purpose of ascertaining the character of suits which the Legislature, when they passed that measure, regarded as falling within the category of "suit for sale" mentioned in art. 147. No doubt a distinction is drawn in that Act between a mortgage and a transaction by which immoveable property is "made security for the payment of money to another," which "does not amount to a mortgage," and to cases falling within this latter description art. 132 still applies. But we are not aware that this is anything more than a crystallisation of the principles enunciated in the many decisions of the Courts delivered on the subject. The first question then that we have to ask ourselves is, whether, looking to the nature of the instrument upon which the suit has been brought to which the reference relates, it can be rightly regarded as falling within the description of instrument it has been our practice hitherto to treat as constituting a simple mortgage, the incidents of which are now very clearly declared in cl. (*b*) of s. 58 of the Transfer of Property Act? We think that it must. It seems to us, upon a perusal of the deed of the 20th of December, 1869, that Khamani Singh did bind himself personally to pay the Rs. 63 with interest; that, from its language, he did impliedly agree that, in the event of his failing to pay, the mortgagee should have a right to cause his two shares to be sold and the proceeds to be applied in satisfaction of the debt; and that in terms he did undertake not to alienate. If the instrument was a simple mortgage, then the plaintiff in the suit was a mortgagee; **[554]** his prayer was to have the property sold, and art. 147 was directly applicable. At the time Act XV of 1877 was passed, it is matter of history that the draft bill of what has now become the Transfer of Property Act was before the Legislative authorities, and until the expressions "suit for foreclosure," "suit for sale," which are now to be found in ss. 86 and 88 made their appearance in that Act, suits so described were unknown to our Courts. Necessarily the Transfer of Property Act cannot affect our decision in the present case, but we think we are warranted in the absence of other sources of information, to refer to it to obtain any light it may be able to throw upon the meaning of "suit for sale."

In reply to the question put by the reference we would say that art. 147 applies.

OLDFIELD, J.—In order to dispose of the reference it is necessary to ascertain to what classes of suits arts. 147 and 132, Act XV of 1877, respectively apply.

Art. 147 is for suits by a mortgagee for foreclosure and sale, and gives a limitation of sixty years from when the money secured by the mortgage becomes due; art. 132 is for suits to enforce payment of money charged on immoveable property, and the limitation is twelve years from the time when the money sued for becomes due.

There was no provision of the nature of that in art. 147 in the Limitation Laws of Act XIV of 1859 or IX of 1871; and art. 132 was introduced for the first time in Act IX of 1871, but in different terms from

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art. 132, Act XV of 1877, being "for money charged upon immoveable property." Suits in which the relief sought was the recovery of the money secured by mortgage by sale of the mortgaged property were dealt with under cl. 12, s. 1, Act XIV of 1859, and art. 132, Act IX of 1871; and, since the passing of Act XV of 1877, have been dealt with under art. 132 of the Act, the question of the application of art. 147 having only recently arisen.

Art. 147, Act XV of 1877, now definitely provides the limitation for suits by a mortgagee for foreclosure and sale, and the Transfer of Property Act may be usefully referred to for the purpose of ascertaining the particular kind of suits the Legislature refers to as a suit for sale in art. 147, and a suit to enforce payment of money charged on immoveable property in art. 132.

[555] It will be seen that the Transfer of Property Act marks the distinction between a mortgage and charge in ss. 58 and 100, and provides by ss. 67 and 88 a suit for sale as one of the remedies of a mortgagee a remedy to which a mortgagee had always been entitled.

The Transfer of Property Bills of 1877 was before the Legislature at the time of the passing of the Limitation Act, and though it did not become law till 1882, and in a form considerably altered from that of the bill of 1877, the latter recognized the distinction between mortgage and charge.

It is reasonable than to suppose that in introducing art. 147, while allowing art. 132 of the former Law of Limitation to remain in its altered form, the Legislature had in view the distinction between a mortgage and a charge, and that the suits for sale referred to in art. 147 are all suits brought by a mortgagee to enforce the remedy which the law has always given him, namely, to obtain a decree or order that the mortgaged property be sold to satisfy the debt.

It is the class of suit for which a form of plaint is prescribed in Form No. 109, sch. iv, Code of Civil Procedure. On the other hand the suits governed by art. 132 will be those in which the relief sought is to enforce payment of money as a charge on immoveable property, where the transaction does not amount to a mortgage.

The *Illustration* to art. 132 gives strength to this view, as it mentions the allowances and fees called *malikana* and *haqqs* as being money charged on immoveable property.

It is difficult to see to what class of suits other than those to which I have referred art. 147 can apply, for the suggestion thrown out at the hearing that it is confined to suits for sale, when a power had been conferred by the mortgage-deed on the mortgagee to sell the mortgaged property, is not tenable, as the article speaks generally of suits by a mortgagee for sale, and, dealt with as they are in the same article as suits for foreclosure, they would necessarily refer to the ordinary remedy of a mortgagee by suit for sale.

Nor do I see any other reasonable way of reconciling and giving effect to the two arts. 147 and 132 than that I have suggested.

[556] If art. 147 refers to suits by a mortgagee in which the relief sought is an order for sale, it is clear that art. 132 must apply to some other class of suits.

I cannot think that art. 132 was intended, as the Bombay High Court say—*Lallubhai* v. *Naran* (1), to include suits by a mortgagee to recover money secured on mortgage as a mere money or personal claim;

(1) 6 B. 719.

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the words in art. 132 "to enforce payment of money charged" show that it refers to suits to enforce a claim against the property charged to the exclusion of mere money claims.

Suits for the recovery of money only have never been held by this Court to be governed by art. 132.

The suit which is the subject of this reference has been brought on a bond which clearly creates a simple mortgage, by which the mortgagor agrees that the mortgagee shall have a right to cause the mortgaged property to be sold, in the event of the mortgagor failing to pay the mortgage-money, and the relief sought is, in the language of the plaint, the recovery of the amount due under the bond with interest, by establishment of the right to enforce the hypothecation, by auction-sale of the interest of the mortgagor in the property mortgaged.

The plaint may not be drawn up in correct form, but the substantial relief sought—and it is that we must look to—is an order for sale in the event of non-payment by the mortgagor of the amount found due, and it can be regarded as nothing else than a suit for sale referred to in art. 147, to which the limitation in that article will apply.

MAHMOOD, J.—In the view of the ruling of this Court in the case of *Martin* v. *Pursram* (1) which was adopted by a Full Bench of the Calcutta High Court in *Raj Coomar Ram Gopal Narain Singh* v. *Ram Dutt Chowdhry* (2) there can be no doubt that the deed of 20th December, 1869, to which this reference relates, is a deed of hypothecation or simple mortgage, the covenant against alienation, taken with the word "*adh*" which occurs in the deed, placing the matter beyond question. Nor can it be doubted that [557] the nature of the suit was for recovery of the money due on the deed by enforcement of the lien thereby created, by bringing the property to sale. The only question then, with which we are concerned, is whether the suit is governed by art. 132 or 147 of sch. ii of the Limitation Act (XV of 1877). In other words, is the suit one "to enforce payment of money charged upon immoveable property," or a suit "by a mortgagee for sale?"

There can be no doubt that the practice of this Court has hitherto been to apply the limitation of twelve years to such suits, the only expression of a different opinion being found in the judgment of my learned brothers OLDFIELD and BRODHURST in the case of *Radho* v. *Umar Daraz Khan* (3).

The question before us is therefore of considerable importance, because the answer to it will determine whether twelve or sixty years is to be the period of limitation for such suits as the one to which this reference relates.

Having carefully considered the question, I have arrived at the same conclusion as my brother OLDFIELD, namely, that such suits fall under art. 147 of sch. ii of the Limitation Act, and are governed by the limitation of sixty years. Under Act IX of 1871 suits of this nature were regarded as falling under art. 132 of the Act, notwithstanding the somewhat significant language of the *Explanation* appended to that article; and suits for redemption fell under art. 148. In other words, the mortgagee was allowed only twelve years for recovering his mortgage-money, whilst the mortgagor had sixty years within which he could redeem. I must here observe that art. 148 of Act IX of 1871 contemplated only suits

(1) N.W.P. H.C.R. (1867) 124.   (2) 13 W.R. (F.B.) 82.
(3) A. W. N. (1883) 200.

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against mortgagees for *recovery of possession* of them mortgaged property and was therefore limited to suits for redeeming property subject to a *usufructuary* mortgage. It did not contemplate suits for redeeming property subject to a *simple* mortgage or hypothecation, in which the question of recovery of possession naturally could not arise. Art. 148 of the present Limitation Act (XV of 1877), by introducing the words "*to redeem or*" has distinctly operated to extend the scope of the clause, so as to include suits for redeeming a simple mortgage. And it has introduced another important alteration also. Under art. 148 of Act IX of 1871 [558] the period of sixty years' limitation in a redemption suit was computed from "the date of the mortgage;" under art. 148 of the present Act the period begins from the time "when the right to redeem or to recover possession accrues."

Again, as it has been pointed out by my brother OLDFIELD, neither Act IX of 1871 nor the law which preceded it made any specific provision as to suits for foreclosure. The reason probably was that such suits were invariably brought after foreclosure had occurred by lapse of the year of grace required by Regulation XVII of 1806. I have recently had occasion, in *Tawakkul Rai* v. *Sheoghulam Rai* (1) to explain the exact effect of the expiry of the year of grace, and I have held that the expiry *ipso facto* invested the *bybilwafa* mortgagee with absolute ownership of the mortgaged property, so that if he was *out of* possession his remedy was to sue for *proprietary* possession, and, if in possession, it was optional for him to bring a declaratory suit to establish his absolute ownership. Such suits were clearly not governed by sixty years' limitation; but art. 147 of the present Limitation Act leaves no doubt upon the question that suits by a mortgagee for foreclosure are now entitled to the benefit of that period.

The relation of mortgagor and mortgagee, in common with other contracts, creates mutual rights and obligations. After the relation is once established, and viewing that relation with reference to the question now before us, the right of the mortgagor is to redeem the property from the incumbrance; the right of the mortgagee is to enforce his security, whether it is a simple mortgage, a usufructuary mortgage, or a mortgage by conditional sale. And it seems to me that if sixty years are allowed to the mortgagor for enforcing his right by redemption, a similar period should reasonably be allowed to the mortgagee for enforcing his right according to the nature of his security. It is intelligible to me, therefore, that so long as the mortgagor is allowed sixty years to redeem, the mortgagee should be allowed a similar period to enforce his security by foreclosure or sale of the property, as the case may be. That the present Limitation Act has introduced an important alteration in the law cannot be doubted: that the alteration is consonant with natural justice and jurisprudential conceptions I fully believe.

[559] But it may be said that this conception of the symmetry of the law is inconsistent with the fact that the right of a usufructuary mortgagee to recover possession of the mortgaged property under the terms of the mortgage still governed by twelve years' limitation under art. 135 of the Limitation Act. To this it seems enough to say that the recovery of possession by usufructuary mortgage does not extinguish the incumbrance by virtue whereof the possession is so obtained, whilst

(1) 6 A. 344.

redemption by the mortgagor and foreclosure or sale by the mortgagee undoubtedly has such effect—a distinction which amply accounts for the difference between the periods of limitation to which I have referred.

I confess that at the hearing I was so far impressed with the argument of the learned Pandit who argued the case on behalf of the appellant, that I was disposed to regard it as anomalous that whilst suits for recovery of immoveable property are governed by only twelve years' limitation, a suit like the present, which is for realization of an interest in such property, should be allowed no less than five times that period. But upon consideration the disparity is perfectly accountable by reason of the fact that between the mortgagor and mortgagee exists a relation similar in nature to that of a trust, and the Limitation Act itself recognizes the fact by taking care to explain in s. 3 "that a mortgagee remaining in possession after the mortgage has been satisfied" cannot be regarded as a trustee. This circumstance alone is enough to account for and explain away the apparent, but not real, anomaly suggested by the argument of the learned Pandit.

I am unaware of any provisions in the law of India which can justify the notion that there can be any suit by a mortgagee *for sale* other than a suit like the present, and the view is supported by the words in the third column of art. 147 of the Limitation Act itself, which provides that the period of limitation is to be computed from the time "when the money secured by the mortgage becomes due," language which leaves no room for doubt that a suit by the holder of a simple mortgage or hypothecation for the enforcement of his lien by sale of the mortgaged property, is a suit which falls under the clause to which I have referred. And this is my answer to this reference.

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6 A. 560 (P.C.) = 11 I.A. 164 = 4 Sar. P.C.J. 512 = 8 Ind. Jur. 326.

[560] PRIVY COUNCIL.

PRESENT:

Lord Fitzgerald, Sir B. Peacock, Sir R. P. Collier, Sir R. Couch and Sir A. Hobhouse.

[*On appeal from the High Court of the North-Western Provinces at Allahabad.*]

RAI BISHENCHAND (*Plaintiff*) v. MUSSUMAT ASMAIDA KOER (*Defendant*). [5th and 6th December, 1883, and 1st March, 1884.]

Hindu Law—Transfer of shares in joint family estate, by the head of the family and his son, to minor grandson—Construction of gift, partial failure not invalidating the whole.

In a joint family, under the Mitakshara, consisting of a grandfather, his son, and that son's son, in pursuance of a family arrangement, the first, with the consent of the second, made by deed a gift of the whole ancestral estate to the third, including with him possible brothers that might be born thereafter. The father, in lieu of his share in the ancestral estate, received money for the payment of debts incurred by him. Possession was given to the minor, through his mother, appointed by the deed of gift to be his guardian. The minor then died, and the mother retained possession.

The family estate, on the death of the grandfather, was attached by one of the father's creditors, who held a decree against him; and, in a suit to avoid the deed of gift, it was *held*, that the transfer to the minor, having been made in good faith, and for good consideration, was valid; and that, though the gift to possible brothers could not take effect, the gift by the head of the family, with

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the consent of the son, to the next generation, of which the only existing member, *viz.*, the minor grandson, was put into possession, was valid. It was not a partition; for (according to the Mitakshara, Chap. I, s. v, verse 31) there could be no partition directly between grandfather and grandson while the father was alive. But it was a family arrangement, partaking so far of the nature of a partition that the father received a portion, and was thenceforth totally excluded; and, *quoad ultra*, the grandfather surrendered his interest to the grandson.

[F., 18 B. 7 (12); 12 C. 663 (672); 31 C. 111 (127); R., 15 B. 326 (334); 15 B. 543 (548); 16 B. 29 (34) (F.B.); 23 B. 146 (173); 26 B. 449 (467)=3 Bom. L.R. 857; 32 B. 59 (74)=9 Bom. L.R. 1305; 24 C. 646 (660); 32 C. 992=9 C.W.N. 749=1 C.L.J. 482; 12 M. 393 (399); 10 Bom. L.R. 778 (780); 97 P.L.R. 1916.]

APPEAL from a decree of the High Court (11th March, 1880), reversing a decree of the second Subordinate Judge of Benares (28th June, 1879).

The questions raised by this appeal arose out of a transaction in a joint family of the Benares district, consisting of the grandfather, Mata Dyal Singh, his son, Udai Narain Singh, and Satrujit Narain Singh, his grandson.

On the 12th July, 1875, Mata Dyal, with the consent of Udai Narain, executed a deed of gift of the ancestral family estate in favour of Satrujit Narain, and of such other sons as might there-[561]after be born to Udai Narain, as to whom the deed of gift stated that he had been compensated by the discharge, out of the family estate, of certain of his debts in the past, and by a cash payment of Rs. 5,000 in respect of his existing debts, and that he retained certain property acquired by himself. Satrujit's mother, Asmaida Koer, was appointed guardian.

The material part of the deed of gift is set forth in their Lordships' judgment. It was registered; under it possession was given to Asmaida Koer on behalf of the minor; and "dakhil kharij" was effected in the revenue records.

Satrujit died on the 28th August, 1875, and after his death Asmaida Koer obtained "dakhil kharij" in her own name. In 1877, the plaintiff obtained a decree on two bonds given to him by Udai Narain for Rs. 5,111. On 21st April, 1878, Mata Dyal died. On the 26th July, 1878, the family estate was attached by the plaintiff as the property of Udai Narain, and liable to be sold in satisfaction of the decree against him.

Asmaida Koer objected under s. 278 of the Code, and her objection was allowed on the 4th September, 1878. She therefore remained in possession, and the decree-holder brought this suit.

The plaintiff alleged that the deed of gift of 1875 was invalid, having been executed to defeat the rights of the creditors of Udai Narain. He also alleged that "the gift made to the minor and to his brothers, who had not been born at the time, and who might be born after the date of the gift, was illegal, under the shasters; as it was impossible to determine their number or the extent of their rights at the time when the gift was made, or to put the donees into possession."

Asmaida Koer answered that the deed of gift to Satrujit had been made in good faith, with the consent of Udai Narain, who had received Rs. 5,000 for payment of debts due to his creditors, besides other sums paid for him, and thus had received his share in the disputed property. She relied on her possession under a good title.

Issues having been fixed raising questions of the *bona fides* of the gift and its legality, the Court of first instance, the Subordinate Judge of

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Benares, gave judgment in favour of the plaintiff. [562] He held that Udai Narain having a right to a share in the family estate, and, whilst his father was alive, a right to a partition, his consent was essential to the validity of the gift. Under the circumstances of his indebtedness, he could not give a valid consent; and the deed of gift was, therefore, ineffectual.

A Divisional Bench of the High Court (SPANKIE, J., and OLDFIELD, J.) reversed that decision on appeal. Their judgment was as follows:—

"If the gift was made under the circumstances stated in the deed and with the object stated, and really took effect by transfer of the property to the minor, the plaintiff cannot have it set aside and defeat appellant's right by inheritance from the donee, or claim to have the property conveyed by it sold in satisfaction of his decrees against Udai Narain.

There was good consideration for the gift, since it was made with the object of preserving the family estate and securing provision for the minor and dependent members of the family, and we see no reason to doubt that it was *bona fide*, for proper and sufficient provision was at the time made for existing creditors. A sum of Rs. 5,000 was expressly set aside for creditors, and that sum was more than sufficient to cover the plaintiff's claim at the time, and no evidence has been adduced to satisfy us that it did not cover all the existing debts due by Udai Narain; and besides the sum of Rs. 5,000, there would be assets in Udai Narain's hands, from the profits of the lease and personal property not affected by the gift.

But there is another way of looking at the arrangement made by the deed: it may be said to effect a partition of the ancestral estate between Mata Dyal and his son Udai Narain, the latter having received Rs. 5,000 in money, which, together with the sums which had been paid out of the property to liquidate his debts, made up his share on partition; and Mata Dyal was quite at liberty to secure to himself in this way a proper share in the estate, and his dealing with such share cannot be questioned by the plaintiff; and this character of the arrangement between Mata Dyal and Udai Narain is borne out by the passage in the deed already cited begin-[563]ning 'Babu Udai Narain Singh will have no right to my inheritance, &c.'

We see no reason to doubt that the gift was intended to take effect and that it did as a matter of fact take effect. The proper and necessary mutation of names in the revenue registers was at once effected, and in the name of Satrujit Narain Singh; and Mussumat Asmaida asserted her position as guardian and manager for the minor, Satrujit Narain Singh, obtaining a certificate under Act XXVII of 1860, and she dealt with the estate in his name, and at his death she succeeded him as heir, and had mutation of names made in her favour, and dealt with the property in her own right. Mata Dyal Narain was an old and infirm man, and died in two or three years after the execution of the deed, and he evidently had resolved to secure what remained of his estate for the provision of his grandson and other dependent members of his family by the gift in question, and there is no reason whatever to suppose that he did not honestly carry out his intention.

We decree the appeal, and set aside the decree of the lower Court, and dismiss the suit with all costs."

On this appeal,

Mr. *J. F. Leith*, Q.C., and Mr. *C. W. Arathoon* appeared for the appellant.

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The respondent did not appear.

For the appellant it was argued :—

In the first place, the evidence had failed to show that there was any *bona fide* intention on the part of the grandfather and father to change the ownership of their estate. The whole transaction of the gift of 1875 might be regarded as a *benami* one, with the object of concealing the interests really held by the co-sharers. Udai Narain Singh was, as regards his creditors, not in a position to make a *bona fide* transfer. Secondly, the gift to the grandson, even if the intent was *bona fide* to make it, was a disposition not permitted by the law of the Mitakshara. This family being undivided, the head of the family and his son could not part with their shares in the manner attempted : no co-sharer in a joint family being able to voluntarily alienate his undivided share. [564] on his own account, and for his own purposes. *Sadabart Pershad* v. *Foolbash Koer* (1), *Suraj Bansi Koer* v. *Sheopersad Singh* (2). The most, in fact, that could be done by a single member of a joint family in the way of charging his own particular interest was that, on a decree being made against him, in respect of his actual liabilities, his right, title and interest, when brought to sale in execution of the decree, would be ascertained by a partition. The right to enforce a partition was all that was alienated by the member of a joint and undivided family, when a decree was made against him, *Din Dyal* v. *Jagdip Narain* (3). Here, however, if the consent of Udai Narain to the gift by the grandfather were allowed to be effective, it would amount to an actual conveyance of his share. There was no authority to show that a grandfather or father could cede or surrender, in his lifetime, his share to another member of the family.

Again, by Hindu Law, the share of the indebted father, when inherited by the son, was burdened with the debts, payable as a pious duty, by the son, out of the inheritance : *Girdhari Lal* v. *Kantu Lal* (4). The operation of this rule would, in this case, be defeated if Udai Narain's act, in consenting to the gift, were allowed to take effect.

Lastly, the gift to the grandson was coupled with a gift to the unborn sons of Udai Narain. The gift, then, including, as it did, objects too remote, *viz.*, persons unborn and incapable of receiving possession, contained what constituted a fatal objection to it.

[Sir R. COUCH referred to the judgment in *Soudamini Dossee* v. *Jogeschunder Dutt* (5), where, in regard to a will, a gift to a class of persons, some of whom, by reason of remoteness or the like, were unable to take, was disputed, and held to fail.]

The whole gift in that case, because, in part, it could not take effect, was held inoperative ; and reference in the judgment was made to *Srimati Bramamoyi Dassi* v. *Jogeschunder Dutt* (6), and to the English case, *Leake* v. *Robinson* (7). The rule applicable [565] to bequests to a class of persons, some of whom could not take, was applicable here. Reference was also made to Act X of 1865 (the Indian Succession Act, 1865), ss. 101, 102, and other sections incorporated with Act XXI of 1870, the Hindu Wills Act.

[Sir A. HOBHOUSE distinguished the present case of a gift from gifts made in wills.]

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(1) 12 W.R. (F.B.) 1.
(2) 5 C. 148 = 4 C.L.R. 226 = 6 I.A. 88.
(3) 4 I. A. 247 = 3 C. 198.
(4) 1 I.A. 321.
(5) 2 C. 262,
(6) 8 B.L.R. 400.
(7) 2 Merivale 363.

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In reference, again, to the voluntary nature of the act of consenting on the part of Udai Narain, and the hindrance to his creditors, *Spirett* v. *Willows* (1) was cited.

On a subsequent day, 1st March, 1884, their Lordships' judgment was delivered by Sir A. HOBHOUSE.

JUDGMENT.

Sir A. HOBHOUSE.—In this case, the suit was brought by the appellant against the respondent and her husband Udai Narain, for the purpose of avoiding a deed of gift made in favour of the children of Udai Narain, and of making land comprised in that deed available to answer debts of Udai Narain.

Udai Narain belonged to a joint family living in the Benares district, and governed by the Mitakshara law. At the date of the transaction complained of, Mata Dyal was the head of the family. Udai Narain was his only son, and he had by his wife Asmaida one son, named Satrujit, who was then between two and three years old. That appears to have been the whole of the family.

Udai Narain was then, and had for some time been, living a profligate life. He had left his wife and the family house, and was living with a prostitute in the city of Benares. He is stated to have been an extravagant man, running into debt, and wasting the family property in the pursuit of pleasure.

It was under these circumstances that the deed in question was executed. It bears date the 12th January, 1875, and is in the form of a declaration by Mata Dyal. He recites that he is too old and infirm to attend to the management of the ancestral villages and the family; that Satrujit is an infant; that Udai Narain pays no attention to the family affairs; that he is frivolous, extravagant, and not likely to support his wife and children, and is placing the [566] family reputation and property in jeopardy. The deed then proceeds as follows:—

"Therefore I have executed this deed of gift of my own accord and free will, and with the consent of Babu Udai Narain Singh, and I am getting the signature of the said Babu affixed to the margin of this document, so that he (Babu Udai Narain Singh) and his heirs may abide by the terms of this document. That Babu Satrujit Narain Singh, minor, himself and his own brothers who may be born hereafter, are and will be the permanent and rightful owners and claimants of all the ancestral properties, moveable and immoveable, my own property; that so long as the said donee does not attain the age of majority, Mussumat Asmaida Koer, the mother of the minors, should duly look after the support, education, and bringing up of the minor, and manage the estate and the family affairs as a guardian of the said minor. That with a view to the completion of this document, I, the executant, will, by filing applications in every department having jurisdiction in this matter, get my name expunged, and will get the name of the minor, under the guardianship of his mother, entered in respect of all villages and land or portions of land and houses, &c.; that the said guardian will in every way be competent to collect rents from the ilaka (estates), realize the outstanding debts, carry on banking transactions, manage all moveable and immoveable properties, and dismiss or employ servants, managers for collections and Court mukhtars, just as she will think proper; that, out of the profits

(1) 3 De. Gex, Jones and Smith, 293.

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which will accrue, after the payment of the Government revenue and defrayal of other necessary expenses, she will, with all possible caution, support, educate, and celebrate the marriage of the minor son and of other sons who may be born in future, and of the daughter, and keep the expenses on a moderate scale, and take every care, so that the ancestral property may not be mismanaged or charged with debt; that Babu Udai Narain Singh should defray his expenses from the profits arising from the lease of Tikari estate acquired by him, and he will have no connection with the ancestral property (and) my own property; that similarly the donee minor, and his guardian, will not have generally any right to demand the profits and products of the said ilakas under lease from Babu Udai Narain Singh, except whatever he (Babu Udai Narain Singh) may give of his [567] own accord from the profits of the said ilaka under lease; that if, after the expiry of the term of the lease, a new lease be not granted to Babu Udai Narain Singh from the Tikari estate, the donee and the guardian should look after the support of Babu Udai Narain Singh; that besides this, Babu Udai Narain Singh will have no more right or title left to my ancestral property, because all his rights, present and future, to my inheritance, have been sufficiently compensated by payment of his heavy debts, defrayal of his extravagant expenses on frequent occasions, and recent payment of Rs. 5,000 on account of debt which he now states to be due by him, which I have been compelled to pay to release the property from every liability, and besides all this, by fixing an allowance for his personal expenses for present and future."

Udai Narain acknowledged the deed under the head of "witnesses," but adding the words "with my own consent." He was therefore a party to his father's gift.

The deed was registered soon afterwards in the Registry Office of Benares, the Sub-Registrar recording that Mata Dyal, who was personally known to him, admitted its execution.

In the month of March, 1875, orders were made for the removal of the several mauzas comprised in the deed from the name of Mata Dyal into that of Satrujit minor under the guardianship of Asmaida. These orders were made on the reports of Tahsildars that Satrujit by his guardian was in possession.

On the 28th of August, 1875, Satrujit died. Asmaida then claimed as his heir to have the estates transferred into her own name, and as, after notices issued, no one objected, orders were made to that effect. She also procured a certificate entitling her as representative of Satrujit to realize about Rs. 544 outstanding debt due to him, and certain promissory notes and bank shares which were his property. It does not appear that these properties were ancestral, but it is not suggested that the infant had any other property.

On the 21st April, 1878, Mata Dyal died. The plaintiff was a creditor of Udai Narain by virtue of two bonds given in February and March, 1874, for an aggregate sum of Rs. 3,000. He [568] had obtained a decree on these bonds against Udai Narain on the 26th April, 1877, for the sum of Rs. 5,111. On the death of Mata Dyal, the plaintiff took steps to enforce his decree against the family property, and on the 26th July, 1878, he attached it, with other property, and advertised it for sale as the property of Udai Narain.

Asmaida then intervened as an objector to the sale, and on the 4th of November, 1878, the Subordinate Judge of Benares allowed her objection,

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and directed that the family property should be released from attachment. In his judgment he states that Asmaida has, as guardian to Satrujit and in her own right, been in possession, and that "her possession up to this day is proved from papers that are extant."

The creditor thereupon brought the present suit, alleging that the deed of January, 1875, was executed merely to defeat the right of the creditors, and was only a paper and fraudulent proceeding; and further that it was illegal as being a gift to unborn persons.

The defendant Asmaida put in a written statement, which was verified by Bindu Lal, her agent. In it she alleged the profligacy and extravagance of Udai Narain; that he had on several occasions incurred illegal debts, which Mata Dyal was compelled to pay in order to maintain his reputation; and that he had consented to the deed of gift after receiving Rs. 5,000, which was considered to be the value of his proper share in the property according to his future title.

The Subordinate Judge decided in favour of the plaintiff. He took the view that Udai Narain's consent, without which Mata Dyal could not alienate the ancestral property, was a fraud on Udai Narain's creditors, and that the deed of gift was wholly void.

Asmaida appealed to the High Court, who reversed the decree and dismissed the suit. That Court considered that the deed was made on good consideration, in good faith, and with a proper provision, not shown to be insufficient, for Udai Narain's creditors. They further thought that the transaction might in some sense be considered as a partition, meaning apparently that Udai Narain had received the value of his share, and had in effect been bought out of the ancestral property.

[569] The transaction has been attacked at the bar on several grounds.

First, it is said that the evidence of change of possession after the execution of the deed is insufficient to show that the parties considered the ownership to be changed. But there are two answers to this argument. In the first place it proves too much. If it is worth anything, it proves that the deed was a pure *benami* transaction, which their Lordships consider to be an inadmissible conclusion. They think it impossible to say that, as between Udai Narain or Mata Dyal and the others, it was intended to have no effect. The second answer is, that, though the evidence of ostensible change of possession seems meagre, there is some, which the Courts below have thought sufficient to prove the fact, though the Subordinate Judge thinks that it is of no validity because tainted by fraud. The Subordinate Judge says:—

"There are papers produced in this case to show that, subsequently to the gift, affairs connected with the estate were carried on in the name of Mussumat Asmaida Koer, as guardian of the minor donee Satrujit Narain Singh, and after the death of the latter in her name, as being the proprietor of the estate by right of inheritance to her minor son deceased, and that she has all along been in possession of the estate. But this use of the lady defendant's name in the affairs, while Mata Dyal Singh and Udai Narain Singh wished it, and all of them formed the members of a joint family, cannot but be considered to be nominal, and has not the effect of removing the taint of fraud from the gift."

And the High Court says:—

"We see no reason to doubt that the gift was intended to take effect, and that it did as a matter of fact take effect. The proper and necessary mutation of names in the revenue registers was at once effected.

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and in the name of Satrujit Narain Singh; and Mussumat Asmaida asserted her position as guardian and manager for the minor Satrujit Narain Singh, obtaining a certificate under Act XXVII of 1860, and she dealt with the estate in his name, and at his death she succeeded him as heir, and had mutation of names made in her favour, and dealt with the property in her own right."

[570] It may be added that in the execution proceeding, where the question was who actually had possession, the then Subordinate Judge decided in favour of Asmaida.

The second point made at the bar was that which forms the main discussion below, *viz.*, that the transaction was a fraud upon creditors. On this point their Lordships concur with the High Court. That it was intended to save the ancestral property from being wasted by the vices and extravagance of Udai Narain is openly avowed on the face of the deed. But such an intention is not fraudulent. It may be carried into effect by honest means. And people who mean to effect such a design by fraud are not likely to put it in the forefront of an instrument which must be registered, which may easily be discovered by persons interested to inquire about the property, and to which attention is likely to be drawn by the consequent mutation of names after public notice and a change of management.

If the statements in the deed are true, it is clear that Udai Narain received a substantial consideration for his consent, not only because the ancestral estate was secured for his son, but because his debts had been paid by Mata Dyal in the past, and were now being provided for to the extent of Rs. 5,000. It is urged that there is no evidence of the payment of this Rs. 5,000, and it is true that Asmaida was not called as a witness; that Bindu Lal, her agent, who verified her statement, was not called; and that the witnesses who speak to the payment speak without much particularity, and do not distinguish between the amount, if any, paid to Udai Narain himself and the amount paid directly to his creditors. But it is difficult to suppose that there was any dispute on the point in the Courts below. No special allegation is made about it in the plaint, though the plaintiff then knew the precise contents of the deed. No separate issue is framed upon it. Besides the written statement, three witnesses speak of Udai Narain "taking" Rs. 5,000. Two of them had attested the deed, and two of them had been employed in carrying portions of the Rs. 5,000, Rs. 900 in all, to the plaintiff himself. All three are cross-examined, but their statements as to the payment are not challenged or tested in any way. The Subordinate Judge treats the [571] payment as one of the facts in the case, though he holds that it cannot save the gifts from the taint of fraud. The High Court treat it as one of the facts in the case, and to a great extent found their judgment upon it. Neither Court discusses the proof of it, or intimates that there was any dispute or doubt raised upon it. It would be a dangerous thing for this Board to allow a conclusion so formed to be brought into doubt merely because the evidence of it in the record may not be so good as would be required if the matter had been directly disputed.

It is suggested that the Rs. 5,000 came from the joint chest; that it was an inadequate consideration for the interest which Udai Narain was giving up; and that he was left insolvent. But the plaintiff, who now wishes us to draw these conclusions, has laid no adequate ground for them in his allegations or in his evidence. Such as the evidence is, it seems probable that the Rs. 5,000 (to say nothing of prior payments

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on Udai Narain's account) was very nearly, if not quite, the value of his share, which on a partition would have been one-fourth of the estate. According to the plaintiff's own valuation of the estate, Rs. 5,000 exceeded the value of that fourth. Even if it came from the joint chest, it is an application by the head and manager of the family of a large share of the family property to the separate purpose of one member, who was indulging his inclinations apart from the family. That is a substantial consideration. There is no proof that Udai Narain was left insolvent, nor any reason to think that he was. It does not clearly appear that he owed anything except to the plaintiff, whose debt at the date of the transaction was reduced to about Rs. 2,400. And it does clearly appear that Udai Narain had other property. He had the Tikari lease, mentioned in the deed of January, 1875. And he had a property called Mauza Sarai Nandan, which has been taken by the plaintiff in execution. It may indeed be that he had only one immoveable property, called by two names; but if such things are left in doubt, it is the plaintiff's fault for not raising issues upon them.

Indeed the plaintiff's case has been framed and argued as though the creditors had got some charge on Udai Narain's share in the family property, and as if it were for the defendant to show **[572]** purchase for value without notice, in order to retain that property. But all the defendant has to show is that the transfer was made in good faith and for good consideration. The document in fact shows valuable consideration approaching, if not equalling, the whole value of Udai Narain's then share. And, though Mata Dyal seems to have taken the precaution to see that portions of the Rs. 5,000 actually reached the hands of Udai Narain's creditors, he was not bound to do that, because they were general creditors and had no lien upon the property. It would place these joint families in a very unfortunate predicament if they could never buy out a vicious member who threatens their ruin, so long as any one of his creditors remains unpaid.

There remains a question of some difficulty whether the deed, which contemplates benefits to after-born sons of Udai Narain as well as to Satrujit, can have any operation in his favour. This question, though raised in the plaint, is not dealt with by either of the lower Courts. It depends entirely on the view which may be taken of the meaning of the parties to the transaction, for the rule of law on which the plaintiff relies, *viz.*, that gifts cannot be made to persons unborn at the time, is well settled.

It is said then that the gift is made to a class, and that, inasmuch as some of the class are unable to take, none can take, and certain sections of the Indian Succession Act of 1865 are invoked to give weight to this contention, the Legislature having thought fit to apply those sections to Hindu wills.

Independently however of the distinction which may be taken between wills the operation of which is suspended during the testator's life, and deeds which operate immediately, especially such deeds as confer a present interest upon a present person, the sections cited have no bearing on such a gift as that under consideration. S. 102 lays down the rule that a bequest inoperative as to some of a class shall be wholly void, not in all cases, but only when the bequest offends against the rules contained in ss. 101 and 102. And the gift under consideration does not fall within either of these two sections. It may be that Illustration (*b*) to s. 102 imports into India an English rule of construction which usually

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defeats the intention of the testator. But whatever force the [573] illustration may have (and it seems out of place as attached to a section intended, not to define the word "class," but only to establish a special incident of gifts to classes), it is not made applicable beyond the two cases contemplated by ss. 100 and 101.

Assuming that the deed is intended to express a gift to the brothers of Satrujit, which cannot take effect as such, what is the whole scheme of the parties? We find them bent on saving the ancestral estate from the consequences of the continued extravagance of one of its members. The plan they adopt, probably the only plan open to them except a complete partition, is a transfer by the head of the family, with the consent of his son, to the lower generation. The only member of that generation was the grandson Satrujit. He therefore is made to take by name and immediately, and the possession and ownership are transferred to him. Is then the gift indisputably designed for him wholly to fail because the parties supposed that they could join with him possible after-born sons, who, if any had happened to be born, could not legally claim under a gift? Is Udai Narain, whose interests were bought out for valuable consideration, to re-enter upon his son, in whose favour they were bought out? No doubt that, on the present assumption, some portion of the intention must fail, but that is no reason why the whole should fail. The paramount intention was to get rid of Udai Narain by passing the property to his sons. That intention is much more readily effectuated by giving the property to Satrujit, the only then son of Udai Narain, than by holding that the deed and all that followed upon it, the mutation of names, the possession and management of Asmaida, did not operate any change at all.

Cases are not rare in which a Court of construction, finding that the whole plan of a donor of property cannot be carried into effect, will yet give effect to part of it rather than hold that it shall fail entirely. In the present case there is every reason for holding that, if Satrujit's possible brothers are not able to take by virtue of the gift, he shall take the whole. He is there present and able to receive the gift. He is an individual designated in the deed. If the deed stood alone, it is a question in each case whether a designated person who is coupled with a class described [574] in general terms is merged into that class or not. But the deed does not stand alone. It is followed by actions of a kind which, even without a deed, may work a transfer of property in India. Satrujit is entered in the Collector's books as the sole possessor of the property, and his guardian takes possession, first in his name, and afterwards as his successor. Their Lordships hold that the circumstance that the parties wished to do something beyond their legal power, and that they have used unskilful language in the deed of gift, ought not to invalidate that important part of their plan which is consistent with one construction of the deed, and is clearly proved from the transfer of the property in fact.

But their Lordships conceive that it is not necessary to view this transaction as though it were to be determined by rules of construction drawn from English law and applicable to English deeds of gift. The High Court viewed it in the light of a partition. It cannot be strictly a partition, for, according to the Mitakshara (Chap. I, s. v, verse 3), there can be no partition directly between grandfather and grandson while the father is alive. But it is a family arrangement, partaking so far of

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the nature of a partition that Udai Narain receives a portion and is thenceforth totally excluded, and, *quoad ultra*, Mata Dyal surrenders his interest to his grandson, who on a complete partition among the whole family would be entitled to one-fourth. Now in such an arrangement it would be quite consistent with Hindu ideas of ancestral property to express a desire that the whole generation into which the property was transferred should benefit by it. Indeed in the case of a partition between father and sons it is laid down in the books that if a son born after the partition of ancestral estate does not out of the residue of his father's estate get a share equal to what his brothers had obtained, the other brothers must contribute to a share out of their portions. This rule is to be found in the Dayabhaga, Chap. VII, ss. 10, 11, and 12, which is a Bengal authority, but it refers to Vishnu and Yajnyavalkya, authorities on which the Mitakshara is founded. Indeed, the principle of the joint family is not less closely, but more closely, insisted on by the Benares school than by the Bengal school of law. But their Lordships are not now affirming the law on this point, nor are they deciding or prejudicing any question which [575] may arise between Satrujit's heirs on the one hand, and his brothers, if any should be born, on the other. They are only showing that the notions present to the mind of the head of a joint Hindu family who is making a family arrangement, are something very different from the notions present to the mind of an English testator when he makes a gift to a class.

It is curious that in the appeal which was argued immediately before this—*Hardi Narain* v. *Ruder Perkash Misser* (1)—there was a similar gift made from a similar motive. Shib Perkash and his infant son Ruder constituted the whole of a joint family living under the Mitakshara law. Shib was extravagant and embarrassed, and to save the ancestral estate he executed a deed of gift to Ruder, coupled with a declaration that, if other sons should be born to him, they should from the date of their birth acquire equal right in the property. It did not occur to anybody to contend that the deed was void, except as a fraud upon creditors. The High Court, consisting of MITTER and TOTTENHAM, JJ., say :—

"But conceding that the gift is void against the father's creditors, it is binding and operative as between the parties to the instrument. Therefore, from the moment of its execution, Shib Perkash ceased to have any joint interest in the family estate."

The appeal turned on other questions, and their Lordships only refer to the case as illustrating the notions present to the minds of Hindus when making arrangements of ancestral property.

The result is that, in whatever light the transaction may be viewed, and whatever questions may arise between those who claim under it, the property effectually passed away from Mata Dyal and from Udai Narain. The appellant's claim fails; his appeal must be dismissed, and their Lordships will humbly so advise Her Majesty.

Solicitor for the appellant: Mr. *T. L. Wilson.*

(1) 10 C. 626 = 11 I.A. 26.

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6 A. 576 = 4 A.W.N. (1884) 181.

6 A. 576 = 4 A.W.N. (1884) 181.

[576] APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

MURLIDHAR (*Plaintiff*) *v.* ISHRI PRASAD (*Defendant*).*
[1st July, 1884.]

Landholder and tenant—Lease—Suit by one of several joint lessors for balance of rent—Act XII of 1881 (*N.W.P. Rent Act*), *s.* 106.

M and *S* were joint lessors of certain land by a *kabuliyat* which did not contain any specification of the shares of the lessors. *M*, stating that the share of rent due to *S* had already been paid, sued the lessee for the recovery of his own share. The amount claimed was all that remained due on the lease.

Held that the plaintiff was entitled, as one of the joint lessors, to sue for the balance of rent, and that his suit was therefore not barred by the terms of s. 106 of the N.-W.P. Rent Act (XII of 1881). *Manohar Das* v. *Manzur Ali* (1), referred to.

Quære.—Whether the *kabuliyat* whereon the suit was based might not be called a "special contract" within the meaning of s. 106 of the Rent Act, so as to render that section inapplicable.

[R., A.W.N. (1898) 129.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Babu *Ram Das Chakarbati*, for the appellant (plaintiff).

Pandit *Sundar Lal*, for the respondent (defendant).

The Court (STRAIGHT, Offg. C. J., and MAHMOOD, J.) delivered the following judgment:—

JUDGMENT.

MAHMOOD, J.—This was a suit for recovery of arrears of rent on a *kabuliyat*, dated the 3rd March, 1880, executed by the defendant in favour of the plaintiff and one Sambburan Das jointly, without any specification of the shares of the two lessors. Sambhuran Das did not join in the suit, but was impleaded as a defendant, and he did not appear to defend. The suit was for recovery of the plaintiff's share of the rent due on the *kabuliyat*, and though the plaint did not clearly state that the amount claimed was the whole balance due on this lease, the plaintiff, in his statement, which has been recorded by the Court of first instance, made it perfectly clear that the share due to Sambhuran Das had been already paid to him by the defendant; that the amount claimed was all that remained due on the lease; and that Sambhuran Das had [577] not joined in the suit because of collusion with the defendant. Both the lower Courts have declined to enter into the merits of the case, on the ground that the suit was not maintainable in the form in which it was brought, by reason of its not including the entire rent due on the lease; and the lower appellate Court, in support of this view, has relied on the ruling of a Division Bench of this Court in *Manohar Das* v. *Manzur Ali* (1) in which BRODHURST and TYRRELL, JJ., held that a suit by one of sevearl joint lessors for his share of the rent payable under the lease was not maintainable, even though the

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* Second Appeal No. 37 of 1884, from a decree of F. S. Bullock, Esq., Officiating District Judge of Allahabad, dated the 13th September, 1883, affirming a decree of Saiyid Ewaz Ali, Deputy Collector of Allahabad, dated the 28th June, 1883.

(1) 5 A. 40.

other joint lessors were impleaded as defendants. The lower appellate Court has also relied upon the provisions of s. 106 of the Rent Act (XII of 1881), which lays down that "no co-sharer in an undivided property shall, in that character, be entitled separately to sue a tenant under this Act, unless he is authorized to receive from such tenant the whole of the rent payable by such tenant; but nothing in this section shall affect any local custom or any special contract."

In the present case, it may be doubtful whether s. 106 is applicable, and whether the *kabuliyat*, whereon the suit is based, may not be called a "special contract" within the meaning of the section, so as to render the section inapplicable. But, apart from this question, we have already said enough to show that the ruling of this Court, relied upon by the lower appellate Court, far from supporting the view which that Court took of the case, supports the contention urged before us by the appellant. According to that ruling "the plaintiff might have sued alone for all the rent," but this cannot be understood to mean that he was bound by an inexorable rule of law to sue even for such portion of the rent as had already been paid by the defendant-lessee. Indeed, there is no such rule of law. And what did the plaintiff say in the present case? He distinctly stated that all that was due on the lease as the share of Sambhuran Das had already been paid to him by the defendant for the year in question, and all that he was suing for was the whole balance still due on the lease, the balance being equal to his share in the rent. That he was entitled as one of the joint lessors to sue for the balance, under such circumstances, cannot be doubted. And his suit therefore appears to us to be clearly maintainable, whether we refer to the terms [578] of s. 106, to the terms of the *kabuliyat*, or to the *ratio decidendi* whereupon *Manohar Das* v. *Manzur Ali* (1) proceeds.

We decree this appeal, and setting aside the decrees of both the lower Courts, remand the case to the Court of first instance for disposal, according to law. Costs in all the Courts will abide the result.

Appeal allowed.

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6 A. 578=4 A.W.N. (1884) 182.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

GAYADAT AND ANOTHER (*Defendants*) v. KUTUB-UN-NISSA (*Plaintiff*).*
[2nd July, 1884.]

Malikana—Government Revenue—Jurisdiction—Act XIX of 1873, *ss.* 3 (1), 53-55, 241 (*b*).

At the settlement of a certain village, a malikana allowance of 10 per cent on the revenue was reserved for *C*, the talukdar to whom the village belonged. At the same settlement, the maafi holding of *A* in the village was resumed, and assessed to revenue; but *A* refused to engage for it, and it was therefore merged for revenue purposes in the mahal of the village, though still held by *A*. In 1872, *A* obtained in the Civil Court a decree by which he was declared to be the

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* Second Appeal No. 1456 of 1883, from a decree of H. P. Mulock, Esq., Offg. District Judge of Farukhabad, dated the 13th August, 1883, reversing a decree of Maulvi Muhammad Abdul Basit Khan, Munsif of Chibramau, dated the 4th May, 1883.

(1) 5 A. 40.

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APPELLATE CIVIL.

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proprietor of his holding, and to be entitled to engage for it separately; and thereupon the Collector constituted the holding a separate mahal, by causing a *khewat* to be prepared, and fixing the proportion of the revenue assessed upon the entire mahal, which the muafi holding should bear. Subsequently the zamindars of the village applied to the Collector that *A* might be made to contribute towards the payment of the malikana allowance of the talukdar. The Collector passed an order declaring *A* to be liable to such contribution; and *A* then instituted a suit for cancelment of the Collector's order, for a declaration of his non-liability to contribute to the malikana allowance of the talukdar, and for a refund of contribution already paid.

Held that inasmuch as the decree of the Civil Court in 1872 and the proceedings of the Collector consequent thereto constituted the muafi holding a "mahal" in the terms of (1), s. 3, Act XIX of 1873, and by the terms of ss. 53-55 of the same Act, a malikana allowance, such as that under reference, is "revenue," and s. 241 (*b*) bars the jurisdiction of the Civil Courts in matters regarding the amount of revenue to be assessed on any mahal, the suit was not cognizable by a Civil Court.

THE plaintiff was daughter and heir of one Hakim Ahsan-ulla. From a date anterior to the cession to the British Government of the district of Farukhabad, the ancestors of Ahsan-ulla owned a [579] small plot (25 pucka bighas) of muafi land in the village of Tira Jakat. At the settlement of the Farukhabad district in 1833, that village was found to be the property of one Chaudhri (defendant No. 1), who was not a party to this appeal. He, however, refused to engage, and the settlement was therefore made with the biswadars, who were now represented by the other defendants to this suit—a malikana allowance of 10 per cent. on the revenue being reserved for Chaudhri Fateh Chand, the talukdar. At the same settlement (1833) the muafi holding of Hakim Ahsan-ulla was resumed and assessed to revenue. The Hakim refused to engage for it, and it was therefore (though still held by the Hakim) merged for revenue purposes in the mahal of the village. At the new settlement in 1869, the position of the talukdar and of the biswadars remained unaltered. Ahsan-ulla, however, claimed to be admitted to a separate engagement for his muafi holding, and on his request being refused by the Settlement Officer, took the matter into the Civil Court. On the 7th November, 1872, he obtained a decree, whereby he was declared to be the proprietor of his holding, and to be entitled to engage for it separately. The mahal of Tira Jakat was assessed to revenue in the settlement of 1833 at Rs. 2,700, *plus* 10 per cent. on that amount (*i.e.*, Rs. 270) as malikana to the talukdar. No change was made in this assessment at the settlement of 1868—1872. Upon Hakim Ahsan-ulla obtaining his decree from the Civil Court, the Collector and Settlement Officer proceeded to constitute his holding a separate mahal by causing a *khewat* to be prepared, and fixing the proportion of the revenue assessed upon the entire mahal, which the muafi holding might fairly be called upon to bear. After some discussion, Ahsan-ulla agreed, on the 2nd December, 1873, to an assessment of Rs. 50 per annum, and orders were passed on that date for the preparation of a *khewat* and for Rs. 50 per annum, being the revenue payable by the muafi holding. Ahsan-ulla appealed from the Collector's order of the 2nd December, 1873, and the matter remained for four years under discussion. At length, on the 8th January, 1878, the local Government reduced the revenue payable by the muafi mahal from Rs. 50 to Rs. 30. This point had not long been disposed of when the biswadars represented to the Collector that although the muafi-holder (now Ahsan-ulla's daughter, the [580] present plaintiff) contributed Rs. 30 per annum to the revenue payable to the Government from the mahal for Government purposes, she

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refused to contribute towards the payment for the benefit of the talukdar to which the mahal was liable, and asked that she might be made to contribute for this purpose Rs. 3 per annum, *i.e.*, 10 per cent. on the revenue payable by her. The Collector of Farukhabad decided this matter, on the 29th March, 1882, by an order in the following terms:—

"It seems to me clear that the zamindars of Tira Jakat are certainly entitled to reduction of the malikana payable by them, and the only question is whether the ex-muafidars are responsible. It seems to me that they are responsible. They are not now muafidars; they are zamindars pure and simple; and they, under the decree of the Civil Court, only occupy the position that, in respect of this land, the zamindars did from the time of settlement to the time of the decree of the Civil Court. The Settlement Officer fixed a percentage upon the Government revenue to be paid to the talukdar by the zamindars, and it seems to me that whatever transfers take place subsequently in respect of the zamindari rights, they are transferred only subject to the incumbrances already upon them. I therefore hold the zamindars of this [a word which is illegible] land (*alias* muafi) in Tira Jakat to be responsible for the percentage upon *their* jama, whatever it may be."

The plaintiff now sued—(1) the talukdar (defendant No. 1), and (2) the biswadars (defendants Nos. 2 to 5) for cancelment of the Collector's order set out above; for a declaration of her non-liability to contribute to the malikana allowance of the talukdar; and for a refund of one year's contribution (Rs 3) paid by her.

The talukdar-defendant prayed exemption from the suit, as having no concern with it. The main plea of the biswadar-defendants was that the suit was not cognizable by a Civil Court.

The Court of first instance (Munsif of Chibramau) held that the suit, being one between private parties and not between private parties and Government, was cognizable by the Civil Court; but it dismissed the suit on the ground that the Collector's order of the 29th March, 1882, was just and equitable.

[581] The lower appellate Court (District Judge) did not consider the question of jurisdiction, but decreed the suit on the ground that the orders of Government, by which Rs. 30 was declared to be the revenue payable by the muafi-holder, were final and conclusive, and that the muafi-holder must be held to have engaged for that amount, and that amount only.

The defendants contended in second appeal that the suit was not one which was cognizable by a Civil Court.

Babu *Ram Das Chakarbati*, for the appellants.

Mr. *Sirajuddin*, for the respondent.

The Court (STRAIGHT, Offg. C. J., and DUTHOIT, J.) delivered the following judgment:—

JUDGMENT.

DUTHOIT, J.—The appeal must prevail. By virtue of the decree of the Civil Court of November, 1872, and of the proceedings of the Collector of December, 1873, the muafi holding became a "mahal" in the terms of (1), s. 3, Act XIX of 1873. By the terms of ss. 53 to 55 of Act XIX of 1873, a malikana allowance, such as that now under reference, is "revenue;" and s. 241 (*b*) of the Act bars the jurisdiction of the Civil

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Courts in matters regarding the amount of revenue to be assessed on any mahal.

The appeal is decreed with costs against the plaintiff in all the Courts.

Appeal allowed.

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6 A. 581 = 4 A.W.N. (1884) 183.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Oldfield.

NATHU RAM AND OTHERS (*Plaintiffs*) *v.* PHULCHAND AND OTHERS (*Defendants*).* [11th July, 1884.]

***Registered instrument—Oral agreement—Act XX of* 1866 (*Registration Act*), s. 48—*Act VIII of* 1871 (*Registration Act*), s. 48.**

Held that an oral agreement of hypothecation of immoveable property, entered into in August, 1869, and which was not accompanied nor followed by possession of the property charged, could not avail against a registered sale-certificate obtained in respect of the same property and dated in August, 1876, whether s. 48 of Act XX of 1866 or s. 48 of Act VIII of 1871 were looked to.

[Not F., 11 A.L.J. 137 = 18 Ind. Cas. 533.]

THE plaintiffs in this suit held a decree for money against Chunni Lal, Munni Lal, and Kalian, dated the 28th June, 1869. **[582]** On their taking out execution of this decree, the judgment-debtors, on the 24th August, 1869, entered into an oral agreement for the satisfaction of the decree. By this agreement two houses and a garden belonging to the judgment-debtors, and which had been attached, were mortgaged by them to the decree-holders as security for the satisfaction of the decree. Subsequently the terms of this oral agreement were reduced to writing in an instrument described as a deed of compromise, dated the 2nd September, 1869, but the said instrument was not registered. On the 26th May, 1876, the same property was sold in execution of a decree held by Phul Chand and Makhan Lal against the same judgment-debtors, the decree-holders being the purchasers. Subsequently the plaintiffs caused the property to be attached in execution of their decree. Phul Chand and Makhan Lal objected, and their objection was allowed. The plaintiffs then brought the present suit against Phul Chand and Makhan Lal and the judgment-debtors to establish their right to recover the amount due on their decree by the sale of the property. The claim was based on the parol mortgage of the property to them in 1869. The defendants Phul Chand and Makhan Lal had obtained a certificate of sale in respect of the property, dated the 1st August, 1876, and the same had been duly registered.

The Court of first instance (Subordinate Judge) dismissed the claim, on the ground that the deed of compromise of the 2nd September, 1869, not having been registered, no priority could be claimed for the agreement of hypothecation which it contained, and that there was no sufficient proof of any prior oral agreement to the same effect. On appeal by the plaintiffs, the lower appellate Court (District Judge)

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* Second Appeal No. 1406 of 1881, from a decree of S.M. Moens, Esq., District Judge of Aligarh, dated the 15th June, 1881, affirming a decree of Maulvi Fariduddin Ahmad, Subordinate Judge of Aligarh, dated the 31st March, 1881.

affirmed the decree. The plaintiff then appealed to the High Court, which remanded to the lower appellate Court the question whether or not any such oral agreement of hypothecation as the plaintiff alleged had in fact been made. Upon this issue, the District Judge returned a finding in the affirmative, and the High Court now proceeded with the hearing of the appeal.

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Mr. *T. Conlan* and Munshi *Hanuman Prasad*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondents.

[583] The Court (STRAIGHT, Offg. C.J., and OLDFIELD, J.) delivered the following judgment :—

JUDGMENT.

STRAIGHT, Offg. C.J.— The Judge has now found that the judgment-debtor to the decree of the 28th June, 1869, did on the 24th August, 1869, orally hypothecate to the now plaintiffs, the then decree-holders, among other properties, the houses now claimed by the defendants under their auction-purchase of the 26th May, 1876. So far, the finding, upon the face of it, is in favour of the plaintiffs. But the learned pleader objects, on behalf of the defendants, that the alleged oral agreement now found to have been made was not accompanied nor followed by possession of the property charged, and it cannot, therefore, avail against the registered sale-certificate of his clients, of the 1st August, 1876. We think this contention is a good one, and must prevail. We have carefully examined the certificate, and it bears every appearance of having been formally and properly registered. Whether we look to s. 48 of Act XX of 1866, or to s. 48 of Act VIII of 1871, the objection of the defendants' pleader is equally effectual and should, we think, be entertained. The appeal must therefore be dismissed, with costs to the plaintiffs in all the Courts.

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

BACHMAN (*Plaintiff*) v. BACHMAN AND OTHERS (*Defendants*).* [7th July, 1884.]

Will—Construction—Legacy—Vesting—Divesting clause—Gift over on legatee's death "prior to division" of the estate—Gift not void for uncertainty—Act X of 1865 *(Indian Succession Act)*, ss 76, 91, 106.

A testator directed his trustees and executors to hold his real and personal estate upon trust to sell the real estate either together or in parcels, and either by public auction or private contract, and to call in, sell, and convert into money such part of his personal estate as should not consist of money, and to divide the said moneys, and the ready money which might belong to such estate, amongst the several persons named in the schedule to the will, and to pay the same to them in the shares and proportions therein mentioned, as and when they should respectively attain the age of twenty-one years in the case of males, or, in the case of females, when they should respectively attain that age or marry. He directed that, in the event of any of such persons dying in his lifetime, or at any time thereafter "prior to the said division," leaving lawful

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* First Appeal No. 10 of 1883, from a decree of R. Scott, Esq., Judge of the Court of Small Causes, Dehra Dun, dated the 31st October, 1882.

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issue, such issue [584] should be entitled to the share which their deceased parent would have taken. One of the legatees who had attained the age of twenty-one years at the testator's death, died five months after him, before payment of the legacy, and left lawful issue.

Held that the legacy vested in interest in the legatee at the testator's death, but that the legatee having died prior to the division of the estate, it became divested; that the "division" of the testator's estate meant, in this will, the ascertainment of the amounts allottable to the share of each legatee, after the conversion of the estate into money; and that the gift over in favour of the legatee's issue was not void for uncertainty, but took effect.

Johnson v. *Crook* (1), *Collison* v. *Barber* (2), *Bubb* v. *Padwick* (3), *Chaston* v. *Seago* (4), *Spencer* v. *Duckworth* (5), referred to.

[R., 7 A. 822 (838) (F.B.); 25 M.L.J. 556=21 Ind. Cas. 698 (700).]

THE question between the parties in this suit was as to the construction and effect of the will of one Jacob George Bachman, who died on the 20th June, 1880, leaving a will containing the following provisions, among others not material to the purposes of this report:—"I give, devise, and bequeath all the real and personal estate to which I shall be entitled at the time of my decease unto my dear wife Matilda Peregrina Bachman for her sole use and benefit absolutely, if she shall survive me; but should she pre-decease me, I direct my trustees and executors hereinafter named to hold my said real and personal estate upon trust, to sell the real estate, either together or in parcels, and either by public auction or private contract......and to call in, sell, and convert into money such part of my personal estate as shall not consist of money, and to divide the said moneys, and the ready money which may belong to such estate, between and amongst the several persons named in, and in accordance with, the schedule hereunder written and to pay the same to them in the shares and proportions therein mentioned, as and when they shall respectively attain the age of twenty-one years in the case of males, or, in the case of females, when they shall respectively attain that age or marry; and I declare that in the event of any of such persons dying in my lifetime, or at any time thereafter prior to the said division, leaving lawful issue, such issue shall be entitled to the share which their deceased parent would have taken; and in the event of any of such persons dying without issue in my lifetime, or at any time thereafter prior to the said division, their share shall sink into, and form part of, my estate."

[585] The testator's wife pre-deceased him. One of the persons named in the schedule of the will as a legatee was William Henry Bachman, a brother of the testator, and the share of the estate given to him by the will was one-twelfth. At the time of the testator's death, William Henry Bachman was more than twenty-one years of age, and correspondence passed between him and the executor of the will, John Augustus Bachman, in which the latter admitted his right to the one-twelfth share. Before, however, any payment of the legacy had been made, the legatee died on the 21st November, 1880. He left lawful issue. By his will, dated the 26th June, 1880, he gave, left, and bequeathed his property, of whatsoever description, including any bequests made by his brother, the said Jacob George Bachman, unto his wife Catherine Bachman, and he appointed her sole executrix of the will. After his death, his wife applied to the executor of Jacob George Bachman's will for payment of the legacy bequeathed by the testator to her husband. But the executor, on

(1) L.R. 12 Ch. D. 639.
(2) L.R. 12 Ch. D. 834.
(3) L.R. 13 Ch. D. 517.
(4) L.R. 18 Ch. D. 218.
(5) L.R. 18 Ch. D. 634.

the ground that, upon the construction of the will, it was doubtful whether the personal representative or the issue of William Henry Bachman were entitled to the said share, declined to pay it over, until the question of the right to receive it should have been determined by the judgment of a competent Court. In consequence of this refusal, the widow instituted the present suit against the executor of the will of Jacob George Bachman, and the issue of her husband William Henry Bachman, praying for relief as follows:—

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"(1) That the will of the said testator, Jacob George Bachman, deceased, so far as it relates to the one-twelfth share of the testator's estate, bequeathed to the late William Henry Bachman, may be construed, and that the rights of the person or persons entitled to or interested in such share may be ascertained and declared.

"(2) That it may be declared that the plaintiff is entitled to the said share absolutely, and that the defendant, John Augustus Bachman, may be ordered to pay and make over the same to her.

"(3) That all necessary accounts and inquiries may be taken and made and directions given in the premises.

"(4) That the plaintiff may have such further or other relief as the nature of the case may require."

[586] The Court of first instance (Subordinate Judge of Dehra Dun) in deciding first what were the intentions of the testator, observed:—"As to the intentions of the testator, which we must take as expressed clearly in the will, there can be no possible argument. He directs the proceeds realized by conversion of his estate into money to be divided between the legatees in fixed proportions, with a subsequent proviso that, in the event of any legatee dying in his lifetime or before the said division, the legacy to him should go over to his lawful issue. No words could more clearly express the testator's intention, or make it more manifest that he intended that the legatees should not have the legacies unless they lived to receive them in hard cash. Before taking up this point, it may be remarked that if the clause of the will providing for the legacies going over had been left out, there could be no doubt but the legacy to William Henry Bachman would have so vested as to pass to his personal representative." Upon the question whether there was anything in law to prevent the testator's intention so construed from being carried out, the Court, following Jessel, M.R., in *Johnson* v. *Crook* (1) and Fry, J., in *Collison* v. *Barber* (2), was of opinion that the gift over in favour of the legatee's issue, contingent upon the legatee's death prior to division of the estate, was valid. The finding was "that the legacy to William Henry Bachman either did not vest in interest in him on the testator's death, or that, if it could be held to have vested on that event, it subsequently became divested on the death of the legatee before division, and, on the latter event, no interest in the legacy passed to the plaintiff as his personal representative."

From this decision the plaintiff appealed to the High Court.

Mr. *Pearson*, for the appellant.—We contend that, immediately on the testator's death, the legacy vested in his son William Henry Bachman. On this point, the language of the lower Court to the effect that, in the absence of the divesting clause in the will, "the legacy to William Henry Bachman would have so vested as to pass to his personal representative," amounts to a finding in our favour; and the

(1) L. R. 12 Ch. D. 639.

(2) L. R. 12 Ch. D. 834.

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respondents having taken no objection to this finding, it must be regarded as conclusive. As regards those legatees who had attained full age when the testator died, the divesting clause is void for [587] uncertainty. If, as the lower Court assumes, the "division" of the estate referred to by the testator means the actual payment of the legacies, such an event is uncertain, and renders the gift over dependent on it void and of no effect. In *Martin* v. *Martin* (1) it was distinctly laid down that a gift over contingent upon the legatee's death before actual receipt, cannot be carried out. The leading case is *Hutchin* v. *Manington* (2), in which it was held that such a contingency is too indefinite; and this is supported by the language of Lord Selborne in *Minors* v. *Battison* (3). No doubt, at first sight, *Johnson* v. *Crook* (4) appears to be a strong authority on the other side. But in the first place, *Johnson* v. *Crook* (4) was disapproved by Hall, V.C., in *Roberts* v. *Youle* (5), and also by Malins, V.C., in *Bubb* v. *Padwick* (6), stating that he was following a long line of authorities. In the second place, Jessel, M. R., in *Johnson* v. *Crook* (4) ignores several important cases. One of them is *Hallifax* v. *Wilson* (7), in which it was held that the legacies vested absolutely at the time at which they were made payable, namely the attainment of majority, and did not go over by reason of the legatee's death after that time, but before actual payment. *Re Yates's Trusts* (8) was decided on the same principle. Other authorities on our side are *Haydon* v. *Rose* (9), *Clark* v. *Henry* (10), and *Hayward* v. *James* (11). In the third place, *Johnson* v. *Crook* (4) is distinguishable, principally in the circumstance that there the testator clearly intended the legatee to run the risk of non-receipt, since he used the strong expression "whether the same, *i e*, the legacy should have become due or payable or not." There is nothing resembling this in the will now under consideration. *Collison* v. *Barber* (12) also is distinguishable. [He also referred to *Jarman on Wills*.]

But whatever may have been the testator's powers, he did not intend that the divesting clause should apply to those legatees who had attained majority before his death. It affects only those legatees who predeceased him and those who, being minors at his death, died afterwards before majority. The term "division," as [588] used in the divesting clause, does not refer to an actual division of the estate among the legatees, as the lower Court supposes. It means, for each legatee, the time when his or her share becomes *de jure* receivable: for minors this is the age of majority, for adults the moment of the testator's death. And the legatee William Henry Bachman, being an adult when his father, the testator, died, the legacy immediately vested in him, and he survived the contingency contemplated by the divesting clause, which could then have no operation.

Mr. *G. E. A. Ross* (with him Messrs. *J. Howard* and *A. Strachey*).—This is first a question of law, and secondly of the proper construction of Jacob George Bachman's will. Upon the question of law we rely on s. 106 of the Indian Succession Act, illustration (*f*) distinctly contemplating the case of a legacy vesting and subsequently becoming divested upon the

(1) L. R. 2 Eq. 404.
(2) 1 Ves. 366.
(3) L. R. 1 App. Cas. 428.
(4) L. R. 12 Ch. D. 639.
(5) 49 L. J. Ch. 744.
(6) L. R. 13 Ch. D. 517.
(7) 6 Ves. 168.
(8) 21 L. J. Ch. 281.
(9) L. R. 10 Eq. 224.
(10) L. R. 11 Eq. 222.
(11) 29 L. J. Ch. 822.
(12) L. R. 12 Ch. D. 834.

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happening of a contingency. So that even assuming *Martin* v. *Martin* (1) and *Bubb* v. *Padwick* (2) to be good law in England, they do not apply to India. But even in England they are not good law. The leading case is *Johnson* v *Crook* (3), in which JESSEL, M. R., fully reviews the authorities on the subject, and rules that if the testator's intention to make the gift over is clear, it must be carried out. That case is further authority for the view that where the contingency upon which the legacy is to go over his death before actual receipt, the gift over is not void for uncertainty. *Johnson* v. *Crook* (3) is supported by *Collison* v. *Barber* (4), and also by *Chaston* v. *Seago* (5) and *Spencer* v. *Duckworth* (6), which are the most recent cases, and in which *Bubb* v. *Padwick* (2) is disapproved. The other side have not sufficiently distinguished *Johnson* v. *Crook* (3). It is immaterial that, in that case, what was given over was not the whole share, but such part or parts thereof as had not been actually received by the legatee; and in the present case, as much as in the other, the testator clearly intended the legatees to run the risk of non-receipt. *Whitman* v. *Aitken* (7) immediately following *Martin* v. *Martin* (1) is also an authority on our side. *Hutchin* v, *Mannington* (8) is explained by Jessel, M R., who shows that its [589] effect was misapprehended by Lord Selborne in *Minors* v. *Battison* (9): it merely shows that the testator's intention must be clear. The point now at issue was not directly raised in *Minors* v. *Battison* (9).

Upon the question of construction, it is clear that the testator wished the legacy to go over upon the legatee's death prior to "the division of the estate." This means not necessarily the time of actual payment, but the expiration of the "executor's year," which every testator must be presumed to know to be the time for payment recognized by the law. *In re Arrowsmiths' Trusts* (10) supports this view. *Collison* v. *Barber* (4) is a strong authority on our side, for there the identical words "division of the estate" were interpreted by Fry, J., as meaning the expiration of twelve months from the testator's death. In *Spencer* v. *Duckworth* (6) also, the words "final division" were similarly construed. The decisions cited by the other side have either been declared bad law or are distinguishable. In *Hallifax* v. *Wilson* (11), the case turned on the ambiguity of the term "payable" as used in the will under consideration: it might refer either to the attainment of majority by the legatees during the lifetime of the prior legatee, or else to the prior legatee's death. In *Re Yates's Trusts* (12), the phrase "entitled in possession" was similarly ambiguous. No such difficulties arise in the present case. The moment of vesting and the contingency upon which divestment occurs must be two separate occasions, for otherwise the legacies of adults could never be divested at all. But this was clearly not the testator's intention. The will contains no indication of any distinction between minors and adults in respect of the divestment of legacies. It shows throughout a strong desire on the part of the testator to keep his estate, if possible, among his own blood relations.

Mr. *Pearson*, in reply.

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(1) L. R. 2 Eq. 404.
(2) L. R. 13 Ch. D. 517.
(3) L. R. 12 Ch. D. 639.
(4) L R 12 Ch. D. 834.
(5) L. R. 18 Ch. D. 218.
(6) L.R. 18 Ch. D. 634.
(7) L. R. 2 Eq. 414.
(8) 1 Ves. 366.
(9) L.R. 1 App. Cas. 428.
(10) 29 L.J. Ch. 774.
(11) 6 Ves. 168.
(12) 21 L.J. Ch. 281.

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The Court (STRAIGHT, Offg. C.J., and MAHMOOD, J.) delivered the following judgments:—

JUDGMENTS.

STRAIGHT, Offg. C.J.—The question before us in this appeal virtually is, whether the Court below has placed a right construction [590] upon the will of Jacob George Bachman, the interpretation of which is sought by the suit. It is admitted that the said testator died on the 20th of June, 1880; that his wife Matilda Peregrina Bachman pre-deceased him; that William Henry Bachman, the husband of the plaintiff, also died on the 21st of November, 1880; and that the plaintiff is the sole legatee under the will of William Henry Bachman, dated the 26th of June, 1880. The question, therefore, to be determined is, whether the one-twelfth share given by the will to William Henry Bachman vested absolutely in him on the death of the testator, and, if it did vest, whether, under the terms of that instrument, it was, in consequence of the death of William Henry Bachman before a division of the estate, divested. Now, I take it as the clear rule to be applied by the Courts in construing wills, that the intentions of a testator are to be gathered in such instruments by attaching to the language used by him its natural and ordinary meaning, and that it is to be given effect to, unless prohibited by any rule of law. "Where the language of the testator is clear and involves no inconsistency or contradiction with other parts of the will, those clear words must prevail"—*Whitman* v. *Aitken* (1). Even if it appears to a Court that "the bequest is unusual or extraordinary, so long as the terms on which it is made are distinct and unambiguous, they must be given effect to." If the testator "has clearly expressed a capricious gift, you cannot control the clear expression of intention."—*Johnson* v. *Crook* (2); and, in the same case, Jessel, M.R., remarks, "where there are two constructions fairly open, *i.e.*, where there is something like what might be called an ambiguity, there the more reasonable of the two ought to be adopted: that is, that you must not attribute caprice to a testator where it can be avoided, but nobody has said that the law prohibits a capricious gift being carried into effect." It is also to be remembered that in construing a will it must be read as a whole, and each clause must be taken in conjunction with, and interpreted by, the other portions of the instrument. So much then for what I understand as general principles for guidance. Now let me turn to the Act itself, with which we are most immediately concerned in considering the case before us. By s. 91 of the Indian Succession Act, it is declared that "if a legacy be given in general terms, without specifying the time when it is [591] to be paid, the legatee has a vested interest in it from the day of the death of the testator, and if he dies without having received it, it shall pass to his representatives." This section must be read in connection with s. 106, which provides that "where, by the terms of a bequest, the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is, from the testator's death, said to be vested in interest." To this section an *Explanation* is attached, the following terms of which are material to

(1) L.R., 2 Eq. 414.

(2) L.R. 12 Ch. D. 639.

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the consideration of the case :—"An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person." Such are the provisions of the law to which we have to look for the purpose of ascertaining the legal operation and effect of the instrument before us. At the hearing of the appeal many English authorities were quoted by the learned counsel on both sides, which by analogy are of value and assistance, and I have perused them with much care, and have derived much instruction from them. But, after all, giving the terms of the will now in question the best consideration I can, and testing it by the rules of the Act by which I am bound, I must determine for myself what the intentions of the testator were, as conveyed to my mind by the language he has employed. Let me then at once turn to the instrument itself. With regard to the earlier portion, it is free from difficulty. First, there is a bequest by the testator to his wife Matilda Peregrina Bachman of "all the real and personal estate to which I shall be entitled at the time of my decease for her sole use and benefit absolutely if she shall survive me." Then it goes on to provide —"but should she pre-decease me, I direct my trustees and executors to hold my said real and personal [592] estate upon trust, to sell the real estate either together or in parcels, and either by public auction or private contract . . . . and to call in, sell, and convert into money such part of my personal estate as shall not consist of money." This clause, to put it shortly, empowers the trustees and executors, in the event of the death of the testator's wife before him, to create a fund in cash by selling and converting into money any real estate or personal property, other than money, of which he died possessed, and to hold the same on trust for purposes thereinafter declared. Let me see what those purposes are. "To divide the said moneys and the ready money which may belong to such estate, between and amongst the several persons (24 in all) named in and in accordance with the schedule hereunder written." In other words, at least so it seems to me, the testator had in contemplation a period of time when the whole of his estate having been converted into cash, it should be apportioned into so many shares or fractional shares for distribution to the various persons named by him. Then follows this direction: "to pay the same to them in the shares and proportions therein mentioned as and when they shall respectively attain the age of twenty-one years in the case of males, or, in the case of females, when they shall respectively attain that age or marry." That is to say, so I read it in conjunction with what has gone before, that whether such persons are twenty-one when the division is made or not, they will be entitled to receive their share at once; but if they are not twenty-one, they shall not be paid them until they *are* twenty-one, or in the case of females, if they are married, but not twenty-one, they shall receive them at once, or if they are not married, then when they attain that age. Taking the will so far, and placing upon it what appears to me to be its natural construction, it seems to me that the crucial event the testator had in his mind and intended to govern the right to take, was this division, when the trustees and executors, having realized the whole

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estate and converted it into cash, had ascertained the several sums of money that represented the proportionate shares given to the various legatees, and held them for distribution. In this connection, it may not be inapposite to remark that, in fixing this event, the testator may reasonably have felt that such division would not be unnecessarily delayed, seeing that the executors and [593] trustees appointed by him to effect it were themselves to be takers of two of the largest shares under the will, and would not be likely to indefinitely postpone it, and so run the risk of forfeiting their right to receive their shares. Reverting, however, once more to the will itself, I come to that portion of it upon which so much turns:—"And I declare that in the event of any of such persons dying in my lifetime, or at any time thereafter *prior to the said division*, leaving lawful issue, such issue shall be entitled to the share which their deceased parents would have taken; and in the event of any of such persons dying without issue in my lifetime, or at any time thereafter prior to the said division, their share shall sink into, and form part of, my estate." It is argued for the appellant, upon the hypothesis that the earlier clauses to which I have referred vested the shares in the legatees living at the death of the testator, and that their legacies then became vested in interest, that this clause is, as a divesting clause, bad for uncertainty, and the cases *Hutchin* v. *Mannington* (1), *Martin* v. *Martin* (2), *Hallifax* v. *Wilson* (3), *In re Yates's Trusts* (4), *Hayward* v. *James* (5), *Haydon* v. *Rose* (6), *Minors* v. *Battison* (7), *Bubb* v. *Padwick* (8), *Roberts* v. *Youle* (9), and *Clark* v. *Henry* (10) were cited in support of this view by the learned counsel for the appellant. Now it seems to me that, applying the principle laid down in ss. 91 and 106 of the Indian Succession Act, the earlier clauses of the will did give the legatees a vested interest in their several shares upon the death of the testator. But whether I am right in this view or not, one of the two alternatives presents itself: either the latter clause, if effect is to be given to it at all, must be regarded as a divesting clause; or, read in conjunction with what precedes it, it must be taken as indicating that the bequest itself was contingent upon the division, and that it did not vest at the death of the testator. Am I then entitled to give effect to this clause? The learned counsel by his able argument virtually says "No." But if not, why not? I have read and re-read this portion of the will by itself, and with the rest of the instrument, and, look at it which way I will, I fail to see why it should be dismissed as bad [594] for uncertainty or ambiguity. I put aside the second of the two alternatives I have mentioned above, because being of opinion, as I am, that the legacies did vest in interest on the death of the testator, and that this clause is a good divesting clause, the consideration of it would only complicate matters. Now I ask, what do the words "prior to the said division," read in conjunction with the context, mean? I think it will be admitted that they can only relate back and have reference to that division already provided for by the testator, when the estate, having been realized and turned into money, had been apportioned for distribution among the various legatees by the trustees and executors. In *Johnson* v. *Crook* (11) Jessel, M. R., observed:—"It does not appear to me to be doubtful that actually received means *actually received*," and I can only, very humbly plagiarising the expression of so great an authority, say that when

(1) 1 Ves. 366. (2) L. R. 2 Eq. 404. (3) 6 Ves. 168.
(4) 21 L.J. Ch. 281. (5) 29 L. J. Ch. 822. (6) L. R. 10 Eq. 224.
(7) L.R. 1 App. Cas. 428. (8) L. R. 13 Ch. D. 517. (9) 49 L. J. Ch. 744.
(10) L. R. 11 Eq. 222. (11) L.R. 12 Ch. D. 639.

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the testator used the words "prior to the said division" he meant what he said, and referred to the division by the trustees and executors of the proceeds derived from the sale of his real and personal property, and the moneys in hand at the time of his death, into proportionate sums in cash for distribution to the various legatees mentioned in the schedule to his will. I interpret the clause in which "prior to the said division" occurs to mean this—if any of those who would otherwise themselves take die before me, or, surviving me, die before actual division of my estate, they will acquire nothing; but if they leave a child or children, such child or children will, if alive at the time of such division, take the share his or their parent would have taken, had such parent then been alive. Either the words "prior to the said division" were intended to have some such meaning, or they are wholly superfluous. For if the testator had intended the shares to vest absolutely upon his death and irrespective of any limitation, whether as regarded the scheduled sharers or their issue, language could readily have been found to express such an intention. The two events to which he refers are death of the sharer "in my lifetime," and death of the sharer "any time thereafter prior to the said division." As to the former of these expressions, its meaning is too obvious to leave room for doubt. As to the latter, what is there ambiguous and uncertain about it, and why should I close my eyes to the natural interpretation the words [595] bear—if any of the sharers die after me and before the division I have provided for has been made, then such and such a thing will happen? If the testator meant, without reservation or limitation, that the share of the parent was to be taken by the child or children, if such parent died in his lifetime, why should he not adopt the alternative of such child or children taking if the parent died after the testator but before the division? It seems to me clear that what the testator had in view was to make sure, as far as he could, that his money should go to his own blood relations. Giving his language, as expressed, the best consideration I can, I find myself constrained to construe it as declaring that, as a condition precedent to the actual taking of a share, there must be a division, and that whenever such division is made, only those of the sharers, or if dead, their children who are alive at the time of such division, will be entitled to take their shares. In short, it appears to me that the clause to which I have been referring is a divesting clause, and that the gift over is good and valid. But it is said this construction places the sharers at the mercy of the trustees and executors, who would have it in their power to postpone the division indefinitely at their own pleasure. This argument is no doubt a plausible one, but I am not sure that it deserves much weight from a legal point of view. For if the testator's language is clear and unambiguous, and there is no uncertainty as to his meaning, I must not, because I think it was an extraordinary thing for him to have placed such large powers in the hands of his trustees and executors, take upon myself to construe his will in the way I think he ought to have made it. I can find no prohibition in the Indian Succession Act rendering such a provision by a testator for the devolution of his estate, if expressed in clear terms, invalid, nor, as I understand *Johnson* v. *Crook* (1) is there outside that Act any general prohibition of English Law to invalidate it. In that case the learned Master of the Rolls cites a passage from a decision of Lord Eldon in *Gaskell* v. *Harman* (2) the

(1) L.R. 12 Ch.D. 639.

(2) 11 Ves. 489.

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report of which unfortunately I cannot get, where the latter observes:—"I admit the soundness of the proposition appearing by the report to have been stated by the Master of the Rolls (Sir W. Grant), that if a testator thinks proper, whether prudently or not, to say distinctly, showing a manifest intention that his legatees, pecuniary or resi-[596] duary, shall not have the legacies or the residue unless they live to receive them in hard money, there is no rule against such intention if clearly expressed." So the learned Master of the Rolls in *Johnson* v. *Crook* (1) himself remarks:—"Of course you may say that a man cannot intend the interest of the legatee to depend upon the diligence or want of diligence of the trustees in endeavouring to sell, and the good or bad faith of the purchaser in completing or refusing to complete a sale, or his means, or on an accident; but if he says, "on the death of any legatee before the sale" by whatever means that sale is delayed—caprice, accident, mistake, fraud, anything, it shall go over; as Sir W. Grant says, there is nothing to prevent it; and he is of opinion that that is so plain that he is quite satisfied that Lord Thurlow could not have meant it. Therefore here again you have authority: one authority by Lord Thurlow himself and another by Sir W. Grant, explaining that there is no law established that it cannot be done, only it must be clearly expressed." Now I gather from the principle thus vigorously enunciated, that there is nothing in law to prohibit a man from making a provision in his will that certain persons shall only actually take shares in his property after his death, contingent upon their being alive at the time when such property has been divided, as directed by him; and that if he says so in plain language, the Courts must give effect to his obvious intention. Uncertainty in the terms in which he expresses such intention is one thing: uncertainty as to the period at which the legatees will be entitled to take is another; and while in the former case, if two constructions are open, the more equitable should be preferred, in the other, the mere introduction of the element of chance should not, that I can see, interfere to prevent the Courts carrying out such intention. Upon turning to the schedule attached to the will before us, it will be found that the majority of beneficiaries are many in number, and have to receive very small shares. It may well be that the testator, having this circumstance present to his mind, thought that the fairest way of dealing with them was to make their being alive at the time of division a condition precedent to taking their legacies, and that he deliberately intended that they should not have them unless, to use the words of Lord Eldon in *Gaskell* v. *Harman* (2) they lived "to receive them in [597] hard money." I have already adverted more than once to the case of *Johnson* v. *Crook* (1), which was decided in 1879 by the late Master of the Rolls. With the exception of *Hallifax* v. *Wilson* (3) and *In re Yates's Trusts* (4) all the authorities quoted by the learned counsel are therein very fully considered, and, as it appears to me, either satisfactorily explained, or with the exception of *Martin* v. *Martin* (5), which is dissented from, are shown not to establish any such prohibition as was contended for by the appellant's counsel. The only recent ruling antagonistic to the principle laid down in *Johnson* v. *Crook* (1) is a decision of Malins, V.C., in *Bubb* v. *Padwick* (6), which I cannot say satisfies me, that the judgment of Jessel, M. R., in the first mentioned case, was erroneous. I prefer therefore to accept and adopt, as far as they are

(1) L. R. 12 Ch. D. 639. (2) 11 Ves. 489. (3) 6 Ves. 168.
(4) 21 L. J. Ch. 281. (5) L.R. 2 Eq. 404. (6) L.R. 13 Ch. D. 517.

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applicable to the case before me, the principles laid down by that very learned Judge. I may add, however, that the "division" to which so much importance attaches in considering the will now in controversy, has been made the subject of judicial exposition by FRY, J., in three different cases reported in L. R. 12 Ch. D. 834, and L. R. 18 Ch. D. 218, and 634. In all those cases, it has been held that the word means the period of a year from the date of a testator's death, or what is commonly styled "the executor's year." Whether such a limitation to the expression "division" should be adopted in the present case, I need not stop to discuss, because William Henry Bachman, having died within six months from the testator's decease, would not, upon the principle enunciated in those rulings, have been entitled to take his share. To sum up the conclusion at which I have arrived, I need only add that in my opinion, looking to the terms of the will, the share of William Henry Bachman did in law vest at the death of the testator, but that he having died prior to the division of the estate, it was divested, and the gift over took effect. I think therefore that the appeal must be dismissed, and that in this Court the parties shall pay their own costs, the defendant of course getting his from the estate.

But as it seems to me that the plaintiff did not frivolously or unnecessarily invoke an interpretation of the will by a Court of Law, the proper order as to the other costs will be, that those of [598] both parties in the Court below shall be paid out of the estate, in which respect its decree must be modified.

MAHMOOD, J.—After the judgment which the learned Chief Justice has delivered, it seems hardly necessary for me to say anything more, for I have arrived at the same conclusions. But I am anxious to delineate the exact steps which my own mind has taken to arrive at those results.

The case has been argued before us with much ability on both sides, and the English reported cases that have been cited show that the point before us is not free from difficulty and doubt. The Courts in India, however, in considering such questions, are bound by the provisions of a consolidatory statute, the object of which is to place the principles of law upon a footing more specific and more certain than the practice of the English Courts in such matters. In interpreting those statutory provisions it is our duty especially to guard ourselves against being guided too much by the English cases and too little by the words of the statute. I do not say that decided cases of the English Courts of Chancery are not to be cited before us as throwing light upon the language of the statute, which, after all, is mainly the formulation of those principles which the Courts of Chancery in England had, long before the passing of the Indian Succession Act, recognized and adopted; but I cannot forget that in many matters that statute has departed from the rules and principles adopted in England. Is the point, then, now before us to be regarded as an illustration of what I have said? I consider it unnecessary to answer this question, because the law in England itself seems to be far from certain upon this specific point. With this attitude of mind I wish, in considering this case, to view the Indian Succession Act and the cases cited before us at the hearing.

It seems to me that the questions which require determination in this case are:—

1. Did the legacy vest in William Henry Bachman immediately upon the testator's death, or was it intended to be contingent up to the time of the "*division*" contemplated by the will?

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2. If it did vest, what was the nature of the interests acquired by the legatee under the will? Were those interests subject to being divested by the provisions of the divesting clause in the will?

[599] 3. What was the exact intention of the testator in employing the expression "*division*" in the divesting clause? Is the intention so uncertain as to render the clause void and inoperative?

4. If not, what was the effect of the divesting clause upon the legacy bequeathed to William Henry Bachman?

I will consider these questions in the order in which I have stated them. It has been pointed out by the learned Chief Justice that the first statutory provision which we have to consider is that contained in s. 91 of the Indian Succession Act; and if the will of Jacob George Bachman did not specify the time when the legacies were to be paid, or to become payable *de facto*, there would be no difficulty in holding that the legatee, William Henry Bachman, had a vested interest from the day when the testator died, and that such vested interest passed in the present case to the plaintiff who is admitted to be his representative. But the will before us does specify the time when the legacies thereunder are to be paid, or to become payable *de facto*, and this is one of the reasons why difficulty and doubt have arisen in this case. The testator in his will directs his trustees and executors to hold his "real and personal estate upon trust, to sell the real estate......and to call in, sell, and convert into money such part of my personal estate as shall not consist of money, and to divide the said moneys and the ready money which may belong to such estate between and amongst the several persons named in and in accordance with the schedule hereunder written, and to pay the same to them......in the shares and proportions therein mentioned, as and when they shall respectively attain the age of twenty-one years in the case of males, or, in the case of females, when they shall respectively attain that age or marry." Here then is the time specified when the legacies are to be paid, or to become payable *de facto*. What is the effect of such specification of time? To find the answer to the question we must turn to s. 106 of the statute, which provides that " where, by the terms of a bequest, the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, *unless a contrary intention appears by the will*, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies [600] before that time and without having received the legacy." Does the will in question in the present case indicate a " contrary intention " such as is contemplated by the statute? My answer is that the will, so far as I have quoted it, indicates no such intention, and if the will had stopped there, I should have unhesitatingly held that immediately upon the death of Jacob George Bachman the legacy bequeathed to William Henry Bachman would have become vested in interest, even though he had been below the age of twenty-one at the time. But William Henry Bachman was not below the age of twenty-one at the death of the testator; and it is obvious that the clause of the will which fixes the age of twenty-one as the period when the legacies were to be paid has no application to his case. Is there anything else in the will which fixes any similar period applicable to the case of William Henry Bachman? Undoubtedly there is, for the testator contemplated a "division" (whatever that may mean) antecedent to payment of any of the legacies, whether the same were bequeathed to persons above the age of twenty-one or below that age. Did such reference to division affect the rights of

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William Henry Bachman in such a manner as would justify us in holding that, because he predeceased the "*division*," therefore he had not vested interest in the legacy? My answer is in the negative, and the reasons for the answer are similar to those which would apply to the case of such legatees as might happen to die before attaining the age of twenty-one. The authority for the answer is s. 106 of the statute; and it is to that section that we must look again for solving the further difficulty in the case. That difficulty lies in the wording of the will itself; for the testator, after saying what I have already quoted, goes on to say—"and I declare that in the event of any of such persons dying in my lifetime or at any time thereafter prior to the said "*division*" leaving lawfu issue, such issue shall be entitled to the share which their deceased parent would have taken." This is the most important clause of the will, so far as the present case is concerned, because William Henry Bachman did die subsequent to the death of the testator and "prior to the said division, leaving lawful issue." What is the exact effect of this event so far as the will is concerned? Does the circumstance that a "*division*" is contemplated by the will before the [601] legacies are paid, or to become *de facto* payable, suggest an inference adverse to the plaintiff? Does the provision that in the event of the legatee's death before the "*division*" the share bequeathed to him is to be taken by his children, point to the conclusion that the interest in the legacy was never vested in William Henry Bachman? An answer—and a full answer—is furnished to these questions by the specific provisions of the statute as they have found expression in the *Explanation* attached to s. 106:—"An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person." I therefore hold that immediately upon the death of Jacob George Bachman the legacy bequeathed to William Henry Bachman became vested in interest, notwithstanding the distinct reference to the division which the will contemplates, and notwithstanding the provision as to the gift over in case of his dying before the division. Indeed, the lower Court has expressed this opinion, and in the argument before us the point was not seriously contested by the learned counsel for the respondents.

This leads me to the second question in the case, and I hold, by reason of the rule contained in s. 106 of the Indian Succession Act, that the legacy did not vest absolutely and indefeasibly, as it would have done if the terms of the will gave the legacy in general terms, without specifying the time when it was to be paid, or to become *de facto* payable. I am of opinion that immediately upon the death of the testator the legacy bequeathed to William Henry Bachman vested in interest, but not in possession, so as to be indefeasible. And if the divesting clause is operative and applicable to his case, the legacy was no doubt subject to being divested by reason of that clause.

So far, however, it appears to me there has been no great difficulty in the case. The difficulty really lies in the determination [602] of the third question which I have enunciated at the outset. Indeed, the learned counsel for the appellant has thrown the greatest force of his argument on the contention that the divesting clause (which is really

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the main part of the will under consideration) is so uncertain in meaning that it must be dealt with as void in giving effect to this will. His contention is that the word "*division*" as it occurs in the will, is ambiguous and capable of more than one meaning. It may mean the time of the death of the testator when, by reason of the vestiture of the legacies in the legatees, their shares became *de jure* receivable. Again, it may mean the actual division of the estate, *viz.*, the actual receipt of the legacies. He further contends that if the former of these interpretations is to be adopted, the death of William Henry Bachman obviously took place subsequent to the "division," so that the plaintiff would naturally be entitled to the legacy, being the representative of the legatee. On the other hand, if the word is to be taken to mean actual receipt of the money, then the learned counsel contends that such receipt, being in itself an uncertain event, the divesting clause is *a fortiori* uncertain, and must be dealt with as void by reason of such uncertainty. Mr. Pearson further contends that the divesting clause applies only to such of the legatees as were below the age of twenty-one at the death of the testator, and that the clause either does not apply to the case of such legatees as were above the age of twenty-one at the testator's death, or, if it was intended to apply to them, it must be held to be void by reason of uncertainty.

Is it so uncertain and void? Mr. Pearson has, in support of his contention, undoubtedly produced before us some authorities entitled to our respect in considering questions of this kind. He cites the case of *Martin* v. *Martin* (1) in which Wood, V.C., relying on *Hutchin* v. *Manington* (2) expressed the rule to be that the terms of a will which provide a gift over in case of the legatee's death prior to the *actual receipt* of the legacy are inoperative in law as indicating what Lord Thurlow called "an immeasurable purpose," the time of the actual payment being indefinite, and subject to uncertainty by reason of accidental contingencies. For this view the learned counsel relies also on the judgment of Lord **[603]** Selborne in *Minors* v. *Battison* (3), which was a case decided by the House of Lords. In that case the learned Lord, after stating "that there was, under this will, one, and only one, period at which the *corpus* of the testator's estate, directed by him to be sold, became *de jure* distributable," pointed out that "in a later clause the testator directs that until all his real and personal estate should be sold and converted into money the trustees should pay to the *cestuis que trustent* the income of such part thereof as should for the time being remain unsold or unconverted." Turning then to the terms of the divesting clause, the learned Lord cited the authority of the two cases already referred to, for the proposition that, when such a clause refers to the time of actual receipt as the turning point of the divestiture, it "is too uncertain and indefinite to be capable of being carried into effect." I must here state in passing that the interest of the legatee in that case was a vested interest in possession by reason of the direction as to payment of the income to the legatee whilst the property remained unsold,—a circumstance which, considering our own law as contained in the *Exception* to s. 107, goes far to distinguish the present case from the case before the House of Lords. And in that case it seems to me that the argument of Lord Selborne proceeds distinctly upon the theory that the terms of the divesting clause were not as certain as those of the vesting clause, and that the will before him rendered it impossible

(1) L. R. 2 Eq. 404. (2) 1 Ves. 366. (3) L.R. 1 App. Cas. 428.

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to ascertain the exact turning point of the divestiture. "The event spoken of in the will," said his Lordship, "is not the completion of any particular sale of particular property, or any other *definite act* to be done by the trustees, but is the death of a child before receiving his or her share of the trust estate, in which case 'such share' is given over. The share is spoken of by the testator as a whole. A divesting clause of this nature ought to be construed strictly; certainly it ought not to be extended to any case not properly described by the words according to their reasonable interpretation. There might be as many sales at different times as there were items of saleable property, according to the exercise of their discretion by the trustees. How can it be said that this testator has declared with reasonable certainty an intention either that *part* of a *share* should go over when the *whole* [604] did not, or that the *whole* share should go over in case of the death of a child, while any *part* of his property was retained by the trustees unsold, although payments might have been previously made on account of that share?" I must here say that, having read the whole report of the case, I hold that *Minors* v. *Battison* (1) is neither applicable to the present case, nor can the rule therein laid down be taken to be any authority for the proposition that, when the divesting clause gives *clear* expression to the intention of the testator, such intention is not to be carried into effect if it renders any specified event as the turning point of divestiture after legacies have once vested in interest.

On behalf of the respondent, Mr. Ross cites the case of *Johnson* v. *Crook* (2) in which one of the most eminent Chancery Judges of England, Jessel, M. R., after reviewing many of the previous rulings, emphatically disapproved the rule laid down in *Martin* v. *Martin* (3) and commented, somewhat adversely, upon the dictum of Lord Selborne in the case of *Minors* v. *Battison* (1). The case is undoubtedly a great authority for the principle advocated by Mr. Ross, as it is a strong enunciation of the proposition that where the intention of the testator as to the turning point of the divestiture is clearly expressed in the divesting clause, such intention must be given effect to, even though it may appear to be capricious. I feel, however, that the case in question is not, as would at first sight appear, a decisive ruling upon the exact point now before us: for here the difficulty is one of detail arising from the use of the word "*division*" as it appears in the will; whilst in the case before the Master of the Rolls the testator used no such expression which, if taken *by itself*, is ambiguous, but the will referring to the legacies employed the very significant words "shall actually have received" followed by the explanatory clause "whether the same shall have become due and payable or not"—words the equivalents whereof are totally absent from the will before us—words upon which the Master of the Rolls laid special emphasis in giving his ruling. The case was disapproved, as Mr. Pearson has pointed out, by Hall, V. C., in *Roberts* v. *Ycule* (4) and by Malins, V.C., in *Bubb* v. *Padwick* (5). The former of these cases, [605] though referred to at the hearing, I have been unable to examine carefully, as unfortunately the library of this Court does not possess the reports in which that case appears. But I have examined the latter of these cases, and I must observe that, in the first place, the words employed in the divesting clause of the will in that case were very different to the words of the will now

(1) L.R. 1 App. Cas. 428. (2) L.R. 12 Ch. D. 639. (3) L.R. 2 Eq. 404.
(4) 49 L. J. Ch. 744. (5) L. R. 13 Ch. D. 517.

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before us; for the will, referring to the turning point of the divestiture, in that case spoke of the death of the legatee "without having *actually* received *the whole* of his or her share;" and then, in expressing the gift over, employed the words "then so much of the share.........as shall not have been *received* by him," &c., "shall go over." And referring to the clause, Malins, V.C., began his judgment by saying:—If this had been a gift over of the *whole share* of each child upon dying before the youngest child attains its majority, it would have been *perfectly good*. The original clause being a vesting clause, this would have been a divesting clause as clearly as the original was a vesting clause and the share must have gone over if any of the children died before the youngest attained his majority. But it is not an *absolute gift* over; it is only in event of their dying without having *received* their shares. And when are they to receive their shares? They are clearly entitled to receive their shares immediately upon the death of the testator, or as soon afterwards as they attain the age of twenty-one years; for the rule of this Court has always been that legatees are entitled to receive their shares when the shares become vested." Now what I have already said is enough to convince me that, on the one hand, the *exact* point of detail decided by Jessel, M.R., in the case of *Johnson* v. *Crook* (1) does not help the case for the respondent very far, except in principle to be accepted by analogy; and, on the other hand, the case of *Bubb* v. *Padwick* (2) is equally inadequate to support the plaintiff's case. For here, as I shall presently show, "*division*" does not mean actual payment or actual receipt of the legacies, such as in the case before Jessel, M.R., nor is there any difficulty here, as in the case before Malins, V.C., arising from the circumstance that the gift over was not *absolute*, or did not relate to the *whole share* of the legatee dying before the contemplated "*division*." Nor is there in this will any confusion caused, as in **[606]** *Bubb* v. *Padwick* (2) by the use of any such words as "*actually received*" in one place, and "*received by him*" in another part of the same clause. For similar reasons, I hold that the case of *Hallifax* v. *Wilson* (3), which was followed by Parke, V.C., in *Re Yates's Trust* (4), does not exactly apply to the present case. The absence of English law reports from the library of this Court has again prevented me from giving a careful consideration to the former of these cases. But judging by the interpretation placed on that case by Parke, V.C., in the latter of these cases, I should say that the point in *Hallifax* v. *Wilson* (3) turned upon the interpretation of the word "*payable*"—a word wholly absent from the will now under consideration. The case of *Haydon* v. *Rose* (5) also turned upon the use of the word "*payable*;" and therefore what I have said of *Hallifax* v. *Wilson* (3) applies to this also. We are not concerned with the word "*payable*," and it may well be that the word conveys a less definite meaning that the word "*division*." The word "payable" may well be taken to mean *de jure* receivable by reason of the presumption of law which favours the vesting of legacies as early as possible, that is immediately upon a will taking effect, which would usually be at the death of the testator. On the other hand, "*division*" as used in this will may not be susceptible of any such meaning, and therefore any rule that we may lay down in this case would not be inconsistent with the rule laid down by Lord Romilly in *Haydon* v. *Rose* (5). Further, if the object

(1) L. R. 12 Ch. D. 639. (2) L. R. 13 Ch. D. 517. (3) 6 Ves. 168.
(4) 21 L.J. Ch. 281. (5) L. R. 10 Eq. 224.

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of Mr. Pearson in citing these cases is to show that the legacy to William Henry Bachman vested in interest upon the death of the testator, they do not serve any great purpose, because I have already conceded, on the construction of s. 106 of the Indian Succession Act, that the legacy did so vest in interest. In the case before Parke, V. C., the words in question were "entitled in possession," which, again, are totally absent from the will which we have to consider. These rulings therefore, though undoubtedly instructive, have been of no great help to me in arriving at my conclusions in this case. Nor can I regard another case cited by Mr. Pearson, *Clark* v. *Henry* (1) as helpful in deciding this case. The terms of the will in that case were couched in [607] language wholly different from the will now before us, the circumstances of the case were entirely different, and I could no more accept the interpretation of that will as governing this case than I could allow the proposition that all bonds and all mortgage-deeds are to be interpreted alike, irrespective of their peculiar wording and of the special circumstances of the case in which their interpretation comes into question. Nor, for similar reasons, need I say anything in regard to the applicability of the ruling of Stuart, V. C., in the case of *Whitman* v. *Aitken* (2) cited by Mr. Ross; for in that case, too, the divesting clause of the will employed the words "actually paid or payable"—words which, whilst they do not occur in the will before us, are not convertible with the expression "*division*" with which we are concerned in this case. Nor does the case of *Chaston* v. *Seago* (3), cited on the same side, seem to me to be sufficiently applicable to furnish a guide for the solution of the present difficulty, for there the words employed by the testator were "received by them" and "paid to them;" and Fry, J., in interpreting those words and reading them with the other parts of the will, "payable and paid at the time or respective times hereinbefore appointed for the payment" of the original shares, said "I cannot help thinking that the reference to the time appointed for payment and the reference to the payment really mean the same thing, and that the testator by payment meant the time appointed for payment." I shall presently state my reasons for holding that in this case "*division*" did not mean actual payment, nor *necessarily* the time appointed for such payment. But Mr. Ross has called upon us to consider the case of *Collison* v. *Barber* (4) as a direct authority in support of his case. I admit that the ruling is more applicable than any of the other cases, for the divesting clause of the will in that case employed words almost identical with those employed by the testator in the case before us. The testator there directed that in case any of his nephews should die before him, or "before the *division* of my estate as before directed," his or their share or shares, if he or they were married, should be invested by the trustees on trust for the benefit of his or their children. The learned Judge, in interpreting the will, held that "*division*" meant the expiration [608] of what is known as the "executor's year," that is "twelve months from the testator's death." But I must point out that even that case is not on all fours with the present, for there a provision existed such as is absent in the present case. The report shows that the testator had directed that in case of any or either of his nieces dying "before me or before the *division* of my estate, leaving issue of any marriage, then the trustees were to hold the share or shares of such niece or

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(1) L. R. 11 Eq. 222.
(2) L. R. 2 Eq. 414.
(3) L. R. 18 Ch. D. 218.
(4) L. R. 12 Ch. D. 834.

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nieces in trust for the benefit of their children"—a provision which I cannot regard as insignificant in determining a question like the present, which has arisen between the representative of the legatee and persons entitled to the benefit of the gift over. The will before us creates no such express trust in favour of the children of William Henry Bachman. Another case, *Spencer* v. *Duckworth* (1) is relied upon by Mr. Ross, for there also the word "*division*" occurred, though preceded by the epithet "*final.*" In that case Fry, J., virtually following his own rulings in the case of *Collison* v. *Barber* (2) and in *Chaston* v. *Seago* (3) held that "*final division*" meant the period of a year from the death of the testator, and that the shares of the deceased legatees had therefore gone over. But it appears to me that, in considering the authority of this case, the word "*final*" is not to be ignored, and that because the word does not appear in the will before us, the present case is not to be absolutely governed by the ruling.

I have considered these cases at such length, not only because they have been cited and relied upon, but also because I think the principles, though not the details, of the rules which they lay down must be treated with respect by the Courts in India in determining cases like the present. But I hope I have said enough to indicate that none of the cases cited entirely solves the exact difficulty with which we are concerned. The cases of *Collison* v. *Barber* (2) and *Spencer* v. *Duckworth* (1) are no doubt most helpful, and the principle laid down in *Johnson* v. *Crook* (4) throws a significant light upon the question now before us. And I may add that I have spoken so much of the exact words of the wills in these decided cases because the words have been cited on the assumption that they are convertible terms with the expression "*division*" as [609] used in this will. But if it is not so, then obviously the cases are not applicable. The fact is, as I have already said, the difficulty in this case is one of detail, *viz.*, the exact construction to be placed on a particular word in a particular clause of a particular will, written by a particular testator.

I now turn to the clear and definite expressions used by the Legislature to meet cases like the present. Mr. Pearson argues that the divesting clause is void by reason of uncertainty. What is the authority for holding that an uncertain bequest is void? The answer is to be found in the wording of s. 76 of the Indian Succession Act, which lays down that "a will or bequest not expressive of any *definite intention* is void for uncertainty." Is the word "*division*" then, as used in Jacob George Bachman's will, "not expressive of any definite intention?" Mr. Pearson contends that it may refer either to actual payment of the legacies, or to the time when they became *de jure* receivable at the death of the testator, and that in the case of the legatees above the age of twenty-one years, the only reasonable interpretation is limited to the latter construction.

Now, I am by no means inclined to concede that in interpreting the word "*division*" in this will, we are limited to a choice between any such alternatives as Mr. Pearson has suggested. Why should the "*division*" mean either actual receipt of the legacies or the period when they become *de jure* receivable? Indeed, I hold that the word, as it occurs in the will, can bear neither of these interpretations. The will creates a trust for a

(1) L. R. 18 Ch. D. 634.
(2) L. R. 12 Ch. D. 834.
(3) L. R. 18 Ch. D. 218.
(4) L. R. 12 Ch. D. 639.

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definite purpose, *viz.*, the conversion of the testator's estate into money. This is the first thing to be done under the will. The next part of the trust is "to *divide*" the said moneys among the legatees, and then "to *pay*" their shares to each of them—the payment would be the complete fulfilment of the trust. There is no reason to hold that "to divide" and "to pay" are convertible terms as used in this will. Indeed, there is ample reason to show that they do not mean the same thing. For the will itself indicates in clear terms that the *payment* of the legacies to such legatees as were below the age of twenty-one was not to be made till such legatees had attained that age, or, in the case of females, till they were married. Now, the word "*division*" is only one word, and it is obvious to me that, as used in this will, it refers [610] only to one event, whatever that event may exactly be. This is to be borne in mind on the one hand, and on the other hand it is obvious that some of the legatees might attain the age of twenty-one before the death of the testator, some after his death but prior to the division, others subsequent to such division. To say, then, that *to divide* means "*to pay*," is to render the terms of the will itself inconsistent and unintelligible; in other words, to place a construction upon the will which its words and context cannot possibly bear. For it seems an untenable proposition to say that the expression "*division*" in this will meant an oft-recurring event, *viz.*, payment of the lagacies according to the age or matrimonial condition of the legatees. These considerations satisfy me that the words "*to pay*" and "*to divide*" do not mean the same thing, and it follows that "*division*" does not mean actual payment. What does it mean then? I have no hesitation in giving the answer. It means what division means in arithmetic, what it means when the mathematical lecturer asks his pupils to do when he directs the division of a specified sum of money among a specified number of persons. It means in this will the ascertainment of the amounts allottable to the share of each legatee after the conversion of the estate into money. I must point out that this observation is not inconsistent with the contention of Mr. Pearson, that the legacy to William Henry Bachman became *de jure* receivable upon the death of the testator. By my observation is inconsistent with, and wholly antagonistic to, the contention which he has put forth, that "*division*" means *de jure* receivable. The will itself leaves no doubt upon the point, for it distinctly contemplates an interval of time between the death of the testator and the division of his estate directed by him. To say then, as Mr. Pearson says, that "*division*" means *de jure* receivable, is to say that when two points in geometrical conception coincide with each other, there is a straight line between them. I therefore need say no more about the exact meaning of the word "*division*" as used in this will. But then the question arises, was the contemplated "*division*" the time appointed for payment of the legacies? To this I can give only a qualified answer, because the context of the will does not permit any other kind of answer. "*Division*" is undoubtedly contemplated by the will as the condition precedent to rendering the lagacies not *de jure* but [611] *de facto* receivable, but this does not necessarily imply that that was the time appointed for actual payment. Indeed, I can quite imagine an interval of time, long or short, between the division and actual payment. The interval would be naturally variable. In the case of male legatees below the age of twenty-one, the appointed time for payment of the legacy would be the moment they respectively attain that age; in the case of females, when they attain that age or when they marry. But then Mr. Pearson contends that William Henry Bachman

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fell under neither of these categories, for he was above the age of twenty one years when the testator died. How does this circumstance affect the question? So far as the learned counsel's argument relates to the inapplicability of the divesting clause to the case of William Henry Bachman, I have only to say that the words "any of such persons," occurring where they do in the will, must be taken to mean all the persons mentioned in the schedule, among whom was William Henry Bachman. To limit these words to the legatees below the age of twenty-one is to say that if a legatee above that age died in the lifetime of the testator, his legacy would not go over but would devolve upon his representatives. I say this because the will leaves no doubt that the death of a legatee prior to the death of the testator, or "prior to the said division," has the same effect so far as the gift over is concerned. The word "*division*" therefore was not *necessarily* the time appointed for payment of the legacies; the testator did not mean it to be so, although as a matter of accidental coincidence the time of division and the time appointed for payment of the legacy may be identical. If a male legatee below the age of twenty-one happens to attain that age at the exact moment when the division is made, of course the time appointed for payment of the legacy is identical with the time of division. And the same remark would apply to the case of a female legatee below the age of twenty-one, who chose to marry at the exact time of the division. Thus, obviously, the time appointed for payment of the legacies and the time of the division may be accidentally coincident. The same remark applies, in principle though not in detail, to the case of William Henry Bachman, because, happening to be above the age of twenty-one when the testator died, he would necessarily be above that age at the period of the division—a period which would [612] thus be coincident with the time when the legacy to him would become *de facto* receivable. But he did not survive the division declared by the testator as the condition precedent to the payment of the legacies bequeathed by him. What is the exact effect of this circumstance on the present case? This is the last question I have to consider and decide.

That a legacy, after having once vested in interest, may be divested under the express terms of a will providing an executory gift over on the occurring of a specified event, is an undoubted proposition of law, illustrated by the case of *O'Mahoney* v. *Burdett* (1) which was decided by the House of Lords, and the case of *Maseyk* v. *Fergusson* (2) decided under the Succession Act itself. Indeed illustration (*f*) of s. 106 of the Act itself proceeds upon the rule which I have stated. Now I have already said enough to show that "*division*" as used in this will means one and only one event, namely, the ascertainment of the amount allottable to each legatee after the conversion of the testator's estate into money. It is an event which, I venture to think, Lord Selborne in *Minors* v. *Battison* (3) would not hesitate to "call a *definite act* to be done by the trustees." Nor, if this were the will in *Bubb* v. *Padwick* (4) would even Malins, V.C., decline to say that it directed the "gift over of the *whole share* of each" legatee, that it was therefore "perfectly good" because "the original clause being a vesting clause, this would have been a divesting clause as clearly as the original was a vesting clause, and the share must have gone over," the terms of the clause providing "an absolute gift over." Indeed, as it seems to me, with the exception of the case of *Martin* v.

(1) L.R. 7 H.L. 388.
(2) 4 C. 304.
(3) L.R. 1 App. Cas. 428.
(4) L.R. 13 Ch. D. 517.

Martin (1) there is in truth no clear authority which supports the abstract proposition of law advocated by the learned counsel for the plaintiff-appellant, that a gift over is void for uncertainty because the divesting clause renders the turning point of divestiture an event which, though certain or ascertainable, is not absolutely fixed in point of time when it is to occur.

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The learned Chief Justice has pointed out the distinction to be observed between uncertainty as to the meaning of an expression **[613]** used by a testator, and uncertainty as to the exact time when the event to which the word refers actually takes place—birth, marriage, or death, whatever the event may be. And why may the event not be "division" if the testator chooses to name it? It certainly is no more uncertain in point of occurrence than marriage. Indeed, uncertainty as to the exact time of the occurrence of a specified event should be called unfixedness of date; it undoubtedly cannot be called "uncertainty" in the sense in which s. 76 of the Succession Act uses the expression.

With such conceptions of the English law upon the subject as I may claim, I wish to express my complete and most respectful concurrence with the principle laid down by Jessel, M.R., in *Johnson* v. *Crook* (2), and I hold that, under the English law as under our own, "where the gift over is not quite clear, that is, where it is susceptible of two meanings, what has been called received *de jure* and received in fact, or what might perhaps be better expressed as actually received and entitled to receive, there, the presumption of law being in favour of not divesting a gift except there are clear words to take it away, and there being two possible meanings, you are to prefer that which leads to the least inconsistency, or, it might be said, you are to prefer that which is the more convenient of the two." But in the case now before us, as I have shown, the word "*division*" is not "susceptible of two meanings," and the vesting clause being clear as to the gift to the original legatees, the divesting clause is couched in "clear words to take it away." I must here observe that in this case, under the terms of the will, the legacy to William Henry Bachman consisted of a bequest in trust to the trustees, and the gift to him was in the form of a direction to pay. The contemplated division, as I have already said, was not a condition precedent to the legacy being vested in interest, but it certainly was an event contemplated by the testator as essential antecedent to the legacy being vested in possession. Such was the nature of the legacy; such was the nature of the interest that William Henry Bachman had in that legacy; such was the nature of the division contemplated by the testator as the turning point of the divestiture with reference to the legatee's death; such in short was the divesting claus which the **[614]** testator wisely or unwisely chose to frame to give effect to his wishes in regard to the disposition of his property, which was nobody else's but his own. Where the uncertainty in those wishes as expressed in this will lies, I fail to see. And so long as I hold that under our law the lawful intentions of a testator are to be given effect to, I must hold that simply because William Henry Bachman did not happen to survive the "*division*" contemplated by the testator, the legacy to him was never vested in possession; that though vested in interest, it was divested by reason of the wishes of the man who originally made the gift subject to the terms of the divesting clause of his will. But I need attribute no caprice to the testator in this case, for I entirely concur with the learned Chief

(1) L.R. 2 Eq. 404. (2) L.R. 12 Ch. D. 639.

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Justice in thinking that it is amply shown by the wording of the will itself that the real object of the testator was to keep his estate among persons of his own kith and kin—persons in whose veins ran the same blood as his own.

I wish to touch upon only one more point. The exact ruling of Fry, J., in *Collison* v. *Barber* (1), *Chaston* v. *Seago* (2), and *Spencer* v. *Duckworth* (3), does not lay down such a thorough-going rule of law as Jessel, M. R., laid down in *Johnson* v. *Crook* (4). Fry, J., controls the terms of the will by supposing virtually that every testator must be understood to frame the language of his will with reference to the rule as to the "executor's year," and therefore, wherever expressions like "received by them." "paid to them," "division," "final division of my estate," are employed by the testator, he must be taken to refer to the expiry of one year from his death. I confess it seems to me this is impairing the rule laid down by Jessel, M. R., though Fry, J., all along professes to follow the ruling of the distinguished Master of the Rolls. Mr. Ross has asked us to place the same interpretation upon the will now before us as Fry, J., placed upon the wills in the three cases to which I have referred; and the learned counsel calls our attention to s. 297 of the Succession Act to show that the "executor's year" is recognized by the express language of the statute. This is so. But the learned Chief Justice has pointed out that it is not an important matter in this case, because William Henry Bachman died long before the expiry of a year from the death of the [615] testator. However, with profound respect to the ruling of Fry, J., I cannot help feeling that the *ratio decidendi* which he adopted in the three cases cited is hardly in full accord with that upon which the ruling of Jessel, M. R., in *Johnson* v. *Crook* (4) proceeds. For Fry, J., imposes the limitation of one year which, I humbly venture to think, the eminent Master of the Rolls would not. He would say in this case "division" means "division," the testator has chosen to name that as the turning point of the divestiture with reference to the legatee's death, William Henry Bachman died before the "division," and his interest was well gone over in favour of his children. I have dwelt upon this point, because whatever the rule in England may be, I am not prepared to hold that the provisions of s. 297 of the Succession Act are to be imported into the terms of every will in this country. And it seems to me that, if it is within the power of the testator to postpone the period of the vesting of a legacy, there is no reason, and certainly nothing in our law, to prevent his fixing any event he likes as the turning point of the divestiture. A man may do what he likes with what is his own, and Jacob George Bachman, in writing his will, did what he liked with what was his own. We are bound to give effect to what he intended, and I hope I have said enough to show that we know for certain what he did intend. And with reference to the argument that the dilatoriness or want of diligence of the trustees in making the division might place the original legatees and their representatives at the mercy of the trustees, I wish to make three brief observations. *First*, that according to my conception of the law, a testator is at full liberty to give extensive powers and discretion to his trustees, and to render the legatees subject to such risks as may arise in consequence. *Secondly*, fraud, accident, or mistake are grounds for relief in Courts of Equity. *Thirdly*, in the present case it has not even been

(1) L.R. 12 Ch. D. 834. (2) L.R. 18 Ch. D. 218.
(3) L.R. 18 Ch. D. 634. (4) L.R. 12 Ch. D. 639.

alleged that the division of his estate, contemplated by the testator, was even practicable before the death of the legatee, William Henry Bachman. 1884 JULY 7.

For these reasons I concur with the learned Chief Justice in dismissing this appeal with such order as to costs as he has proposed. APPELLATE CIVIL.

Appeal dismissed.

6 A. 583 = 4 A.W.N. (1884) 194.

6 A. 616 = 4 A.W.N. (1884) 185.

[616] APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

RIAYATULLAH KHAN, MINOR (*Defendant*) v. NASIR KHAN (*Plaintiff*).* [8th July, 1884.]

Civil Procedure Code, ss. 42, 43.

R purchased two houses under the same sale-deed. Four years afterwards, he sued for possession of one of the houses, alleging that he had been dispossessed by the ancestor of the defendant. Subsequently he sued the same defendant for possession of the other, alleging that, at the time when he instituted the former suit, he had already been dispossessed of the house now in question, and by the same person.

Held that, although the plaintiff's title to both houses rested on the title acquired by him under one and the same sale-deed, yet the cause of action, *viz.*, his ouster from the two houses on different occasions, gave rise to two separate causes of action, which he was not bound to join in the former suit, there being nothing in the Civil Procedure Code to compel him to do so. *Jardine Skinner and Co.* v. *Ranee Shama Soonduree Debia* (1) and *Ram Sunder Saha* v. *Delanney* (2), referred to.

[R., 4 K.L.R. 179; 25 Ind. Cas. 579.]

THE plaintiff in this case was the purchaser of two houses under a sale-deed dated the 18th September, 1876. In 1880, he instituted a suit for possession of one of the said houses, alleging that he had been dispossessed by Dorab Khan, ancestor of the defendant. Subsequently he brought the present suit for possession of the other house, raising in respect of it the same allegation, and stating that, at the time when he brought the former suit, he had already been dispossessed of the house now in question. The Court of first instance (Munsif) dismissed the suit, observing as follows:—"I think that this claim is, under s. 43 of the Civil Procedure Code, a '*portion omitted*,' and it cannot now be entertained. For the plaintiff states that he acquired both the properties under one and the same deed, and that he has been dispossessed of both of them by one and the same person, and both suits have been instituted against the same defendants, who are the heirs of the person who dispossessed him. When the plaintiff's dispossession from this property, according to his own statement, took place prior to his dispossession from the other property, it is evident that he could have brought both claims in a single suit." The plaintiff appealed to the District Judge, who set aside the Munsif's decree, substantially on the same grounds as will be found stated in the judgment of the High Court, and remanded the suit to the Court of first instance for disposal on the merits.

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* First Appeal No. 170 of 1883, from an order of A. F. Millett, Esq., District Judge of Shahjahanpur, dated the 17th September, 1883.

(1) 13 W.R. 196. (2) 20 W.R. 103.

1884 JULY 8. —— APPELLATE CIVIL. —— 6 A. 616= 4 A.W.N. (1884) 185.

[617] From this order of remand the defendant preferred the present appeal, relying on the reasoning of the Munsif as above set forth.

Pandit *Nand Lal*, for the appellant.

Lala *Lalta Parshad*, for the respondent.

The Court (STRAIGHT, Offg. C. J., and MAHMOOD, J.) delivered the following judgment :—

JUDGMENT.

STRAIGHT, Offg. C.J.—Although the respondent's title to both houses rested on the title acquired by him under one and the same sale-deed, yet the cause of action, *viz.*, his ouster from the two houses on different occasions, gave rise to two separate causes of action, which he was not bound to join in the former suit. There is nothing in the Civil Procedure Code to compel a plaintiff to do so,; and s. 42 cannot be understood to convey any such meaning. The "subjects in dispute" in the former suit related to one house; the "subjects in dispute" in this suit relate to the house now in question. The present case is analogous to the cases of *Jardine Skinner and Co.* v. *Ranee Shama Soonduree Debia* (1) and *Ram Sunder Saha* v. *Delanney* (2) disposed of by the Calcutta Court, and, adopting the principle laid down in those rulings, we dismisss this appeal.

Appeal dismissed.

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6 A. 617=4 A.W.N (1884) 192.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Oldfield.

MANSHA DEVI AND ANOTHER (*Plaintiffs*) v. JIWAN MAL *alias* ABDUL RAHMAN AND OTHERS (*Defendants*).* [9th July, 1884.]

Hindu Law—Widow—Daughter—Maintenance—Residence—Marriage expenses.

J, a Hindu, embraced the Muhammadan religion, and married a Muhammadan woman, whom he took to live with him. At the time of his conversion, he had a Hindu wife who, together with her minor daughter, now instituted a suit against him, praying (1) for an allowance by way of maintenance, (2) that the allowance might be fixed as a charge on specific property belonging to the defendant, (3) for an order compelling the defendant to provide to plaintiffs with a separate house for their residence, and (4) that a sum of Rs. 4,000 might be awarded to them, to defray the marriage expenses of the minor plaintiff.

Held, that the defendant ought not to be compelled to provide residence for the plaintiffs, inasmuch as the allowance awarded to them should cover all such expenses as maintenance and house-rent.

Held, that the claim of Rs. 4,000 for the minor plaintiff's marriage expenses should be rejected, since it was not shown that any marriage expenses had been [618] incurred or were at present required for her, and since, if she lived to reach a marriageable age, the matter would then be in the hands of her guardian.

Held further, that the right of the wife and daughter to be maintained out of the husband's and father's property was undoubted, and that when the Court has made an order directing a sum to be paid by way of maintenance, it has undoubtedly the power to ensure the enforcement of its order, and this could best be done by fixing the allowance to be a charge on specific property. *Jamna*

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* First Appeal No. 106 of 1883, from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 18th July, 1883.

(1) 13 W. R. 196. (2) 20 W. R. 103.

v. *Machul Sahu* (1), *Ramabai* v. *Trimbak Ganesh Desai* (2), *Sham Lal* v. *Banna* (3), and *S. M. Mahalakshmamma Garu* v. *S. M. Venkataratnamma Garu* (4), referred to.

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APPELLATE CIVIL.

6 A. 617 = 4 A. W. N. (1884) 192.

THE plaintiff in this case, Mansha Devi, was the wife, and Hira Devi was the minor daughter, of Jiwan Mal, represented by her mother, Mansha Devi.

The defendants were Jiwan Mal *alias* Abdul Rahman, his mother Sukhi, and one Kali. Jiwan Mal embraced the Muhammadan religion, and took the name of Abdul Rahman, and it was alleged that he turned the plaintiffs out of his house, and lived with Kali, prostitute, and fraudulently transferred his property to his mother, who transferred it to Kali under a deed of sale dated the 5th November, 1882. The plaintiffs brought the present suit to have an allowance by way of maintenance awarded to them, at the rate of Rs. 15 per mensem for Mansha, and Rs. 10 for Hira Devi. They asked that it should be fixed as a charge on the property transferred under the deed of sale and other property of Jiwan Mal; they further asked for an order that Jiwan Mal should provide them with a separate house for their residence; that a sum of Rs. 4,000 might be awarded to them to defray the marriage expenses of the minor plaintiff; and that the alienation of the property by Sukhi in favour of Kali might be set aside. The defendant, Jiwan Mal *alias* Abdul Rahman, pleaded that he had not turned the plaintiffs out of his house; that he was willing to maintain them if they would reside in his house with his mother and aunt, both Hindus, and who lived apart from him; that he was willing to allow them Rs. 4 per mensem; that the claim for Rs. 4,000 was excessive; and that he was willing to pay for their maintenance any sum the Court might choose to fix. The other defendants contended that the alienations were *bona fide* and valid, and that the plaintiffs had no cause of action. The Subordinate Judge of Saharanpur found that Jiwan Mal had embraced the Muhammadan religion and married a Muhammadan wife, and that, under **[619]** such circumstances, Mansha could not be forced to live with him, that she was the proper person to have charge of their minor daughter, and that both were entitled to be maintained by Jiwan Mal. He decreed an allowance for the two plaintiffs of Rs. 15 per mensem, to be reduced to Rs. 10 when the daughter left her mother's care. He refused to decree the claim for Rs. 4,000, or to direct that a house be provided for the plaintiffs' residence, and he also refused to make the allowance a charge upon the property. He considered that the defendant Jiwan Mal's liability on that account was a personal liability, he observed that if there should be any failure to pay the allowance, the plaintiffs might bring a suit to make it a charge on the property, and he directed each party to pay their own costs. The plaintiffs appealed to the High Court, and prayed for all the reliefs which they claimed in their plaint, and for their costs. The case was remanded by the High Court to the Subordinate Judge for the trial of certain issues under the orders of the High Court, dated the 29th January, 1884. The order set out that the Subordinate Judge had found, among other matters, that Jiwan Mal had become a convert to Muhammadanism; that he had effected a legal marriage with Kali under the Muhammadan Law; and that under these circumstances, the plaintiffs were entitled to claim maintenance from Jiwan Mal personally; but he had recorded no finding

(1) 2 A. 315.
(2) 9 B.H.C.R, 283.
(3) 4 A. 296.
(4) 6 M. 83.

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as to the circumstances under which Jiwan Mal transferred his property to his mother, and she subsequently made it over to Kali; nor whether such transfer to Kali covered the whole of his estate or left some portion of it still at his disposal; and the Court observed that *prima facie* the right of the plaintiff Mansha as a wife to maintenance was against Jiwan Mal personally; but it was not prepared as at present advised to say that it had no power to insure its enforcement either by prohibiting Jiwan Mal from transferring any property that might still remain with him, or declaring the allowance to be a charge upon the property, if he had assigned the whole of it, which was now in the possession of another. The High Court directed the determination of the following issues:—" 1. When and under what circumstances was the transfer made to Sukhi; what was the consideration for it; and did it convey the whole of the property owned by and belonging to Jiwan Mal? 2. If it did not cover the whole of his property, to what extent is he now possessed of unincum-[620]bered property that can be made available as security for the payment of any maintenance to which the plaintiff Mansha Devi may be declared entitled by decree? 3. At the time the plaintiff Mansha Devi and Jiwan Mal were living together as man and wife, what was their general pecuniary *status*, and the condition in life enjoyed by them, and what was his monthly income?" The Subordinate Judge returned his findings to the effect that Jiwan Mal executed a deed of gift in favour of his mother, Sukhi, on the 3rd November, 1880, in respect of certain property, at a time when he was squandering his estate, and had become involved in debt, that there was no real transfer, and that the transaction was a mere device to save the estate from creditors. The Subordinate Judge further found that such property as was not included in the gift was incumbered by mortgages, and that prior to the transfer to Sukhi the property gave an annual income of Rs. 600 or Rs. 700, and that the income now derived from the property other than that transferred was Rs. 200 or Rs. 250 a year.

No objections were taken to these findings, and the appeal again came before the High Court.

Pandit *Nand Lal*, for the appellants.

Lala *Lalta Prasad*, for the respondents.

The Court (STRAIGHT, Offg. C.J., and OLDFIELD, J.) delivered the following judgment:—

JUDGMENT.

OLDFIELD, J. (after stating the facts, and observing that the Court accepted the findings of the Subordinate Judge upon the issues remitted, continued :)—We consider that the several pleas in regard to an increase in the monthly allowance, the demand of Rs. 4,000 for marriage expenses, and the provision of a house for separate residence, should be disallowed.

Looking to the income of the defendant Jiwan Mal, we consider that the allowance of Rs. 15 per mensem is as much as the plaintiffs can properly claim, and we are not disposed to oblige the defendant to provide residence for the plaintiffs, as we think the allowance should cover all such expenses as maintenance and house-rent.

We consider the Subordinate Judge was right to refuse the sum of Rs. 4,000 for the minor plaintiff's marriage expenses, as it has not been shown that any marriage expenses have been incurred [621] or are at present required for the minor plaintiff, and as the Subordinate Judge observes, if she lives to reach a marriageable age, the matter

will be in the hands of her guardian at the time. There remains the question whether we should make the sum allowed for maintenance a charge on the property of Jiwan Mal *alias* Abdul Rahman. Now the right of the wife and daughter to be maintained out of the husband's and father's property is undoubted—*Jamna* v. *Machul Sahu* (1), *Ramabai* v. *Trimbak Ganesh Desai* (2),—and the respondent, Jiwan Mal, has not appealed or taken objections to the decree of the Subordinate Judge adjudging the plaintiffs' right to live apart from him, and to be maintained by him, under the circumstance found, namely, his conversion to the Muhammadan religion and marriage with a Muhammadan woman, whom he has taken to live with him ; and we are of opinion that when the Court has made an order directing a sum to be paid by way of maintenance by the respondent, it has undoubtedly the power to ensure the enforcement of its order, and that this can best be done by fixing the allowance to be a charge on specific property. This form of relief has been granted in cases where a widow seeks maintenance from the heirs who have inherited her husband's property, and is necessary to enable the person entitled to maintenance to enforce the claim as a charge upon the property.—*Sham Lal* v. *Banna* (3), *S. M. Mahalakshmamma Garu* v. *S. M. Venkataratnamma Garu* (4). In the case before us, the alleged assignments of Jiwan Mal's property to Sukhi and by her to Kali cannot be set up to prevent the allowance being made a charge on the property, for the alleged gift to Sukhi has been shown to have been merely colourable, and not to have passed the properties to her, and the so-called deed of sale, which is in fact one of gift, in favour of Kali by Sukhi, can confer no title on her.

We therefore so far modify the decree of the lower Court as to declare that the allowance payable to the plaintiffs shall be charges upon the following property. (Here followed a list of properties.)

The value of the above is stated in the sale-deed executed by Sukhi in favour of Kali to be Rs. 6,000.

We further order that the plaintiffs' costs in all Courts shall be paid by defendant, Jiwan Mal *alias* Abdul Rahman.

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6 A. 622 (F.B.)=4 A.W.N. (1884) 252.

[622] FULL BENCH.

Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

QUEEN-EMPRESS *v.* RAM KURIA. [9th July, 1884.]

Criminal Procedure Code, s. 439—Enhancement of sentence so as to alter its nature—High Court's powers of revision.

The High Court, in the exercise of its powers of revision, can enhance a sentence so as to alter its nature.

IN this case, the following question was referred to the Full Bench by OLDFIELD and DUTHOIT, JJ. :—

"Can the High Court, in the exercise of its powers of revision, enhance a sentence so as to alter its nature?"

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(1) 2 A. 315.
(2) 9 B.H.C.R. 283.
(3) 4 A. 296.
(4) 6 M. 83.

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The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

The accused was not represented.

The following opinion was delivered by the Full Bench :—

OPINION.

STRAIGHT, Offg. C.J., and OLDFIELD, BRODHURST, MAHMOOD and DUTHOIT, JJ.—We are of opinion that the question put to us in the referring order must be answered in the affirmative. By s. 423 of the present Code of Criminal Procedure, the power which an appellate Court formerly had under s. 280 of the repealed Code to enhance a sentence has been expressly removed, and its capacity to interfere with the punishment awarded by the trying Court is now limited, among other matters, to altering the nature of the sentence, " but not so as to enhance the same." S. 439 of the present Code, however, which confers on the High Courts their powers of revision, not only authorizes them to do all that may be done by an appellate Court under ss. 423 and 426, but in terms declares that they may do what an appellate Court cannot, namely, "enhance the sentence." No reservation or limitation except that contained in the third paragraph of the section is placed upon the exercise of this special power, and unless we introduce the words " but not so as to alter its nature," no such qualification is to be inferred. Moreover, the inconsistencies which present themselves are, if there is any limitation of the kind suggested, that while, on the one hand, an appellate Court cannot enhance a sentence, it may alter its nature : a High Court in revision may enhance it, but not [623] alter its nature. We believe it was intended to preserve to the High Court all the powers of enhancement they had under the old law, but to make them exercisable only in revision, so as to leave them, *qua* appellate Courts, upon the same footing as all other appellate Courts.

Our reply to the reference is therefore in the affirmative.

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6 A. 623=4 A.W.N. (1884) 207.

APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

RAMLAKHAN RAI AND OTHERS (*Judgment-debtors*) *v.* BAKHTAUR RAI (*Decree-holder*).* [11th July, 1884.]

Execution of decree—Compromise—Civil Procedure Code, ss. 210, 257-*A*.

The parties to a decree for money, dated the 14th July, 1871, entered into a compromise whereby, in lieu of a portion of the decretal money, the decree-holder was placed in possession of certain property, and the remainder of the decretal money was to be paid by fixed annual instalments, and, in case of default in the payment of any instalment, it was agreed that the entire amount should become immediately realizable by execution of the decree. On the 11th December, 1882, the decree-holder, alleging default in payment of the instalments, applied for execution of the compromise.

Held, that such an agreement could not be treated as an instalment decree, and, as such, capable of execution. *Debi Rai* v. *Gokal Prasad* (1), followed.

[R., 11 A. 228 (231).]

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* Second Appeal No. 40 of 1884, from an order of J. W. Power, Esq., District Judge of Ghazipur, dated the 7th January, 1884, reversing an order of Babu Rajnath Prasad, Additional Munsif of Ballia, dated the 23rd August, 1883.

(1) 3 A. 585.

THE decree sought to be executed in this case was passed on the 14th July, 1871. In the course of its execution, the judgment-debtor, with the concurrence of the decree-holder, executed a deed on the 21st December, 1874, by way of compromise, whereby, in lieu of a portion of the decretal money, the decree-holder was placed in possession of certain property, and the remainder of the decretal money was to be paid by certain fixed annual instalments payable at the end of the month of Jaith, beginning with 1283 fasli, and ending with 1292 fasli, and in case of default in the payment of any instalment, it was agreed that the entire decretal money should become immediately realizable by execution of the decree. The compromise was filed in Court by the judgment-debtor, and placed on the record.

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[624] After the compromise, no application for execution of the decree was made. On the 11th December, 1882, the decree-holder made the present application for execution of the compromise.

The Court of first instance (Munsif of Ballia) found that the compromise had been duly entered into, but that the allegation of the decree-holder that the first five instalments had been duly paid out of Court was not proved; that the endorsements as to such payments had been made by the decree-holder in order to prevent the decree being barred; and that the instalments having never been paid, the decree was barred by limitation.

Upon appeal by the decree-holder, the District Judge of Ghazipur, treating the admission of the decree-holder as to the receipt of the first five instalments as in itself sufficient to prove his allegation, held that the execution of the decree for the remaining instalments was not barred by limitation, "as the period runs from the date of instalment due."

The judgment-debtors appealed to the High Court.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellants.

Lala *Lalta Prasad*, for the respondent.

The Court (STRAIGHT, Offg. C. J., and MAHMOOD, J.) delivered the following judgment:—

JUDGMENT.

MAHMOOD, J.—In this second appeal, the learned counsel for the judgment-debtors has addressed us at length upon the question that the compromise of the 21st December, 1874, had the effect of extinguishing the decree, by the substitution of a new contract, which could be enforced only by a fresh regular suit, and not in execution of the decree. He further complains that, before holding that the execution of decree was not barred by limitation, the lower appellate Court was bound to record clear findings as to whether the first five instalments had been actually paid. For this contention the learned pleader has called our attention to certain reported cases which favour the view, and principally to the Full Bench ruling of this Court in *Debi Rai* v. *Gokal Prasad* (1). On the other hand, the learned pleader for the respondent, whilst admitting that the Full Bench ruling of this Court is opposed to his view, [625] cites *Amir-un-nissa Khatoon* v. *Meer Mahomed Hossein* (2), *Sheo Golam Lal* v. *Beni Prasad* (3), and especially the Privy Council ruling in *Sadasiva Pillai* v. *Ramalinga Pillai* (4) as authorities in support of his

(1) 3 A. 585.
(2) 2 C.L.R. 143.
(3) 5 C. 27.
(4) 2 I.A. 219=15 B.L.R. 383.

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contention. We have also been referred to the terms of ss. 210 and 257-A of the Civil Procedure Code.

It seems to us that in deciding this appeal we are concluded by the Full Bench ruling of this Court in *Debi Rai* v. *Gokal Prasad* (1) to which the learned pleader for the appellants has referred. In that case the Privy Council ruling in *Sadasiva Pillai* v. *Ramalinga Pillai* (2), whereon the respondent relies, was considered by the learned Judges, and the majority of the Court held that the ruling did not prevent them from holding that agreements such as the compromise of 21st December, 1874, now before us, could not be executed as a decree. The case was a much stronger one than the present, because there the compromise had for a long time been executed as a decree without any objection on the part of the judgment-debtor. In the present case the decree-holder does not seek execution of the original decree of the 14th July, 1871, but of the "*kistbandi*" compromise of 21st December, 1874. The case is distinguishable from the Full Bench ruling to the extent of the circumstances, that the compromise here, besides fixing instalments, also placed the decree-holder in possession of certain immoveable property for the purpose of realizing from the profits thereof a portion of the decretal money, and that the compromise has never before the present application been sought to be executed as a decree. But the distinction renders the Full Bench ruling all the more powerful in governing this case, and under that ruling it must be held that the decree-holder-respondent cannot be allowed to treat the compromise of 21st December, 1874, as if it was an instalment decree and as such capable of execution. This view renders the consideration of the other points in the case unnecessary for the disposal of this appeal.

We decree this appeal, and setting aside the order of the lower appellate Court, restore that of the Court of first instance; costs in all the Courts to be paid by the decree-holder-respondent.

Appeal allowed.

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6 A. 626 = 4 A.W.N. (1884) 253.

[626] APPELLATE CRIMINAL.

Before Mr. Justice Straight, Offg. Chief Justice.

QUEEN-EMPRESS *v.* MEHRBAN SINGH AND OTHERS. [14th July, 1884.]

Pleadings—Civil Procedure Code, ss. 51, 115—*False verification of written statement—False evidence—Act XLV of* 1860 (*Penal Code*), *s.* 191.

A person filing a written statement in a suit is bound by law to state the truth, and if he makes a statement which is false to his knowledge or belief, or which he believes not to be true, he is guilty of giving false evidence within the meaning of s. 191 of the Penal Code

[F., 1 Weir 174; Cited, 27 P.R. 1894 (Cr.); R., 7 S.L.R. 25 = 14 Cr. L J. 456 = 20 Ind. Cas. 616.]

THE facts of this case are sufficiently stated in the judgment.

Mr. *Carapiet*, for the appellant, Mehrban Singh.

Mr. *G. E. A. Ross*, for the appellants, Munna Lal, Baldeo Prasad, and Bhawani Prasad.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

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(1) 3 A. 585. (2) 2 I.A. 219 = 15 B.L.R. 383.

JUDGMENT.

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STRAIGHT, Offg. C.J.—These five appeals are preferred from a decision of the Sessions Judge of Farukhabad, passed on the 31st March, 1884. Of the five appellants, Mehrban Singh was convicted of giving false evidence by making a false verification of a written statement of defence in the Court of the Munsif of Kaimganj, and the other four of abetting him in the giving of such false evidence. As regards Mehrban Singh, the objection in appeal is that there was insufficient evidence to warrant a conviction, and, in respect of the others, the arguments urged on their behalf are that there is no legal proof sufficient to sustain the charge of abetment of the offence of Mehrban, or to show that the statements contained in the written statement filed by him were wilfully and corruptly false.

The circumstances of the case are of a somewhat peculiar character, and it is necessary that I should shortly detail them. The prosecutor, one Nawab Piare Sahib, is a resident of Shamsabad, and in the city of Farukhabad there lives one Babu Durga Prasad, of the firm of Chota Lal, and who apparently acts as his general agent and manager. The appellants all live in a village called Manjhana, and at that place Babu Durga Prasad has a *kothi*, which is in charge of a person by name Partab Narayan. At the [627] time of the transaction taking place, out of which the present charges have arisen, the appellant Mehrban Singh was karinda of Nawab Jan, brother of Nawab Piare Sahib, and he, with the other four appellants, was the joint owner of 2 biswas, 2 biswansis, 7 kachwansis, 6½ tanwansis of mauza Kurna Bed, in the Farukhabad district. This property was in mortgage to Babu Durga Prasad, and in January, 1880, the amount due to him for principal and interest amounted to Rs. 270. In that month, negotiations were entered into for a sale of the above-mentioned share to Nawab Piare Sahib, in the name of his mother Mussamat Jafri Begam, and it was agreed that Rs. 368 should be paid to the vendors in cash, and Rs. 270 to Babu Durga Prasad in discharge of his mortgage. According to the evidence of Sham Sarup, a karinda in the employ of Nawab Piare Sahib, he obtained Rs. 368 from his master at Shamsabad either upon or prior to the 25th January, 1880, and, having brought it to Manjhana, he lodged it in the custody of Partab Narayan, at the *kothi* of Babu Durga Prasad. He further states that, on the 26th, being pressed by Mehrban Singh, who said he was badly in want of money, he paid over the amount to the five appellants at Manjhana, and that thereupon a deed of sale was prepared by one Dwarka Prasad. That person deposes that he drew up the document; that the signatures of the appellants were put to the document in his presence, which is not denied, and that they stated to him that they had received the Rs. 368. Upon the same date, the instrument was registered, and before the registering officer the appellants also made a like admission. From the evidence of Partab Narayan, it appears that Sham Sarup, who had deposited the Rs. 368 with him for safe custody on the 26th, got it from him on the 27th, as also a sum of Rs. 16 for the registration expenses, and that, upon Partab Narayan subsequently informing his master Babu Durga Prasad of the fact, and inquiring how the latter amount was to be shown in the books of the Manjhana *kothi*, he received instructions to refund the Rs. 368 which had been paid by Nawab Piare Sahib through Sham Sarup to the appellants, and, with the Rs. 16, to charge the amount in the accounts between Babu Durga Prasad and

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the Nawab's estate. This was done, and, according to the evidence of Partab Narayan, the Rs. 368 were repaid on the 22nd [628] February, 1880. This explains the meaning of Nawab Piare Sahib's statement, when he gave his evidence, that he had not paid the money. So far, the sale transaction was brought to a close, but *dakhil-kharij* proceedings still remained to be effected, and when the Nawab sought to carry them through, he was resisted by the appellants. Ultimately, on the 24th January, 1883, the Nawab instituted a suit in the Court of the Munsif of Kaimganj to recover possession of the property sold under the sale of the 27th January, 1880. He was met by a plea, professedly on behalf of all the appellants, and directly drawn up at the instance of Mehrban; that the Rs. 368 had not been paid, but that it had been agreed that they were to be paid at the time of mutation of names; and that they were not paid at that time, nor had the plaintiff satisfied the mortgage of Babu Durga Prasad as agreed. In the course of the hearing of that suit, Mehrban gave his evidence upon oath, and swore to the same effect as was set forth in the statement of defence. It is, however, in respect of the matter contained in the statement of defence that the charge was preferred and has been tried against all the appellants, that is to say, as regards Mehrban Singh for giving false evidence, and against the other four for abetting him.

I may at once say that, in my opinion, if there is a substantial allegation in that statement, which is verified as true to the best of the knowledge of the party making it, and to have been intentionally and knowingly made, such party is liable to prosecution under s. 193 of the Penal Code. By s. 115 of the Civil Procedure Code, it is enacted that written statements filed in the course of a suit, "shall be signed and verified in the like manner as plaints;" and by s. 51 of the same Act, it is provided that "the plaint shall be signed by the plaintiff and his pleader (if any), and shall be verified at the foot by the plaintiff, or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case." Consequently, a person filing a written statement in a suit is bound by law to state the truth, and if he makes a statement which is false to his knowledge or belief, or which he believes not to be true, he is guilty of giving false evidence within the meaning of of s. 191 of the Penal Code. The whole question in this case therefore is, whether the allegation contained in the [629] written statement filed in the Court of the Munsif of Kaimganj on the 9th February, 1883, as to the Rs. 368 not having been paid, was false to the knowledge of Mehrban, whether he made it knowingly and intentionally, and whether the other appellants instigated him to make such a statement on their behalf as well as his own.

It was pressed upon me by the learned counsel for the last-mentioned persons that a mere assertion in a pleading contrary to fact, but merely made for the purpose of putting a plaintiff to proof of his case, cannot be made the subject of a prosecution in a Criminal Court. I do not go the length of saying that there may be no exceptions of the kind suggested by the learned counsel, but I am of opinion that, as a rule, according to the law of this country, a litigant in making allegations as to material and substantial facts which go to support his claim as a plaintiff, on the one hand, or to meet a claim against him as a defendant on the other, is bound to truly state them, and if he does not do so, and if it can be shown that he has intentionally asserted things which are false to his knowledge, he is within the scope of s. 191 of the Indian Penal Code.

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For it must be remembered that the very essence of crimes of this kind is not how they may injure this or that party to the litigation, but how they may deceive and mislead the Courts, and thus produce the most mischievous consequences to the administration of civil and criminal justice. My experience in this Court has been such as to satisfy me that there is a too common notion abroad that false statements may be made in pleadings in suits with impunity. It is high time that this very erroneous idea should be corrected, and it is desirable it should be generally understood that this impression is a very misleading one, and that those who act under it are likely to get themselves into trouble.

[The learned Judge proceeded to deal with the particulars of the case under consideration, and affirming the conviction and the sentence upon the appellant Mehrban, he allowed the appeal of the other accused, and directed their release, on the ground that the charge of abetment had not been conclusively proved against them.]

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6 A. 630=4 A.W.N. (1884) 209.

[630] APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

IMTIAZ BEGAM AND OTHERS (*Defendants*) v. LIAKAT-UN-NISSA BEGAM (*Plaintiff*).* [14th July, 1884.]

Act XXIII of 1871 (Pensions Act), s. 12—Assignment of pension in lieu of dower.

A, who was in receipt of a *zihakhi* pension from Government, assigned by deed a portion thereof to his wife, in lieu of dower. After his death, disputes arose between the wife and the heirs of *A* in regard to a portion of the amount thus settled on her; and she instituted a suit, on a certificate granted her by the Collector under s. 6 of Act XXIII of 1871, in which she prayed for a declaration of her proprietary right in respect of the said sum, and of her power to transfer the same.

Held that inasmuch as, with reference to s. 12 of Act XXIII of 1871 *A* could not legally assign any portion of his pension to the plaintiff, the deed executed by him in her favour was null and void; and that, inasmuch as it was upon the basis of that instrument that she now came into Court, her suit must fail, since she was seeking to obtain a declaration of right rested upon a deed which was contrary to law.

[R., P.L.R. (1900) 361; 86 P.R. 1914=26 Ind. Cas. 743.]

THE facts of this case were as follows. One Ahmad Hasan Khan, who was in receipt of a *zihakhi* pension from Government of Rs. 17-12-11 per mensem, on the 12th February, 1865, by deed assigned Rs. 8 thereof in lieu of dower to his wife, the plaintiff in this suit, Liakat-un-nissa. On the 15th September, 1871, Ahmad Hasan Khan died, and disputes then arose between his widow and Muhammad Hasan Khan, the brother of the deceased, with regard to this pension. On the 25th September, 1871, a petition was presented to the Collector by Muhammad Hasan Khan, as for himself and heirs of Ahmad Hasan Khan, praying that in future the payment of the pension might be distributed as follows, namely, Rs. 1 12-11 to Nazir Muhammad Khan, son of the deceased's sister, Rs. 8 to Muhammad Hasan Khan, and Rs. 8 to Liakat-un-nissa. It was further stated by the petition that, of the Rs. 8 receivable by

* Second Appeal No. 125 of 1884, from a decree of Pandit Jagat Narain, Subordinate Judge of Farukhabad, dated the 3rd January, 1884, affirming a decree of Maulvi Zahir Husain, Munsif of Farukhabad, dated the 26th September, 1883.

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Liakat-un nissa, Rs. 4 were to be considered as her own absolute property, and the other Rs. 4 were, at her death, to go to her husband's heirs. No active opposition was offered to this application by the plaintiff, and all that she alleged in the present suit regarding it was that it was drawn up under the superintendence of Muhammad Hasan Khan, and that she had no opportunity of taking legal advice. [631] In 1873, the plaintiff contracted a second marriage, and thereupon Muhammad Hasan Khan, brought a suit against her in the Civil Court to recover the Rs. 4 to which she had been declared entitled for her life, on the ground that by her marriage she had forfeited her right to it. He failed, however, and after an infructuous application to the Revenue Court with a like object, the matter would seem to have been dropped, until the plaintiff, being desirous of commuting the Rs. 8 settled on her by her husband for a lump sum as contemplated by s. 10 of Act XXIII of 1871, applied to the Collector for that purpose. Her application was opposed by the present defendants, who represented Muhammad Hasan Khan, as to the Rs. 4, of which, under the arrangement of the 25th September, 1871, she was only entitled to a life interest; and thereupon the Collector, requiring her to establish her right to this Rs. 4, granted her a certificate under s. 6 of Act XXIII of 1871, upon the strength of which she brought the present suit, asking for a declaration of her proprietary right in respect of such Rs. 4 and of her power to transfer the same. Both the lower Courts decreed the claim.

In second appeal by the defendants, it was contended on their behalf that, as the deed of the 12th February, 1865, executed by Ahmad Hasan, upon which the plaintiff's title was based, amounted to an assignment of money payable on account of a pension, it was null and void with reference to s. 12 of Act XXIII of 1871, and could not be recognized in a Court of Law.

Mr. *Amir-ud-din*, for the appellants.

The respondent did not appear.

The Court (STRAIGHT, Offg. C.J., and MAHMOOD, J.) delivered the following judgment:—

JUDGMENT.

STRAIGHT, Offg. C.J.—We think that the contention of the learned counsel for the appellant is fatal to the plaintiff's claim, and that as Ahmad Hasan Khan could not legally assign any portion of the pension to the plaintiff, Liakat-un-nissa, the deed of the 12th February, 1865, was null and void. As it is upon the basis of this instrument that she now comes into Court, it is obvious that her suit fails, as she is seeking to obtain a declaration of right resting solely and entirely upon the deed, if such deed was, as it undoubtedly was, invalid, in the sense that it was contrary to law, and her [632] claim is unmaintainable. This view of the matter in no way affects the Rs. 4 share of the pension, of which she is admittedly in possession, and to which she would seem to be entitled as one of her deceased husband's heirs? We must therefore decree the appeal with costs, and, reversing the decision of the Courts below, the suit will stand dismissed.

Appeal allowed.

6 A. 632=4 A.W.N. (1884) 208=9 Ind. Jur. 155.

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APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

TULSHA AND OTHERS (*Plaintiffs*) *v.* GOPAL RAI (*Defendant*).*
[14th July, 1884.]

Hindu Law—Hindu widow—Daughter—Maintenance—Marriage expenses—Misjoinder.

A Hindu widow, with her two daughters as co-plaintiffs, sued the son of her deceased husband by another wife, alleging that he was in possession of his father's property, for maintenance and for the marriage expenses of the daughters, both of whom were of marriageable age. The Court of first instance gave the plaintiffs a decree for a monthly allowance, and Rs. 540 to the widow as arrears of maintenance, and Rs. 1,000 for the marriage expenses of the daughters.

Held that, inasmuch as the mother was the natural guardian of the two other plaintiffs, and it was proper for them to reside with and be provided for by her, and the common maintenance was, so to speak, a joint matter, the suit was not, at any rate at the stage of appeal, open to objection on the ground of misjoinder of parties and causes of action; nor, looking at the peculiar circumstances of the family, which made the mother the most natural and proper person to arrange the marriages of the two minor plaintiffs, was the prayer for marriage expenses improperly added.

Held further, that the Court of first instance should have separated the maintenance to which it considered the three plaintiffs respectively entitled, and that, as to the two minor plaintiffs, it should have declared that such maintenance should cease upon their marriage.

[F., 23 M. 512 (516); R., 11 A. 194 (202) (F.B.); 32 A. 325 (332)=7 A.L.J. 236 (243) =5 Ind. Cas. 413 (415); 21 M.L.J. 600=10 M.L.T. 57=11 Ind. Cas. 570=(1911) 2 M. W.N. 285.]

PLAINTIFF No. 1 in this suit was the first wife of one Harsukh Rai, deceased, and plaintiffs Nos. 2 and 3 were his two daughters by plaintiff No. 1. The defendant was the son of Harsukh Rai by his second wife. The plaintiffs sued the defendant, alleging that he was in possession of his father's property, for maintenance and for Rs. 7,000 for the marriage expenses of plaintiffs Nos. 2 and 3. The Court of first instance (Subordinate Judge of Saharanpur) gave the plaintiffs a decree for an allowance of Rs. 13 per mensem, and Rs. 540 to plaintiff No. 1 as arrears of maintenance for three years, and Rs. 1,000 for the marriage expenses of plaintiffs Nos. 2 and 3.

[633] The plaintiffs appealed to the High Court, contending that the allowance fixed by the lower Court was too small, having regard to the income of the property and the *status* of the family, and that the amount decreed for marriage expenses was also too small, regard being had to the amount usually expended on marriages in the family.

The defendant also appealed on the grounds, *inter alia*, that there was misjoinder of causes of action and of plaintiffs, and that the sums awarded on account of maintenance and marriage expenses were both excessive.

The appeals were respectively numbered 111 and 139.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Shah *Asad Ali*, for the appellants in No. 111 and the respondents in No. 139.

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* First Appeal No. 111 of 1883, from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 23rd May, 1883.

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Munshi *Kashi Prasad*, for the appellant in No. 139, and the respondent in No. 111.

The Court (STRAIGHT, Offg. C. J., and BRODHURST, J.) delivered the following judgment :—

JUDGMENT.

STRAIGHT, Offg. C. J.—These two appeals, 111 and 139, are from a single decree of the Subordinate Judge of Saharanpur, and they may conveniently be disposed of together. There is no need to recapitulate the facts of the case, as they are fully set forth in the judgment of the Court below. Taking Appeal No. 139 first, we do not feel ourselves pressed by the defendant-appellant's pleas therein. Seeing that the plaintiff Tulsha, as mother, was the natural guardian of the other two plaintiffs, and that it was proper for them to reside with and be provided for by her, and the common maintenance being, so to speak, a joint matter, we are not prepared to hold, at any rate at this stage of the litigation, that the suit was open to objection on the ground of misjoinder of parties and causes of action. Nor, looking to the peculiar circumstances of this family, which make Tulsha the most natural and proper person to arrange the marriages of the two minor plaintiffs, are we disposed to hold that the prayer for marriage expenses was improperly added. At the time the suit was brought both the girls were of a marriageable age, and it was only in accordance with Hindu Law that a sum of money suitable to their [634] condition and the custom of their family should be secured against their marriage taking place. The other pleas in No. 139 do not appear to us to have any force, and the appeal must be dismissed with costs.

With regard to Appeal 111 we think that the Subordinate Judge should have separated the maintenance to which he considered the three plaintiffs respectively entitled, and that as to the two minor plaintiffs he should have declared that such maintenance would cease upon their marriage. Moreover it seems to us that Rs. 15 was a somewhat low figure at which to place the monthly allowance for all the three persons, and we therefore so far allow this appeal, that the Subordinate Judge's decree will be modified to this extent, that the plaintiff Tulsha will be declared entitled to a monthly allowance of Rs. 15, and the two minor plaintiffs to a monthly allowance of Rs. 5 each, such latter allowance to cease in either case upon marriage. The amount of arrears recoverable will, so far as Tulsha is concerned, stand as decreed by the Subordinate Judge, but as regards the minor plaintiffs, they will be entitled to receive Rs. 180 each for arrears. As regards the amount allowed for marriage expenses by the Court below, we shall not interfere. There will be no order as to costs in the Appeal 139.

Appeal allowed.

6 A. 634=4 A.W.N. (1884) 210=9 Ind. Jur. 157.

1884 JULY 16. — APPELLATE CIVIL. — 6 A. 634=4 A.W.N. (1884) 210=9 Ind. Jur. 157.

APPELLATE CIVIL.

Before Mr. Justice Brodhurst and Mr. Justice Duthoit.

JANKI DAS (*Plaintiff*) v. THE EAST INDIAN RAILWAY COMPANY (*Defendant*).* [16th July, 1884.]

Civil Procedure Code, s. 266—*Gratuity—Liability to attachment—Gift—Delivery—Act IV of* 1882 (*Transfer of Property Act*), *s.* 123—*Act IX of* 1872 (*Contract Act*), *s.* 90.

K, a servant in the employment of the East India Railway Company, was recommended by the Traffic Manager a bonus in consideration of long and good services. This recommendation was sanctioned, and the amount of the bonus was received by the District Paymastor. Before payment to *K*, the money was attached in execution of a decree obtained against him by *J*.

Held that inasmuch as the bestowal of the money was a gift of moveable property of date subsequent to the 1st July, 1882, and was not evidenced by a registered instrument, it could only be effected by actual delivery; that as there [635] had been no such delivery as completed the transfer (s. 123 of the Transfer of Property Act, and s. 90 of the Contract Act), the money was not at *K*'s disposal, and he could not have enforced payment; and that the money was therefore not liable to attachment in execution of a decree against him.

ON the 20th March, 1882, one Kelly, in the employment of the East Indian Railway Company as a yard foreman at the Allahabad Railway Station, was recommended by the Traffic Manager of the Company a bonus of six months' pay in consideration of his long and good services. This recommendation was approved of and the bonus sanctioned by the Board of Directors and ultimately by the Government of India. On the 15th August, 1882, the amount of the bonus, Rs. 1,080, was received by the District Paymaster of the Company, for payment to Kelly. On that same day, before payment to Kelly, the money was attached in execution of a decree against Kelly, which had been obtained by the plaintiff, one Janki Das. The Paymaster of the East India Railway Company refused to pay the money so attached, on the ground that nothing was due to the judgment-debtor. The plaintiff therefore instituted the present suit against the Company for recovery of the above-mentioned sum of Rs. 1,080.

The Court of first instance (Munsif of Allahabad) dismissed the claim, holding that the money in question was not liable to attachment in execution of a decree against Kelly, inasmuch as the gift to him had never been legally completed, so as to entitle him to enforce payment. On appeal, the District Judge upheld the decree.

The plaintiff appealed to the High Court, and it was contended on his behalf that as soon as the payment of the gratuity to Kelly had been sanctioned, and the amount remitted to the District Paymaster at Allahabad, it became in effect the property of Kelly, and liable to attachment in execution of a decree passed against him.

Mr. *T. Conlan* and Lala *Lalta Prasad*, for the appellant.

Mr. *G. T. Spankie*, for the respondent.

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* Second Appeal No. 1492 of 1883, from a decree of F. S. Bullock, Esq., Offg. District Judge of Allahabad, dated the 31st August, 1883, affirming a decree of Babu Prag Das, Offg. Munsif of Allahabad, dated the 18th June, 1883.

1884
JULY 16.

APPELLATE CIVIL.

6 A. 634 = 4 A.W.N. (1884) 210 = 9 Ind. Jur. 157.

The Court (BRODHURST and DUTHOIT, JJ.) delivered the following judgment:—

JUDGMENT.

DUTHOIT, J.—The Rs. 1,080 was in no sense a debt due by the Company to Kelly, but was a gift bestowed from motives of compas- [636] sion. It has, however, been contended by the learned counsel for the appellant, that from the moment when sanction to pay the money reached Allahabad, the money was at his client's disposal; that his client could have compelled the Paymaster to pay the money to him; and that the issue of the order to pay was equivalent to payment of the money.

There is, we think, no force in these contentions. The bestowal of the gratuity was a gift of moveable property. Its date is subsequent to the 1st July, 1882, and it was not evidenced by a registered instrument. It could therefore only be effected by actual delivery. The receipt of the order to pay is not equivalent to delivery to Kelly, for Kelly was not personally put into possession of the money, nor had the Paymaster authority from Kelly to hold the money on his behalf. As, therefore, there had been no such delivery (s. 123 of the Transfer of Property Act, and s. 90 of the Contract Act) as completed the transfer—vested the property—the money was not at Kelly's disposal, and he could not have enforced payment of it. The appeal fails, and is dismissed with costs.

Appeal dismissed.

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Act XXVII of 1860 (Collection of Debts on Succession).

(1) *Certificate for collection of debts—Grant to several persons jointly.*—A certificate under Act XXVII of 1860 should not be granted to several persons jointly, but, where there are several claimants to the certificate, the District Court should determine which of such persons has the best title to the certificate, and grant the same accordingly. MADAN MOHAN v. RAMDIAL, 5 A. 195=2 A.W.N. (1882) 215 ... 132

(2) *Execution of decree—Certificate for collection of debts—Application for execution by representative of deceased decree-holder – Objection to title—Order refusing to allow representative take out execution until granted certificate —Appeal — Civil Procedure Code, s. 244.*—On appeal from an order allowing an application by the legal representative of a deceased decree-holder for execution, the appellate Court, holding that the applicant must obtain a certificate under Act XXVII of 1860 before he could take out execution of the decree, made an order directing that execution of the decree should be stayed until the applicant had obtained such certificate.

Held, that such order fell under s. 244 of the Civil Procedure Code, and was therefore appealable.

Also, following the principle enunciated in 4 A. 485 that the possession of a certificate under Act XXVII of 1860 was not "an imperative condition precedent to the institution" of execution-proceedings by the representative of a deceased decree-holder; but that, where the judgment-debtor objects to the title of the person claiming to execute the decree, the Court should consider whether the objection is vexatiously raised or is a *bona fide* one. HOTI LAL v. HARDEO, 5 A. 212=2 A.W.N. (1882) 191 ... 144

(3) *Debt due to deceased person—Suit by legal representative—Certificate to collect debts.*—The plaintiffs in this suit sued the defendants on a bond, claiming as the heirs of the deceased obligee. The defendants denied that the plaintiffs were the heirs of the deceased obligee, and contended that they should have obtained a certificate under Act XXVII of 1860 before suing. There being good reason to doubt the validity of the title of the plaintiffs, the lower appellate Court postponed the decision of the case for a certain time in order to give the plaintiffs an opportunity of obtaining such certificate. The plaintiffs failing to avail themselves of this opportunity, the lower appellate Court dismissed the case. The High Court, on second appeal, refused to disturb the lower appellate Court's decision. BATASI v. MAHESH, 5 A. 555=3 A W.N. (1883) 133 ... 382

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Held that such absence without leave did not amount to "withdrawal from the duties of his office without permission," within the meaning of s. 29 of Act V of 1861. QUEEN-EMPRESS v. SALIG RAM, 6 A. 495=4 A.W.N. (1884) 215 ... 777

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(2) S. 257—See GUARDIAN AND MINOR, 5 A. 245.

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(1) S. 6—See SMALL CAUSE COURT SUIT, 6 A. 449.

(2) S. 19—See TREES, 5 A. 564.

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(1) S. 2 (5), (6)—See TREES, 5 A. 564.

(2) S. 6—See MORTGAGE (FORECLOSURE), 6 A. 262.

Act IV of 1869 (Divorce).

S. 14—*Dissolution of marriage*—*Discretionary bar*—*Separation from wife without reasonable cause*—*Conduct conducing to wife's adultery*.—A husband separated himself from his wife, who up to the time of his doing so was a virtuous woman, merely because she had run him into debt. He did not write to her, or go to see her, or make her an allowance proportionate to his income, after he had done so. *Held*, upon a petition by the husband for dissolution of his marriage on the ground of his wife's adultery, such adultery having been committed during such separation, that his conduct towards his wife disqualified him from obtaining the relief sought. HOLLOWAY v. HOLLOWAY AND CAMPBELL, 5 A. 71=2 A.W.N. (1882) 177 ... 49

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S. 2—*Rules made by Local Government, N. W. P.*—*Rule* VI—*Act* XVI *of* 1873 (*Village and Road Police Act*), *s.* 8, *cl.* (3)—*Departures of women of proclaimed families from their homes*—*Omission to report such departures*.—Although Rule VI of the Rules framed by the Government of the North-Western Provinces under Act VIII of 1870 (Infanticide Act), s. 2, declares it to be the duty of the village chaukidar to report, on the occasion of his periodical visit to the police station, not only the occurrence among proclaimed families in the village, of births, of the deaths of infants, and of the removal of pregnant women to other villages but also "other deaths, removals, and arrivals," this last duty is not cast upon him by the provisions of the Infanticide Act itself; for Rule VI is not on this point consistent with the Act.

Held, therefore, that a chaukidar who had omitted to report the departure of a woman of a proclaimed family from her home was not guilty of an offence under the Infanticide Act.

Held also that the heads of proclaimed families are not bound by any of the Rules framed under the Infanticide Act to give information to the chaukidar regarding the departure of the women of their families. QUEEN-EMPRESS v. BHUPAL, 6 A. 380=4 A.W N. (1884) 132 ... 695

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S. 12—*Assignment of pension in lieu of dower*.—*A*, who was in receipt of a *sihakhi* pension from Government, assigned by deed a portion thereof to his wife, in lieu of dower. After his death, disputes arose between the wife and the heirs of *A* in regard to a portion of the amount thus settled on her; and she instituted a suit, on a certificate granted her by the Collector under s. 6 of Act XXIII of 1871, in which she prayed for a

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declaration of her proprietary right in respect of the said sum, and of her power to transfer the same.

Held that inasmuch as, with reference to s. 12 of Act XXIII of 1871 *A* could not legally assign any portion of his pension to the plaintiff, the deed executed by him in her favour was null and void; and that, inasmuch as it was upon the basis of that instrument that she now came into Court, her suit must fail, since she was seeking to obtain a declaration of right rested upon a deed which was contrary to law. IMTIAZ BEGAM v. LIAKAT UN NISSA BEGAM, 6 A. 630=4 A.W.N. (1884) 209 ... 869

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Act XVIII of 1873 (N.-W.P. Rent).

(1) *Ss.* 3 (4) (*a*), 7—*Ex-proprietary tenant—Sir land—Burden of proof.*—*Held* that the question whether land held by a person, whose proprietary rights in a mahal had been sold in execution of a decree, while Act XVIII of 1873 was in force, was held by him as sir at the time of such sale, must be determined by that Act.

Land recorded as sir during the progress of a settlement of the district in which it is situate is not "sir land" as defined in s. 3 (4) (*a*) of Act XVIII of 1873 (N.-W.P. Rent Act). Such land does not become "sir land" within the meaning of that definition until the settlement is closed and confirmed.

Where a person, whose proprietary rights in a mahal have been sold in execution of a decree, alleges that land held by him at the time of such sale was held as sir, the burden of proof lies on him. HARI DAS v. GHANSHAM NARAIN, 6 A. 286=4 A.W.N. (1884) 77 ... 630

(2) Ss. 8, 9, 95—See LANDLORD AND TENANT, 5 A. 103.

(3) S. 9—See LANDLORD AND TENANT, 5 A. 121.

(4) S. 76—See POSSESSION, 5 A. 297.

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Act XIX of 1873 (N.-W.P. Land Revenue).

(1) Ss. 3 (1), 53, 55, 241 (6)—See MALIKANA, 6 A. 578.

(2) Ss. 107, 139—See EXECUTION OF DECREE, 6 A. 452.

(3) *Ss.* 113, 114—*Partition—Objection raising question of title—Determination of question—Appeal*—Res judicata.—Where in proceedings for partition under Act XIX of 1873, a question of title to land is raised between the parties to the partition, and there is an adjudication of such question, such adjudication will operate as a bar to a suit between the same parties in the Civil Courts to contest the title to such land, notwithstanding that in some respects such adjudication may have been irregular or defective.

Held, in this case, on consideration of the partition proceedings, that the question of title raised therein had been adjudicated on and therefore the rule mentioned above applied. BATESHAR NATH v. FAIZ-UL-HASAN, 5 A. 280=3 A.W.N. (1883) 20 ... 193

(4) *Ss.* 113, 114, 115—*Partition of mahal—Omission to frame decree in case under s. 113, in which a question of title is decided—Necessity for a decree in such a case—Necessity for a decree in a suit under the Civil Procedure Code—Second appeal.*—When a Collector or Assistant Collector has determined to inquire into objections raising questions of title preferred under s. 113 of the N.-W.P. Land Revenue Act, 1873, his proceeding thereupon must be conducted as an original suit in a Civil Court.

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It is essential that in a suit under the Civil Procedure Code a decree should be drawn up.

Held, therefore, that in a proceeding under s. 113 of the N.-W.P. Land Revenue Act, where the rights of the parties are decided, a decree should be drawn up giving effect to the decision.

An Assistant Collector passed a decision under s. 113 declaring the rights of the parties, but did not draw up a decree giving effect to such decision. There was an appeal to the District Court from such decision, which made a decree affirming it.

Held, by STUART, C.J., on second appeal, that the defect arising from the want of a decree on the record of the Court of first instance was a bar to the hearing of the second appeal, and the proceedings of the District Court should be set aside, and the case should be sent back to the Assistant Collector in order that he might frame a decree.

Held, by STRAIGHT, J., that the decree of the District Court was appealable, such defect notwithstanding, and the appeal should be decreed and the decree of the District Court reversed, and the case be sent back to the Assistant Collector for the purpose aforesaid.

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(6) S. 167—See MUAFIDAR, 6 A. 503.

(7) S. 190—See LANDLORD AND TENANT, 6 A. 52.

(8) S. 205—See DISQUALIFIED PROPRIETOR, 5 A. 264.

(9) Ss. 220—231—See ACT XII OF 1881 (N.-W.P. RENT), 6 A. 170.

Act XII of 1881 (N.W.P. Rent).

(1) See LANDLORD AND TENANT, 5 A. 495.

(2) Application of Civil Procedure Code to suits in Revenue Courts—See CIVIL PROCEDURE CODE, 1882, 5 A. 406.

(3) Ss. 7, 9—See OCCUPANCY RIGHT, 6 A. 54.

(4) S. 9—See HINDU LAW (JOINT FAMILY), 6 A. 234.

(5) S. 9—See LANDLORD AND TENANT, 5 A. 616; 6 A. 19.

(6) Ss. 10, 30, 95 (*a*), (*c*), (*n*)—See JURISDICTION, 6 A. 403.

(7) Ss. 10, 95 (*a*) and (*l*)—See LANDLORD AND TENANT, 6 A. 110.

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(9) Ss. 14, 95 (*l*), 206—See LANDLORD AND TENANT, 5 A. 25.

(10) Ss. 18, 31, 34 (*b*), 95 (*n*)—See LANDLORD AND TENANT, 5 A. 260.

(11) *Ss.* 36, 40, 95 (*f*), 206, 207, 208—*Jurisdiction—Transfer of appeal to Subordinate Judge—Civil Procedure Code, s.* 13—Res judicata.—A Subordinate Judge, to whom an appeal is transferred under the Bengal Civil Courts Act (VI of 1871), has not the power to dispose of it in the manner provided by ss. 206, 207 and 208 of the N.-W.P. Rent Act, 1881; the District Judge alone has the power to dispose of appeals in that manner.

The plaintiffs, who claimed to be tenants of certain land under a lease from the zamindar, alleging that the defendant was their sub-tenant, under s. 36 of the N.W.P. Rent Act, 1881, caused a notice of ejectment to be served upon the latter under the provisions of that Act. The defendant did not make an application under that Act contesting his liability to be ejected, and the plaintiffs applied under ss. 40 and 95 (*f*) of that Act for assistance to eject him. The Revenue Court trying this application rejected it on the ground that the defendant was not a sub-tenant of the plaintiffs, but a co-sharer in their tenancy. The plaintiffs thereupon sued the defendant in the Civil Court for a declaration that the latter was not a partner with them in the lease, and for possession of the land by his ejectment therefrom.

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Held, that the relief sought in the suit by the plaintiffs was not one which a Revenue Court could give under any of the clauses of s. 95 of the Rent Act, which presupposes an admitted relation of landholder and tenant; and therefore the determination by the Revenue Court of the plaintiffs' application for ejectment of the defendant was not the decision of a Court competent to try the suit, and was no bar to its maintenance in a Civil Court, within the principle of s. 13 of the Civil Procedure Code. LODHI SINGH v. ISHRI SINGH, 6 A. 295 = 4 A.W.N. (1884) 90 ... 636

(12) Ss. 93, 95, 148—See LANDLORD AND TENANT, 6 A. 81.

(13) Ss. 93 (*h*), 203—See LAMBARDAR AND CO-SHARER, 5 A. 438.

(14) Ss. 93 (*i*), 171, 177—See MUAFIDAR, 6 A. 503.

(15) S. 95—See LANDLORD AND TENANT, 5 A. 429.

(16) *S. 96-A—Application of the provisions of the Civil Procedure Code to suits in the Revenue Court—Arbitration—Judgment in accordance with award—Appeal—Act* XIX *of* 1873 (*N.-W.P. Land-Revenue Act*), *ss.* 220-231.—The provisions of the Civil Procedure Code relating to awards are not applicable to suits under the N.-W.P. Rent Act, 1881, the matters in dispute in which have been referred to arbitration, as s. 96-A of that Act specially imports into it the procedure of the N.-W.P. Land-Revenue Act with regard to arbitration.

Where the Court trying a suit under the Rent Act, the matters in dispute in which have been referred to arbitration, has refused an application to set aside the award, and has decided the case in accordance with the award of the majority of the arbitrators, no appeal lies from its decision. FAHIM-UN-NISSA v. AJUDHIA PRASAD, 6 A. 170 = 4 A.W.N. (1884) 15 ... 549

(17) S. 106—See LANDLORD AND TENANT, 6 A. 576.

(18) *Ss.* 128 (*a*), 140—*Judgment by default—Appeal.*—S. 128 (*a*), Act XII of 1881 (N.-W.P. Rent Act) refers to the procedure described in ss. 124, 125, 126, when no appearance has been put in on the day fixed by the summons or proclamation for the appearance of the defendant, or on any subsequent day to which the hearing of the case may be adjourned prior to the recording of an issue for trial, and not to subsequent non-appearance of parties on a day fixed for trial of issues, to which s. 140 relates. MUHAMMAD ABDUL RAHMAN KHAN v. MUHAMMAD QUTAB-UD-DIN, 6 A. 446 = 4 A.W.N. (1884) 158 ... 742

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(21) *Ss.* 182, 183, 189—*Appeal to District Judge.*—An appeal lies to the District Judge under s. 189 of the N.-W.P. Rent Act as well from appellate as from original decisions of the Collector. RAJA SINGH v. SULKA, 6 A. 398 = 4 A.W.N. (1884) 137 ... 708

(22) *Ss.* 189, 206, 207, 208—*Jurisdiction—Transfer of appeal to Subordinate Judge.*—The defendant in a suit instituted in a Civil Court set up as a defence that it was cognizable in the Revenue Court. The Court of first instance (Munsif) disallowed this defence, and gave the plaintiff a decree. The defendant appealed to the District Judge, again contending that the suit was cognizable in the Revenue Court. The appeal was transferred by the District Judge to the Court of the Subordinate Judge. The Subordinate Judge dismissed the suit on the ground that it was not cognizable in the Civil Courts, but in the Revenue. *Held* that looking to the terms of ss. 189, 206, 207 and 208 of the N.-W.P. Rent Act, the District Judge had no power to transfer the appeal to the Subordinate Judge, who had not the powers vested in the appellate Court by s. 208. RAM PRASAD v. RAI KISHEN, 6 A. 36 = 3 A.W.N. (1883) 185 ... 454

(23) *S.* 191—*Appeal—Appeal to High Court from appellate decree of District Judge passed in appeal from appellate decree of Collector—Jurisdiction.*—An appeal lies to the High Court from a decree of a District Judge passed in appeal from an appellate decree of a Collector. JAI RAM v. DULARI CHAND, 5 A. 309 (F.B.) = 3 A.W.N. (1883) 47 ... 213

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(25) *Ss.* 206, 207, 208—*Jurisdiction—Civil and Revenue Courts—Institution of suit in wrong Court.*—In a suit instituted in the Court of an Assistant Collector, an objection was taken that the suit was not maintainable in the Revenue Court. The objection was allowed and the suit dismissed. On appeal by the plaintiff, the Assistant Collector's decision was affirmed. The appellate Court had not before it the materials necessary for the determination of the suit.

Held, reading together ss 207 and 208 of Act XII of 1881 (N.-W.P. Rent Act), that though the objection to the jurisdiction was taken in the first Court and repeated before the appellate Court, the latter should only have *pro tanto* entertained it for the purpose of determining to what Court it should direct its order of remand, and should not have passed an order the effect of which was to maintain the dismissal of the suit. DEBI SARAN LAL v. DEBI SARAN UPADHIA, 6 A. 378=4 A.W.N. (1884) 122 ... 693

(26) *S.* 207.—In a suit instituted in the Court of an Assistant Collector under cl. (*h*), s. 93 of the N.-W.P. Rent Act, an objection was taken that, the plaintiffs not being recorded shareholders, the suit was not maintainable in the Revenue Court. The objection was allowed, but the Court, at the same time, disposed of the case on the merits, and dismissed the suit. On appeal, the lower appellate Court affirmed the decree, on the ground that the Revenue Court had no jurisdiction in the matter.

Held, that as there were materials on the record for the determination of the suit, the Judge should, with reference to s. 207 of the Rent Act, have disposed of the appeal on the merits. SHEO PRASAD v. ANRUDH SINGH, 6 A. 440=4 A.W.N. (1884) 154 ... 737

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(4) See ARBITRATION, 5 A. 333; 6 A. 174; 6 A. 186.

(5) See CIVIL PROCEDURE CODE, 1877, 5 A. 266.

(6) See EXECUTION OF DECREE, 6 A. 21.

(7) See LIMITATION ACT (XV OF 1877), 5 A. 591.

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(9) *Security for costs—Practice—Notice to show cause—Rejection of appeal—Civil Procedure Code*, ss. 2, 549—" *Decree.*"—An order under s. 549 of the Civil Procedure Code rejecting an appeal because security has not been furnished, as directed under that section, is a " decree " within the meaning of s. 2, from which an appeal will lie.

The discretion conferred on an appellate Court by s. 549 to demand security for costs must be properly exercised; and such discretion is not so exercised when the order requiring such security is made without notice to the appellant to show cause why the order should not be made.

No order affecting a party should be made without notice to him calling upon to show cause why the order should not be made. SIRAJ-UL-HAQ v. KHADIM HUSSAIN, 5 A. 380=3 A.W.N. (1883) 60 ... 263

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(1) See CRIMINAL PROCEDURE CODE (1882), 6 A. 484.

(2) *Appellate Criminal Court, powers of, in disposing of appeal—Appellant bound to show ground for interference—Criminal Procedure Code, ss. 421, 423.*—A convicted person appealing is not in the same position before the appellate Court as he is before the Court trying him: he must satisfy the appellate Court that there is sufficient ground for interfering with the order of conviction; and if no such ground is shown, it is the duty of the appellate Court not to interfere. EMPRESS v. SAJIWAN LAL, 5 A. 386=3 A.W.N. (1883) 72 ... 267

——3.—Second Appeal.

(1) See ACT XIX OF 1873 (N.-W.P. LAND REVENUE), 5 A. 260.

(2) See REVIEW, 5 A. 14.

——4.—To Privy Council.

(1) See PLEADERSHIP EXAMINATION, 6 A. 163.

(2) *Appeal to Her Majesty in Council—Extension of time for giving security—Civil Procedure Code, s. 602.*—The time allowed by s. 602 of the Civil Procedure Code for giving the security and making the deposit required by that section may be extended. FAZUL-UN-NISSA BEGAM v. MULO, 6 A. 250 (F.B.)=4 A.W.N. (1884) 71 ... 605

Arbitration.

(1) See CIVIL PROCEDURE CODE (1877), 5 A. 293.

(2) See PARTNERSHIP, 5 A. 500.

(3) *Judgment in accordance with award—Appeal—Civil Procedure Code, s. 522.*—*Held*, that an appeal lies from a decree passed in accordance with an award when such decree is impugned on the ground that there is no award in law or in fact upon which judgment and decree could follow under s. 522, Civil Procedure Code. LACHMAN DAS v. BRIJPAL, 6 A. 174 (F.B.)=4 A.W.N. (1884) 16=8 Ind. Jur. 448 ... 552

(4) *Order refusing to file in Court agreement to refer to arbitration—Appeal—Court-fee—Civil Procedure Code, ss. 2, 523—"Decree."*—*Held* by the Full Bench (OLDFIELD, J., *dissenting*) that an order refusing to file in Court an agreement to refer to arbitration is not appealable.

Per OLDFIELD, J.—That such an order is appealable, and the Court-fee payable on the memorandum of appeal is an *ad valorem* fee computed on the value of the subject-matter in dispute in the appeal. DAYA NAND v. BAKHTAWAR SINGH, 5 A. 333 (F.B.)=3 A.W.N (1883) 56 ... 231

(5) *Refusal to file award in Court—"Decree"—Appeal—Civil Procedure Code, ss. 2, 525.*—*Held* (OLDFIELD, J., *dissenting*), that an appeal does not lie from an order disallowing an application to file an award under s. 525 of the Civil Procedure Code. BHOLA v. GOBIND DAYAL, 6 A. 186 (F.B.)=4 A.W.N. (1884) 31 ... 560

(6) *Submission—Reciprocity of obligation of parties to award.*—An arbitrator's award declared the right of a member of a Hindu family jointly possessed of village houses and property, such member being deaf and dumb, and not a party to the arbitration and award. He afterwards sued for separate possession as against the others, who in their defence denied his title to inherit by Hindu Law on account of his physical infirmity, which was from birth. The award having been produced at the hearing, *held* that this member of the family, being a stranger to the submission to arbitration, was under no obligation to abide by the award; and that he, consequently, could not avail himself of what the award contained in his favour. HIRA SINGH v. GANGA SAHAI, 6 A. 322 (P.C.)=11 I. A. 20=4 Sar. P. C. J. 491 ... 655

(7) *Withdrawal of suit—Appeal from order permitting withdrawal—High Court's powers of revision—Civil Procedure Code, ss. 2, 373, 588, 622—Practice—Notice to show cause—Amendment of plaint.*—An order under s. 373 of the Civil Procedure Code permitting the withdrawal of a suit, with liberty to bring a fresh one, not being made appealable by s. 588, or being a "decree" with the meaning of s. 2, is not appealable.

Arbitration—(*Concluded*). PAGE

When the plaintiff in a suit applies for permission to withdraw it with liberty to bring a fresh one, such permission should not be granted without the defendant being served with notice to show cause why such permission should not be granted.

L, claiming as heir to *H*, a deceased Hindu, sued *K*, his widow, and *G* a minor represented by his mother and guardian *B*, to have the adoption by *K* of *G* set aside and for certain other reliefs. The matters in difference in the suit were referred to arbitration, and an award was made in favour of the defendants. The plaintiff preferred objections to the award. Before these were disposed of *K* died. The Court of first instance subsequently allowed the objections and set aside the award. The minor defendant then applied to the High Court for revision of the order setting aside the award. This application was rejected on the ground that the order might be impugned on appeal from the decree in the suit. The plaintiff subsequently applied for permission to withdraw the suit, with liberty to bring a fresh one, on the ground that, *K* having died, he was entitled to possession of the immoveable property left by *H*. This permission was granted. The minor defendant applied to the High Court for revision.

Held that it might have been a very good ground for allowing the plaintiff to withdraw the suit that *K*, the adoptive mother of the minor defendant, had died *pendente lite* had no arbitration proceedings taken place in the course of the suit; but when the parties had referred their differences to arbitration, and an award had been made in favour of the defendant, and had been set aside, and an application for revision of the order setting it aside had been refused, on the ground that the matter could be made the subject of appeal from the final decree in the suit, permission to withdraw the suit and bring a fresh one should not have been granted. The minor defendant might be seriously prejudiced by such a course, and the suit had not abated against him by the death of *K*, while on the other hand, a decree in the suit if in his favour, would decide the litigation, and if in favour of the plaintiff, would not prevent his bringing a suit for possession on each separate cause of action which had arisen.

The High Court refused to allow the plaint in the suit to be amended, by the addition of a claim for possession of the property left by *H*. KALIAN SINGH v. LEKHRAJ SINGH, 6 A. 211=4 A W.N. (1884) 28 ... 578

Arrest.

(1) See EXECUTION OF DECREE, 6 A. 385.

(2) *Arrest of judgment-debtor—Production of warrant—Escape from lawful custody—Civil Procedure Code, ss. 251, 336, 337, 588 (29), 651—Criminal Procedure Code, ss. 46, 80, 413, 423, 439—High Court's powers of revision—Appeal.*—The apprehension of a judgment-debtor in execution of a decree without the officer making the apprehension having the warrant of the Court executing the decree in his possession at the time of making the apprehension is illegal; and therefore in such a case the judgment-debtor does not render himself liable to punishment under s. 651 of the Civil Procedure Code, if he escapes from the custody of the officer making the apprehension.

Quære.—Whether a person convicted under s. 651 of the Civil Procedure Code, of escaping from lawful custody, who is sentenced to one month's imprisonment only, can under s. 588 (29) of that Code appeal? EMPRESS OF INDIA v. AMAR NATH, 5 A. 318=3 A.W.N. (1883) 54 ... 220

Attachment.

Wrongful attachment of property—Assignment of right to sue for compensation.—The mere right to sue for compensation for the wrongful attachment of moveable property in execution of a decree is not transferable by sale. PRAGI LAL v. FATEH CHAND, 5 A. 207=2 A.W.N. (1882) 219 ... 140

Award.

(1) See ACT XII OF 1881 (N.-W.P. RENT), 6 A. 170.

(2) See ARBITRATION, 6 A. 174.

(3) See SPECIFIC PERFORMANCE, 5 A. 263.

Bailment. PAGE

Work done—Contract—Quantum meruit—Bailee's lien—Act IX *of* 1872 (*Contract Act*), *s.* 70.—*S* delivered *J* an organ to repair, *J* promising to repair it for Rs. 100. *J* subsequently refused to repair it for that sum, and claimed to be entitled to retain the organ until he received certain remuneration for the work done. *Held*, that as where there is an express contract, it must be performed in its entirety or nothing can be claimed under it, and there is only room for a *quantum meruit* claim where no express contract has been made, *J* was not entitled to retain the organ until he was paid. SKINNER v. JAGER, 6 A. 139=3 A.W.N. (1883) 263=8 Ind. Jur. 386 ... 528

Benami Transaction.

Benami purchase—Suit against certified purchaser—Grant of sale-certificate after institution of suit—Civil Procedure Code, s. 317*—Certified purchaser.*—*A* sued *K*, the purchaser of certain immoveable property sold in execution of a decree under Act VIII of 1859, for a declaration that *K* had purchased such property on her behalf. The suit was instituted after Act VIII of 1859 was repealed and Act X of 1877 came into force. When the suit was instituted *K* did not hold a sale-certificate. After it was instituted he applied for and obtained a sale-certificate under s. 317 of Act X of 1877. *Held*, that, when the suit was instituted, it was maintainable, as the defendant not being a certified purchaser under s. 260 of Act VIII of 1859, that section did not apply; and that when the defendant obtained a certificate under s. 317 of Act X of 1877, he became a certified purchaser, and the suit would only be maintainable if the plaintiff made out a case falling within the provisions of the last part of s. 317. ALDWELL v. ILAHI BAKHSH, 5 A. 478 (F.B.)=3 A.W.N. (1883) 125 ... 329

Bond.

(1) *Allegation of payment—Allegation of loss of document—Burden of proof.*—The plaintiff in a suit on a bond for money accounted for not producing it by alleging that the defendant had stolen it. The defendant admitted the execution of the bond, but alleged that he had paid it. *Held* that the defendant was bound to begin and prove payment either by the production of the bond or other evidence or by both. CHUNI KUAR v. UDAI RAM, 6 A. 73=3 A.W.N. (1883) 221=8 Ind. Jur. 320 ... 482

(2) *Interest—Penalty.*—The obligor of a bond agreed that, if the principal amount were not paid at the end of twelve months with interest thereon, such interest should be added to the principal, which together should represent the principal sum until a further year's interest at the original rate had accrued, when the same process should be followed of adding unpaid interest to the principal and so on until the debt was liquidated. *Held* that the stipulation as to the annual capitalisation of principal and interest, for the purpose of carrying interest could not be regarded as removing the transaction from the region of an ordinary contract on a bond under which an obligor was bound by the terms to which he had agreed. SARJU PRASAD v. BENI MADHO, 6 A. 61=3 A.W.N. (1883) 208 ... 472

(3) *Interest—Penalty.*—The obligor of a bond promised therein to pay the amount on a certain day, without interest, and, if he made default, to pay the amount with interest at the rate of Rs. 2 per cent. per mensem. *Held*, in a suit on the bond, that such interest was not penal in its character, but contract interest, the liability to pay which was not made contingent on any breach of any part of the contract, and therefore should not have been reduced. KUNJBEHARI LAL v. ILAHI BAKHSH, 6 A. 64=3 A.W.N. (1883) 210 ... 475

(4) *Interest—Penalty—Act* IX *of* 1872 (*Contract Act*), *s.* 74.—The obligor of a bond for the payment of money agreed therein in respect of interest as follows:—"I will pay the money with interest at one rupee one anna per cent. per mensem on demand; as regards interest, I agree that I will pay the interest, of the amount every six months which may be found due under the accounts: in the event of non-payment every six months I will pay the interest at the rate of one rupee eight annas per mensem from the date of the execution of the bond."

Held by STUART, C.J., that the stipulation to pay the higher rate of interest in case of non-payment of interest at the lower rate was a stipulation in the nature of a penalty, and should be so treated in the accounts to be taken.

Bond—(*Concluded*). PAGE

Held by TYRRELL, J., that the non-payment of interest at the lower rate was not a breach of the contract, the contract being that the obligor might adopt either of the scales of payment, and therefore the stipulation in question was not in the nature of a penalty. NARAIN DAS v. CHAIT RAM, 6 A. 171=4 A.W.N. (1884) 19 ... 556

(5) *Interest—Penalty—Act* IX *of* 1872 (*Contract Act*), *s.* 74.—The obligor of a bond promised to pay the amount on demand with interest at the rate of Rs. 6-4 0 per cent. per mensem, to pay the interest every six months, and if he made default in the payment of the interest for any six months, to pay interest on such interest at such rate. *Held*, in a suit on the bond, default in the payment of interest as agreed having occurred, that as the obligor expressly undertook to pay such high rate of interest and there was no question of penalty, that is to say, of a liability to damages for breach of the terms of a contract in the sense of s. 74 of the Contract Act, the contract rate of interest stipulated to be paid could not be interfered with. BHOLA NATH v. FATEH SINGH, 6 A. 63=3 A.W.N. (1883) 210=8 Ind. Jur. 319 ... 474

Breach of Contract.

(1) See CIVIL PROCEDURE CODE (1877), 5 A. 277.

(2) See CONTRACT ACT (IX OF 1872), 5 A. 238.

Breach of Trust.

See TRUSTEE, 6 A. 24.

Burden of Proof.

(1) See ACT XVIII OF 1873 (N.-W.P. RENT), 6 A. 286.

(2) See BOND, 6 A. 73.

(3) See FRAUD, 6 A. 406.

(4) See HINDU LAW (JOINT FAMILY), 6 A. 193.

(5) See MORTGAGE (BY CONDITIONAL SALE), 6 A. 344.

(6) See PRE-EMPTION, 5 A. 184.

Cancellation.

(1) *Suit for, of bond—Value of subject-matter of suit—Jurisdiction.*—The value of subject-matter of a suit for the cancellation of a bond is to be determined with reference only to the principal amount, and not that amount together with the interest payable thereon when the suit is instituted. GULAB RAI v. MANGLI LAL, 5 A. 71=3 A.W.N. (1883) 216 ... 481

(2) Suit for, of instrument—See LIMITATION ACT (XV OF 1877), 5 A. 322.

(3) Suit for, of instrument—See MORTGAGE (BY CONDITIONAL SALE), 5 A. 490.

(4) Suit for, of instrument—See POSSESSION, 6 A. 75.

(5) *Suit for, of instrument—Suit for possession of immoveable property—Limitation.*—The purchasers at a sale in execution of decree of land sued to set aside an instrument of usufructuary mortgage of the land executed by the judgment-debtor before the sale, and for possession of the land, alleging that the mortgage was fraudulent and collusive. *Held* that, as the main and substantial relief sought was the recovery of possession of immoveable property from persons trespassing on it under the title of a fictitious mortgage, and the declaration of the invalidity of the defendants' pretensions was no more than an incidental step in the assertion of the plaintiffs' title and right to possession, the limitation of twelve years was applicable to the suit. IKRAM SINGH v. INTIZAM ALI, 6 A. 260=4 A.W.N. (1884) 73 ... 612

Cantonment.

Grant of land by military authorities for building purposes—Resumption of land by Civil authorities—Assignment of profits of the land to Municipal Committee—Liability of grantee to pay ground-rent—Refusal of grantee to pay ground-rent to Municipality—Suit by the Secretary of State for India for declaration of title and assignment of rent—Cause of action—

Cantonment—(*Concluded*). PAGE

Jurisdiction of Civil Court—Right of grantee to compensation in case of ejectment.—Certain land situate within the limits of a cantonment was granted free of rent for building purposes by the military authorities. Under the Military Regulations relating to such grants such a grant could not be resumed by the Government without a month's notice and without the payment of the value of such buildings which might have been authorized to be erected. The land was subsequently resumed by the Civil authorities, and, the land being within municipal limits, the ground-rents on it were assigned to the Municipality. The Municipal Committee having demanded ground-rent in respect of the buildings erected on such land under such grant from the representative in title of the original grantee, and the latter having refused to pay the same or to vacate the land, the Secretary of State for India in Council sued him in the Civil Court for a declaration of the proprietary right to the land, for its assessment to ground rent, and, in the event of the refusal of the defendant to pay such rent, when fixed, for his ejectment therefrom, and for mesne profits of the land for six years. The cause of action was stated in the plaint to be the refusal of the defendant to pay ground-rent or to accept a lease or to surrender the land after a notice to that effect had been issued to him by the Municipal Committee as the plaintiff's agents.

Held that the Municipal Committee were the plaintiff's duly authorized agents to lease and obtain rent for the land occupied by the defendant's buildings with their compounds; that such notice was properly issued in that character on behalf of the plaintiff; and that the defendant's subsequent refusal to pay rent, or to accept a lease or evacuate the premises amounted to a sufficient denial of the plaintiff's title to afford him a good cause of action—that, assuming that no agreement to pay rent existed, the plaintiff was entitled to demand and recover reasonable compensation for the use and occupation of the land by the defendant—that the suit was maintainable in the Civil Court, and it had power to grant the plaintiff the reliefs sought—that by the conditions of the grant by the military authorities the plaintiff was not disqualified from demanding ground-rent for the land before he had paid the defendant the value of the buildings, but that, looking to those conditions, it would not be fair or equitable to grant the plaintiff a decree, pure and simple, for the ejectment of the defendant, but he should be put under the condition that, if, in case of the defendant's refusal to pay the rent fixed, he desired to eject him, the value of the buildings as cantonment residence must first be determined, and when determined, must be tendered to the defendant, and if the latter refused to accept it, the plaintiff would then be entitled to eject him. SECRETARY OF STATE FOR INDIA v. JAGAN PRASAD, 6 A. 148=4 A.W. N. (1884) 6 ... 534

Certificate.

For collection of debts—See ACT XXVII OF 1860, 5 A. 195; 5 A. 212, 5 A. 555.

Champerty.

See LIMITATION ACT (XV OF 1877), 5 A. 76.

Charge.

See MORTGAGE (CONSTRUCTION), 5 A. 11.

Civil Procedure Code (Act VIII of 1859).

(1) Ss. 7, 15—See DECLARATORY SUIT, 5 A. 345.

(2) Ss. 257, 259—See EXECUTION SALE, 5 A. 305 (F.B.); 5 A. 364.

Civil Procedure Code (Act X of 1877).

(1) *S.* 13—Res judicata.—*N* sued *W* for a moiety of a brick kiln, claiming by right of inheritance, and alleging in respect of the other moiety that it was his own property. *W* in her defence to the suit denied that *N* had any right in the kiln and that a moiety of the kiln belonged to him. An issue was framed on the point whether a moiety of the kiln belonged to *W* which the Court of first instance decided in *N's* favour. *N* eventually obtained a decree for a moiety of the kiln which he claimed by right of inheritance. *W* appealed, contending, *inter alia*, that it was not proved that a moiety of the kiln belonged to *N*. The appeal was decreed, and the

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decree of the Court of first instance in *N*'s favour was set aside. *W* subsequently sued *N* for the value of bricks which he had wrongfully taken from the kiln. *N* set up as a defence to the suit that a moiety of the kiln belonged to him. *Held*, that the issue whether a moiety of the kiln belonged to *N* was *res judicata*, under s. 13, *Expl.* 1 of the Civil Procedure Code. WILAITI BEGAM v. NUR KHAN, 5 A. 514=3 A.W.N. (1883) 110 ... 354

(2) S. 13—See CONSTRUCTION, 6 A. 269 (P.C.).

(3) S. 13—See LANDLORD AND TENANT, 5 A. 245.

(4) S. 13—See RES JUDICATA, 5 A. 118; 5 A. 595.

(5) *S.* 17—*Contract—Breach—"Cause of action"—Jurisdiction.*—The expression "cause of action," as used in s. 17 of the Civil Procedure Code, does not mean *whole* cause of action, but includes *material part* of the cause of action.

In a suit for compensation for breach of a contract, the making of the contract is a material part of the cause of action.

Held, therefore, where a contract was made at *C* and broken at *A*, that the Court at *C* had jurisdiction to try the suit for compensation for the breach of such contract. BISHUNATH v. ILAHI BAKHSH, 5 A. 277=3 A.W.N. (1883) 34=7 Ind. Jur. 621 ... 191

(6) *S.* 24—*Place of suing.*—S. 24 of the Civil Procedure Code does not empower a High Court to transfer a suit instituted within its own jurisdiction to the jurisdiction of another High Court, but only to declare in which Court a suit shall proceed, and, if necessary, to stay all further proceedings within its own jurisdiction.

The defendants in a suit instituted at Mainpuri, who resided and carried on business at Surat, applied under s. 24 of the Civil Procedure Code that the suit might be tried at Surat, on the ground that it would be tried with greater convenience to them at that place. *Held*, that there being no balance in favour of either justice or convenience on the side of the Surat Court, the suit should proceed at Mainpuri. TULA RAM v. HARJIWAN DAS, 5 A. 60=2 A.W.N. (1882) 164 ... 41

(7) S. 25—See SMALL CAUSE COURT SUIT, 5 A. 274.

(8) Ss. 28, 45—See MISJOINDER, 5 A. 163 (F.B.).

(9) S. 30—See CO-SHARER, 5 A. 602.

(10) *Ss.* 43, 73—*Application of the Civil Procedure Code to suits in the Revenue Courts—Act* XII *of* 1881 (*N.-W.P. Rent Act*)—*Suit, withdrawal of—Relinquishment of part of claim.*—*Held*, by the Full Bench (STUART, C.J., *dissenting*), that the Courts of Revenue in the North-Western Provinces, in those matters of procedure upon which the Rent Act of those Provinces (Act XII of 1881) is silent, are governed by the provisions of the Civil Procedure Code.

Held, therefore that the procedure provided by ss. 43 and 373 of the Civil Procedure Code is applicable to suits tried under the N.-W.P. Rent Act, 1881. MADHO PRAKASH SINGH v. MURLI MANOHAR; HIRA SINGH v. MAKUND SINGH, 5 A. 406 (F.B.)=3 A.W.N. (1883) 92 ... 281

(11) S. 215, Chap. XXXVII—See PARTNERSHIP, 5 A. 500.

(12) S. 230—See EXECUTION OF DECREE, 6 A. 388.

(13) Ss. 231, 232—See EXECUTION OF DECREE, 5 A. 27.

(14) *S.* 244—*Question for Court executing decree—Separate suit.*—Certain persons, claiming by right of inheritance to *C*, sued *B*, *N*, *A*, *K*, and others for possession of certain immoveable property, and obtained a decree dated in August 1876 for possession of the same. In the course of the litigation which ended in that decree *Z* purchased certain immoveable property from *B*, *N*, *A* and *K*. *Z* was subsequently dispossessed of such property in execution of the decree of August 1876. He thereupon sued the holders of that decree for possession of the same, alleging that his vendors had inherited the same from *D*, that it was not affected by that decree, and that he had been improperly dispossessed of it in execution of that decree.

Held by the Court, that, the plaintiff not being the representative of any of the parties to the suit in which that decree was passed, in the sense of s. 244 of the Civil Procedure Code, but being, if his allegations were

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true, a purchaser from certain of the judgment-debtors of property not affected by that decree, the suit was not barred by the provisions of that section. ZAUKI LAL v. JAWAHIR SINGH, 5 A. 94=2 A.W.N. (1882) 188. 65

(15) S. 244—See ACT XXVII OF 1860, 5 A. 212.

(16) Ss. 246, 247—See EXECUTION OF DECREE, 5 A. 272.

(17) S. 254—See EXECUTION OF DECREE, 5 A. 86 (F.B.).

(18) *S. 257-A—Execution of decree—Compromise.*—The decree-holder and judgment-debtor of a decree filed a petition (*suleh nama*) in the Court executing the decree, praying that the Court would sanction an arrangement providing for the payment of the decree by instalments, and enhancing the rate of interest made payable by the decree. The Court sanctioned the arrangement. *Held*, that the "*suleh nama*" was within s. 257-A of the Civil Procedure Code, and the decree might be executed in accordance with its provisions. SITA RAM v. DASRATH DAS, 5 A. 492 (F.B.)=3 A.W.N. (1883) 68 ... 339

(19) S. 257-A—See EXECUTION OF DECREE, 5 A. 596.

(20) *Uncertified adjustment of decree—Question as to adjustment between decree-holder and third party.*—Certain immoveable property having been attached in execution of a decree for money, dated in 1879, directing the sale of such property, *T*, who had purchased such property in 1880, objected to the attachment. His objection having been disallowed, he sued to establish his right to the property and for the removal of the attachment. He claimed on the ground, amongst others, that the decree of 1879 had been wholly adjusted. The alleged adjustment had not been certified under s. 258 of the Civil Procedure Code. *Held*, that the provisions of that section did not debar the Courts trying the suit from determining, as between *T* and the decree-holder, whether the decree of 1879 had been adjusted or not. TEGH SINGH v. AMIN CHAND, 5 A. 269=3 A.W.N. (1883) 18 ... 185

(21) *S. 276—Alienation of property under attachment.*—A private alienation of property under attachment is void, under s. 276 of the Civil Procedure Code, "as against all claims enforceable under the attachment" only. *Held*, therefore, where property attached in execution of a decree was alienated, and was after such alienation again attached, the first attachment having expired, and was brought to sale in pursuance of the second attachment, and the purchaser sued for possession of the property claiming on the ground that the alienation of the property was void under the provisions of s. 276, that as no claim was enforced or was enforceable under the first attachment under which the property was alienated, but the purchaser was claiming under the second attachment, such alienation could not be assailed under the provisions of s. 276. GOBIND SINGH v. ZALIM SINGH, 6 A. 33=3 A.W.N. (1883) 183 ... 451

(22) S. 283—See SMALL CAUSE COURT SUIT, 5 A. 462.

(23) S. 285—See EXECUTION OF DECREE, 5 A. 615.

(24) *S. 295—Mortgage—First and second mortgages—Sale of mortgaged property in execution of decree of second mortgagee—Suit by first mortgagee for re-sale of property in execution of his decree.*—On the 22nd March, 1878, the first mortgagee of certain property obtained a decree enforcing his mortgage. On the 25th March, 1878, the second mortgagee obtained a decree enforcing his mortgage. Both decrees were made by the same Court. On the 20th June, 1878, the property was put up for sale in execution of the second mortgagee's decree. The first mortgagee subsequently brought a suit for a re-sale of the property in satisfaction of his decree. *Held* that this was the only course open to him, and he could not have enforced satisfaction of his decree in accordance with the provisions of s. 295 of the Civil Procedure Code, inasmuch as the provisions of the first and second provisos to that section refer only to sales in execution of simple money-decrees, whereas the property in question had been sold in execution of a decree ordering its sale, and the provisions of the third proviso relate to subsequent and not prior incumbrances. JAGAT NARAIN RAI v. DHUNDHEY RAI, 5 A. 566 (F.B.)=3 A.W.N. (1883) 150 ... 390

(25) Ss. 310, 311, 622—See REVISION, 5 A. 42.

(26) Ss. 313, 315—See EXECUTION SALE, 5 A. 577.

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(27) S. 315—See EXECUTION SALE, 5 A. 364.

(28) S. 316—See SALE CERTIFICATE, 5 A. 84; 5 A. 568.

(29) S. 317—See BENAMI TRANSACTION, 5 A. 478.

(30) S. 330—See PARDANASHIN, 5 A. 92.

(31) Ss. 352, 353—See INSOLVENT, 5 A. 268.

(32) S. 358—See INSOLVENT, 5 A. 258.

(33) S. 372—See COMPROMISE, 5 A. 209.

(34) *S.* 503—*Receiver.*—The powers conferred by s. 503 of the Civil Procedure Code are not to be exercised as a matter of course, and it is not a reason for allowing an application for the appointment of a receiver that it can do no harm to appoint one. The discretion given by that section is one that should be used with the greatest care and caution. Because a plaintiff in his plaint makes violent and wholesale charges of waste and malversation against a defendant in possession of property as executor under a will or as the tenant for life, and upon this basis applies for a receiver to be appointed, it is not a necessary consequence that such appointment should be made.

Held, in this case, where the sons of a Hindu widow, in possession of her husband's estate, under a will, sued their mother, as reversioners under the will, for possession of the estate, on the ground of mismanagement and waste, and on the same grounds applied for the appointment of a receiver under s. 503 of the Civil Procedure Code, that a receiver had been appointed on insufficient grounds. SRIMATI PROSONOMOYI DEVI v. BENI MADHAB RAI, 5 A. 556=3 A.W.N. (1883) 136 ... 383

(35) *Ss.* 521, 622—*Arbitration—Setting aside award for misconduct of arbitrator—High Court's powers of revision.*—An order under s. 521 of the Civil Procedure Code, setting aside an award, made on a reference to arbitration in the course of a suit, under Chapter XXXVII of the Code, on the ground of the arbitrator's misconduct, is not subject to revision by the High Court in the exercise of the powers conferred on it by s. 622 of the Code. CHATTAR SINGH v. LEKHRAJ SINGH, 5 A. 293 =3 A.W.N. (1883) 39 ... 202

(36) S. 539—See MAHOMEDAN LAW (WAKF), 5 A. 497.

(37) *S.* 559—*Appeal—Addition of respondent.*—The Court of first instance gave the plaintiff in a suit for money a decree against the defendant *B*, exempting the defendants *A* and *H*. *B* appealed, making the plaintiff the respondent to the appeal. The plaintiff did not appeal from the decree of the Court of first instance in respect of the exemption of *A* and *H*. The appellate Court made *A* a respondent to the appeal, under s. 559 of the Civil Procedure Code, and, exempting *B*, gave the plaintiff a decree against *A*. *Held*, that inasmuch as s. 559 does not empower an appellate Court virtually to make an appeal for an appellant, who has refrained from availing himself of his privileges under the law, by introducing for him other respondents than those he has included in his petition of appeal, and it could not be said that *A* was "interested in the result of the appeal," as, having the unappealed decree of the Court of first instance behind him, his position was secure, the appellate Court had improperly made *A* a respondent to the appeal and given a decree against him. ATMA RAM v. BALKISHEN, 5 A. 266=3 A.W.N. (1883) 24 ... 182

(38) Ss. 565, 623—See REVIEW, 5 A. 14.

Civil Procedure Code (Act XIV of 1882).

(1) Application of, to suits in Revenue Courts—See ACT XII OF 1881 (N.-W.P. RENT), 6 A. 170.

(2) Ss. 2, 378, 583, 622—See ARBITRATION, 6 A. 211.

(3) Ss. 2, 523—See ARBITRATION, 5 A. 333.

(4) Ss. 2, 525—See ARBITRATION, 6 A. 186.

(5) Ss. 2, 549—See APPEAL (GENERAL), 5 A. 380.

(6) *S.* 13—Res judicata—*Landholder and tenant—Application for tenant's ejectment for building on land—Suit for demolition of building.*—A decision of a Revenue Court disallowing an application to eject a tenant because he has built on his land, does not under s. 13 of the Civil Procedure Code bar

Civil Procedure Code (Act XIV of 1882)—*(Continued)*. PAGE

a suit in the Civil Court to have the buildings demolished. AMRIT LAL v. BALBIR, 6 A. 68=3 A.W.N. (1883) 212 ... 478

(7) *S.* 13—*Vendor and purchaser—Purchase "pendente lite"—Res judicata.*—Certain persons, claiming by right of inheritance to *C*, sued *B*, *N*, *A*, *K*, and others for possession of certain immoveable property, and, on appeal to the High Court, in August, 1876, their claim was decreed in full. In the course of the litigation which ended in that decree, *Z* purchased certain immoveable property from *B*, *N*, *A*, and *K*. *Z* was subsequently dispossessed of such property in execution of the decree of August, 1876. He thereupon sued the holders of that decree for possession of the same, alleging that his vendors had inherited it from *D*, that the figures of the total of *C's* property given in the plaint in the former suit were erroneous, that the property now in suit was not affected by that decree, and that he had been improperly dispossessed of it. It appeared that there was in fact a mistake in the total of the extent of *C's* property given as stated in the plaint in the former suit.

Held that the plaintiff, having purchased *pendente lite*, was bound by the decree of the High Court against the persons through whom he claimed, that the claim in the former suit having been decreed in full, the property now in suit was then decreed to the present defendants, and that the claim of the plaintiff to go behind that decree could not be entertained. HUKM SINGH v. ZAUKILAL, 6 A. 506=4 A.W.N. (1884) 177 ... 785

(8) S. 13—See ACT XII OF 1881 (N.-W.P. RENT), 6 A. 295.

(9) S. 13, Expls. I and II, and S. 44—See RES JUDICATA, 6 A. 358.

(10) Ss. 13, 43—See STAMP ACT (I OF 1879), 6 A. 70.

(11) *Ss.* 21, 622—*Transfer of suit—High Court's powers of revision.*—*Held* that an order under S. 25 of the Civil Procedure Code transferring a suit in which an appeal would lie from the decree made therein was not subject to revision by the High Court under S. 622. FARID AHMED v. DULARI BIBI, 6 A. 233=4 A.W.N. (1884) 45=8 Ind. Jur. 529 ... 593

(12) S. 25—See PATENT, 5 A. 371.

(13) Ss. 30, 535—See PARTIES, 6 A. 284.

(14) *Ss.* 42, 43.—*R* purchased two houses under the same sale-deed. Four years afterwards, he sued for possession of one of the houses, alleging that he had been dispossessed by the ancestor of the defendant. Subsequently he sued the same defendant for possession of the other, alleging that, at the time when he instituted the former suit, he had already been dispossessed of the house now in question, and by the same person.

Held that, although the plaintiff's title to both houses rested on the title acquired by him under one and the same sale-deed, yet the cause of action, *viz.*, his ouster from the two houses on different occasions, gave rise to two separate causes of action, which he was not bound to join in the former suit, there being nothing in the Civil Procedure Code to compel him to do so. RIAYATULLAH KHAN, MINOR v. NASIR KHAN, 6 A. 616=4 A.W.N. (1884) 185 ... 859

(15) S. 45—See PRE-EMPTION, 6 A. 106.

(16) Ss. 51, 115—See PLEADINGS, 6 A. 626.

(17) S. 108—See EX PARTE JUDGMENT, 6 A. 144.

(18) *S.* 111—*Set-off.*—The heirs to *M*, deceased, appointed *A*, one of the heirs, manager of *M's* estate with a view to the payment of the debts due by the deceased. A creditor of the deceased sued his heirs to recover his debt, and obtained a decree, in execution of which the share of *Z*, one of the heirs, in *M's* landed estate was sold. The sale-proceeds exceeded *Z's* share of such debt and she sued the other heirs for contribution in respect of the difference. The defendants claimed a set-off in respect of *Z's* share of the liabilities of *M's* estate which had been satisfied by *A* as manager. *Held* that the set-off claimed could not be entertained in such suit. ABUL HASAN v. ZOHRA JAN, 5 A. 299=3 A.W.N. (1883) 45 ... 206

(19) S. 206—See POSSESSION, 6 A. 30.

(20) Ss. 206, 622—See REVISION, 6 A. 125.

(21) Ss. 210, 257-A—See EXECUTION OF DECREE, 6 A. 623.

Civil Procedure Code (Act XIV of 1882)—(*Continued*). PAGE

(22) Ss. 214. 221, 247—See PRE-EMPTION, 6 A. 351.

(23) S. 214—See PRE-EMPTION, 6 A. 370.

(24) Ss. 223, 268—See EXECUTION OF DECREE, 6 A. 243.

(25) S. 230—See EXECUTION OF DECREE, 6 A. 189; 6 A. 388.

(26) S. 231—See EXECUTION OF DECREE, 6 A. 69.

(27) Ss. 234, 235, 295, 368—See MORTGAGE (GENERAL), 6 A. 255.

(28) S. 244—*Questions for Court executing decree—Fresh suit—Suit by judgment-debtor to set aside execution-sale—Order to refund purchase-money.*—A judgment-debtor, alleging that his right as occupancy-tenant of certain land had been sold in execution of the decree, sued the decree-holder and the auction-purchaser to set aside the sale as illegal under s. 9 of the N.-W. P. Rent Act. The Court of first instance decreed the claim, and ordered the defendant-decree-holder to refund the purchase-money.

Held that, as between the defendant-decree-holder and the plaintiff, the question at issue was one arising between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree, and was therefore, under s. 244 of the Civil Procedure Code, to be determined by the Court executing the decree, and not by separate suit.

Held also that, apart from this consideration, it was beyond the lower Court's powers to make an order directing the decree-holder to refund the purchase-money, that being a matter between two co-defendants which was not raised, and could not be decided, in the present suit. RAM GOPAL v. KHIALI RAM, 6 A. 448=4 A.W.N. (1884) 159 ... 743

(29) S. 244—See EXECUTION SALE, 6 A. 392.

(30) S. 244 (c)—See EXECUTION OF DECREE, 5 A. 452.

(31) Ss. 251, 336, 337, 588 (29), 651—See ARREST, 5 A. 318.

(32) S. 265—See EXECUTION OF DECREE, 6 A. 452.

(33) S. 266—*Gratuity—Liability to attachment—Gift—Delivery—Act* IV *of* 1882 *(Transfer of Property Act)*, s. 123—*Act* IX *of* 1872 *(Contract Act)*, s. 90.—*K*, a servant in the employment of the East India Railway Company, was recommended by the Traffic Manager a bonus in consideration of long and good services. This recommendation was sanctioned, and the amount of the bonus was received by the District Paymaster. Before payment to *K*, the money was attached in execution of a decree obtained against him by *J*.

Held that inasmuch as the bestowal of the money was a gift of moveable property of date subsequent to the 1st July, 1882, and was not evidenced by a registered instrument, it could only be effected by actual delivery, that as there had been no such delivery as completed the transfer (s. 123 of the Transfer of Property Act, and s. 90 of the Contract Act), the money was not at *K*'s disposal, and he could not have enforced payment and that the money was therefore not liable to attachment in execution of a decree against him. JANKI DAS v. THE EAST INDIAN RAILWAY CO., 6 A. 634 =4 A.W.N. (1884) 210=9 Ind. Cas. 157 ... 873

(34) S. 266 (*g*)—*Gratuity—Liability to attachment in execution of decree.*—The bar in s. 266 of the Civil Procedure Code to the attachment of gratuities allowed by Government to its ex servants, military and civil, is not limited to such gratuities as are allowed to "pensioners," but applies to a gratuity granted in consideration of past services. BAWAN DAS v. MUL CHAND, 6 A. 173=4 A.W.N. (1884) 16 ... 551

(35) Ss. 281, 283—See EXECUTION OF DECREE, 6 A. 109.

(36) S. 283—See EXECUTION OF DECREE, 6 A. 21.

(37) S. 306—See EXECUTION SALE, 5 A. 316.

(38) S. 320—See EXECUTION OF DECREE, 5 A. 314 (F.B.).

(39) Ss. 335, 622—*Resistance to execution of decree—High Court's powers of revision.*—An order under s. 335 of the Civil Procedure Code is subject to revision by the High Court under s. 622 of that Code. SHEORAJ SINGH v. BANWARI DAS, 6 A. 172=4 A.W.N. (1884) 16=8 Ind. Jur. 454 ... 550

(40) S. 344—See INSOLVENT, 6 A. 289.

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(41) Ss. 352, 353—See INSOLVENT, 6 A. 142.

(42) S. 522—See ARBITRATION, 6 A. 174.

(43) Ss. 567, 574—See REMAND, 6 A. 383 ; 6 A. 391.

(44) S. 575—*Rules made by High Court—Reference of appeal to other Judges of same Court—Composition of Bench hearing referred appeal—Presence of referring Judges necessary.*—The only Bench which can legally deal with an appeal which has been referred under the provisions of s. 575 of the Civil Procedure Code is one which includes the Judges who first heard the appeal, and whose difference in opinion on a point of law necessitated the reference.

The words "judgment" as used in Rule II of the Rules made by the High Court, North-Western Provinces, to regulate references under s. 575 of the Civil Procedure Code, must not be understood in its strict sense, but merely as an expression of opinion containing reasons for a contemplated or proposed judgment. ROHILKHAND AND KUMAON BANK, LIMITED v. ROW, 6 A. 468=4 A.W.N. (1884) 248 ... 758

(45) S. 602—See APPEAL (TO PRIVY COUNCIL), 6 A. 250.

(46) S. 623—See EX PARTE DECREE, 6 A. 65.

(47) S. 623—*Review of judgment—Grounds of admission—Alteration of law.*—A lower Court admitted a review of judgment on the ground that the decision of a Divisional Bench of the High Court, which it had followed in that judgment, had subsequently been overruled by the Full Bench. *Held* that the lower Court was not authorised to admit a review of judgment on such ground. AMRIT LAL v. MADHO DAS, 6 A. 292=4 A.W.N. (1884) 89=8 Ind. Jur. 589 ... 634

(48) Chap. XLV—See PLEADERSHIP EXAMINATION, 6 A. 163.

(49) Sch. ii, No. 164—See EX PARTE JUDGMENT, 6 A. 144.

Compensation.

(1) See ATTACHMENT, 5 A. 207.

(2) See CRIMINAL PROCEDURE CODE (1882), 6 A. 96.

Compromise.

Assignment pending suit—Civil Procedure Code, s. 372.—The "cases of assignment, creation or devolution" of any interest pending a suit contemplated by s. 372 of the Civil Procedure Code are those in which "the person to whom such interest has come" is arrayed on the same side in the suit as "the person from whom it has passed."

Held, therefore that a compromise in a suit for land, between the plaintiff and one of the defendants, whereby the latter consented to a decree being given to the former for half the land, was not a "case of assignment" of an interest in such land within the meaning of that section. RADHA PRASAD SINGH v. RAJENDRA KISHORE SINGH, 5 A. 209=2 A.W.N. (1882) 220 ... 142

Confession.

(1) *Code of Criminal Procedure (Act X of 1872), ss. 122, 193, 346—Code of Criminal Procedure (Act X of 1882), ss. 342, 364.*—On a certain day a confession by an accused person was recorded by a Magistrate, and on the next day the same Magistrate, having jurisdiction to do so, examined the witnesses for the prosecution and eventually committed the accused. *Held*, that such confession, having been made to a Magistrate competent to hold, and who actually then was holding, an inquiry preliminary to committal, must be regarded as falling within s. 193 of Act X of 1872 or s. 342 of Act X of 1882, and as such governed by the reservations contained in s. 346 of the former Act, or s. 364 of the latter.

Observations on ss. 342 and 364 of Act X of 1882 (Criminal Procedure Code). EMPRESS OF INDIA v. YAKUB KHAN, 5 A. 253=3 A.W.N. (1883) 25 ... 173

(2) See EVIDENCE ACT (I OF 1872), 6 A. 509.

Construction. PAGE

(1) *Of decree in order made in execution proceedings—Finality of such order.*—A Court having jurisdiction decided in the course of execution proceedings (in an order which was not appealed) that the decree to be executed awarded mesne profits according to its true construction. *Held* that this decision had become final between the parties, not under s. 13 of Act X of 1877, but upon general principles of law, as an interlocutory order in the suit.

The order construing the decree having been made in the same suit in which the application was made, the question whether the law of "*res judicata*" applied was not relevant, that term referring to a matter decided in another suit. RAM KIRPAL v. RUP KUARI, 6 A. 269 (P.C.) = 11 I.A. 37 = 4 Sar. P.C.J. 489 = 8 Ind. Jur. 214. ... 618

(2) Of instrument—See INSOLVENT, 5 A. 392.

Contract.

(1) *Continuing breach—Limitation.*—*A* agreed with *B* to refund to *N* the price of certain property sold by *A* to *N*, and of which a share belonged to *B*. *A* having died without fulfilling the agreement, *N* obtained against *B* a decree for possession of part of the property.

Five years subsequent to *N*'s suit, *B*'s heirs sued *A*'s heirs for damages for breach of the agreement.

Held that such breach of the agreement was a continuing breach, and had not even yet ceased, and that therefore the present suit was not barred by No. 115, sch. ii of the Limitation Act. IMDAD ALI v. NIJABAT ALI, 6 A. 457 = 4 A.W.N. (1884) 168 ... 750

2) *Relations resembling—Money paid—Voluntary payment—Act* IX *of* 1872 (*Contract Act*), ss. 69, 70.—*B* sold certain immoveable property to *A*, one of the terms of the agreement of sale being that *A* should retain a portion of the purchase-money, and therewith pay the amount of a simple decree for money against *B* held by *C*. *A* failed to pay the amount of *C*'s decree, and *B* therefore sued him for the balance of the purchase-money, and obtained a decree. In the meantime *C* had the property attached in execution of his decree against *B*. *A* thereupon paid the amount of *C*'s decree. *B* subsequently took out execution of his decree against *A* for the balance of the purchase-money, and *A* paid the amount of the decree. *A* then sued *B* to recover the amount which he had paid in satisfaction of *C*'s decree against *B*.

Held, that *A* was entitled, under s. 70 of the Contract Act, 1872, to recover such amount, *B* having enjoyed the benefit of the payment, and the same not having been intended to be gratuitous.

Semble, that the case came within the provisions of s. 69 of the Contract Act and of the principle laid down in *Dulichand* v. *Ramkishan Singh* (7 C. 648 = 8 I.A. 93). AJUDHIA PRASAD v. BAKAR SAJJAD, 5 A. 400 = 3 A. W.N. (1883) 79 = 8 Ind. Jur. 104 ... 277

Contract Act (IX of 1872).

(1) See CONTRACT, 5 A. 400.

(1-*a*) Ss. 23, 30—See WAGES, 5 A. 443.

(2) Ss. 69, 70—See VENDOR AND PURCHASER, 6 A. 67.

(3) S. 70—See BAILMENT, 6 A. 139.

(4) S. 74—See BOND, 6 A. 63; 6 A. 179.

(5) *S.* 74—*Breach of contract—Liquidated damages—Penalty—Measure of damages.*—Under s. 74 of the Contract Act, 1872, the Courts are not bound, even in cases where the parties to a contract have, in anticipation of a breach, expressly determined by agreement what shall be the sum payable as damages for the breach, to award such sum for a breach, but may award for the same "reasonable compensation" not exceeding such sum.

As a general principle, compensation must be commensurate with the injury sustained. Acting upon this principle, when the injury consists of a breach of contract, the Court would assess damages with a view of restoring to the injured party such advantage as he might reasonably be expected to have derived from the contract, had the breach not occurred.

Contract Act (IX of 1872)—(*Concluded*). PAGE

Held, therefore, where the parties to a contract to deliver a certain quantity of raw indigo on a certain day agreed that a certain sum should be paid as compensation in case such indigo was not delivered as agreed, that the method of asessing damages in case of a breach of the contract would be to ascertain the quantity of indigo which could have been pressed out of the stipulated amount of indigo plant, to ascertain the price at which the indigo might have been fairly sold in the market during the season to which the contract related, and to deduct from such price the ordinary charges of producing and selling the quantity of indigo in question; and that more than the amount so ascertained ought not equitably to be awarded, such amount being "reasonable compensation" for a breach of the contract. NAIT RAM v. SHIB DAT, 5 A. 238=3 A.W.N. (1883) 2 ... 162

(6) S. 90—See CIVIL PROCEDURE CODE (1882), 6 A. 634.

(7) S. 265—See PARTNERSHIP, 5 A. 500.

Co-sharer.

(1) *Suit by one of several co-sharers against others affecting joint land—Civil Procedure Code*, s. 30.—A share-holder of an undivided piece of land sued three of his co-sharers, who, he alleged, had trespassed on the land by building thereon, for restoration of the land to its original condition. The Court of first instance tried and determined the suit as brought and framed. The lower appellate Court dismissed the suit on the ground that, there being many co-sharers, the plaintiff could not alone sue, and under s. 30 of the Civil Procedure Code the suit was bad.

Per STUART, C. J.—That the lower appellate Court was right in holding that s. 30 of the Civil Procedure Code applied to the case, but that it was not right in dismissing the suit, but should have remanded it for the procedure provided by that section. Also, that the permission mentioned in s. 30 is express and not constructive.

Per BRODHURST, J.—That s. 30 was not applicable to the case, that section contemplating a case, in which there are numerous parties, having the same interest in a suit, who are all before the Court, and are all anxious to have the matter in dispute disposed of, but, in order to save trouble and expense, are desirous that one or more of them shall sue or defend on behalf of all in the same interest.

Per STRAIGHT and TYRRELL, JJ.—That s. 30 was not applicable to the case, the first part of that section implying that the plaintiff therein contemplated wishes to sue on behalf of other persons similarly interested in suing, they also wishing the same. HIRA LAL v. BHAIRON, 5 A. 602=3 A.W.N. (1883) 155 ... 415

(2) See LEASE, 5 A. 40.

Costs.

(1) See EXECUTION OF DECREE, 5 A. 589; 6 A. 48.

(2) Refund of—See EXECUTION OF DECREE, 6 A. 21.

(3) Security for—See APPEAL (GENERAL), 5 A. 380.

Court Fees Act (VII of 1870).

(1) S. 7 (i) (vi)—See PRE-EMPTION, 6 A. 488.

(2) S. 7 (viii), sch ii, No. 17 (i) and (iii)—See DECLARATORY SUIT, 6 A. 466.

(3) S. 17 (iv), cl. (c)—See DECLARATORY SUIT, 5 A. 331 (F.B.).

(4) *Sch. ii, No.* 17 (1)—*Suit to establish right—Suit to set aside summary decision.*—The plaintiffs alleged in their plaint as follows:—Certain property having been attached in execution of a decree, their mother, the wife of the judgment-debtor, objected to the attachment on the ground that the property had previously come into her possession under a transfer by sale in lieu of her dower debt. The plaintiffs' mother died pending the determination of the objection, having devised her property to the plaintiffs. They succeeded to the same, and certain other property, which also had been transferred to their mother in lieu of her dower-debt, having been also attached in execution of the same decree, the plaintiffs objected to the attachment. The Court executing the decree passed orders disallowing both objections. Upon these allegations the plaintiffs claimed to set aside both orders. They paid, with reference to cl. i, art. 17, sch. ii

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of the Court Fees Act, 1870, a Court-fee of Rs. 20 on their plaint, but the Court of first instance held that this was not sufficient, and that the Court-fee should be calculated on the amount of the decree in execution of which the property had been attached.

Held that, looking at the nature of the reliefs sought, cl. i, art. 17, sch. ii of the Court Fees Act, 1870, was applicable, and that a ten-rupee stamp in respect of each order sought to be set aside was payable. FATIMA BEGAM v. SUKH RAM, 6 A. 341=4 A.W.N. (1884) 113=8 Ind. Jur. 633 ... 668

Criminal Procedure Code (1872).

(1) Ss. 122, 193, 346—See CONFESSION, 5 A. 253.

(2) *Ss.* 195, 196, 207—*Improper discharge—Powers of Magistrate making inquiry in Sessions case—High Court's powers of revision.*—A Magistrate inquiring into a case exclusively triable by the Court of Session is not bound to commit the accused person for trial, where the evidence for the prosecution, is believed, would end in a conviction; but is competent, if he discredits such evidence, to discharge the accused.

The High Court can only interfere under s. 297 of Act X of 1872 (Criminal Procedure Code) in such a case, if it comes to the conclusion that the Magistrate has illegally and improperly under-rated the value of such evidence.

The meaning of the words "sufficient grounds" in s. 195 of that Act explained. *In re* LACHMAN, 5 A. 161=2 A.W.N. (1882) 223=7 Ind. Jur. 432. ... 109

(3) S. 282—See FORGERY, 5 A. 217.

(4) S. 455—See STAMP ACT (I OF 1879), 5 A. 17.

(5) S. 467—See PENAL CODE (ACT XLV OF 1860), 5 A. 36.

(6) *S.* 471—*Preliminary inquiry.*—An order made under s. 471 of Act X of 1872 sending a case for inquiry to a Magistrate is not necessarily bad because the Court did not make a preliminary inquiry before making such order. The law requires only such preliminary inquiry "as may be necessary."

Held, therefore, where a Munsif, being of opinion that both the parties to a suit tried by him had given false evidence therein on certain points, sent the case for inquiry to the Magistrate under s. 471 of Act X of 1872, with a proceeding embodying the facts of the case, and charging the parties respectively with giving false evidence on such points, and there was nothing to show that any inquiry that the Munsif could have made was necessary or would have put the Magistrate into a better position for dealing with the case than he was in, that the Munsif's proceedings were not bad because he did not hold a preliminary inquiry. EMPRESS OF INDIA v JUALA PRASAD, 5 A. 62=2 A.W.N. (1882) 165 ... 43

(7) *S.* 536—*Maintenance of wife—Adultery of wife subsequent to order for maintenance*—Res judicata.—A husband upon whom an order to make an allowance for the maintenance of his wife had been made, under s. 536 of Act X of 1872, objected to the payment of the allowance on the ground that his wife was living in adultery. The Magistrate entertaining this objection disallowed it, on the ground that the charge of adultery against the wife was not established. The husband subsequently again objected to the payment of the allowance on the same ground. The Magistrate entertaining the second objection allowed it, and directed the husband to discontinue paying the allowance. His order was based on proof of adultery by the wife before the date of the order of the former Magistrate. *Held*, on the general principles of the rule of *res judicata*, that the second Magistrate was wrong in law in re-opening matters already adjudicated upon, and his order directing the discontinuance of the allowance on the ground of facts antecedent to the former Magistrate's order must be held to be illegal LARAITI v. RAM DIAL, 5 A. 224=2 A.W.N. (1882) 240 ... 152

(8) S. 478—See PENAL CODE (ACT XLV OF 1860), 5 A. 233.

(9) S. 536—See MAHOMEDAN LAW (MAINTENANCE), 5 A. 226.

Criminal Procedure Code (1882) PAGE

(1) *Ss.* 4 (*d*), 88, 89—*Attachment of property belonging to persons absconding—Proceedings of Magistrate under s.* 88 *of Criminal Procedure Code—"Judicial proceedings."*—There is no provision of law requiring a Magistrate who has attached property under s. 88 of the Criminal Procedure Code to investigate the claims of third persons to the ownership of such property.

The proceedings of a Magistrate under s. 88 of the Criminal Procedure Code are therefore not "judicial proceedings" in the sense of s 4 (*d*) of that Code. QUEEN-EMPRESS v. SHEODIHAL RAI, 6 A. 487=4 A.W.N. (1884) 214 ... 771

(2) *Ss.* 32 (*a*), 262—*Act* XLV *of* 1860 (*Penal Code*), *s* 73—*Summary trial—Solitary confinement.*—It is not illegal to impose solitary confinement as part of the sentence in a case tried summarily. EMPRESS v. ANNU KHAN, 6 A. 83=3 A.W.N. (1883) 224 ... 489

(3) Ss. 32, 33, 262—See SUMMARY TRIAL, 6 A. 61.

(4) Ss. 46, 80, 413, 423, 439—See ARREST, 5. A. 318.

(5) S. 107—See SECURITY TO KEEP THE PEACE, 6 A. 26.

(6) Ss. 107, 112, 115—See SECURITY TO KEEP THE PEACE, 6 A. 214.

(7) Ss. 112, 114, 117, 118—See SECURITY FOR GOOD BEHAVIOUR, 6 A. 132.

(8) *Ss.* 145, 147—*Dispute as to immoveable property—Collection of rent—Joint undivided property.*—A dispute existing between one of the co-sharers of an undivided estate and the lessee of another co-sharer, as to the right of the latter to collect rent, such right being denied on the ground that the lessor was not in possession of her share, an inquiry was made under Chapter XII of the Criminal Procedure Code and the lessor was declared to be in possession of her share. *Held*, that the provisions of that chapter were not applicable to the dispute in question. BENI NARAIN v. ACHRAJ NATH, 5 A. 607=3 A.W.N. (1883) 163 ... 419

(9) S. 167—See PENAL CODE (ACT XLV OF 1860), 6 A. 129.

(10) S. 195—See SANCTION TO PROSECUTE, 6 A. 45; 6 A. 101; 6 A. 105.

(11) Ss. 195, 215, 476—See SANCTION TO PROSECUTE, 6 A. 98.

(12) S. 205—See PARDANASHIN, 6 A. 59.

(13) *S.* 206, *and sch.* III, *arts.* II, III (7)—*Magistrate of the 2nd class—Power to commit for trial—Case triable by Court of Session and Magistrate of the 1st class—Discharge of accused.*—A complaint of an offence made punishable by s. 392 of the Penal Code was brought in the Court of a Magistrate of the second class, who had been invested with the powers described in s. 206 of the Criminal Procedure Code. The Magistrate passed an order directing that the inquiry should be held in his Court, and accordingly an inquiry was held under the provisions of Chap. XVIII of the Criminal Procedure Code, and the accused was discharged.

Held that powers conferred under s. 206 of the Criminal Procedure Code convey authority to carry into effect any of the provisions of Chap. XVIII of the Code; that the procedure to be adopted under Chap. XVIII is not confined to cases exclusively triable by a Court of Session, but is also applicable to cases which, in the opinion of the Magistrate concerned, ought to be tried by such Court; that the order of the Magistrate in the present case, directing inquiry to be held in his Court, must be taken to mean that, in his opinion, the case referred to was one which ought to be tried by a Court of Session; and that his order discharging the accused was therefore legal. RAMSUNDAR v. NIROTAM, 6 A. 477=4 A.W.N. (1884) 205 ... 76

(14) S. 222—See PENAL CODE (ACT XLV OF 1860), 6 A. 204.

(15) *S.* 250—*Case instituted "upon complaint"—Frivolous or vexatious complaint—Compensation.*—A case instituted by the police, on a complaint to them, is not instituted "upon complaint" in the sense of s. 250 of the Criminal Procedure Code, and therefore in such a case an order awarding compensation made under that section is illegal. ISHRI v. BAKHSHI, 6 A. 96=3 A.W.N. (1883) 224 ... 498

(16) Ss. 342, 364—See CONFESSION, 5 A. 253.

(17) *Ss.* 350, 437—"*Further inquiry.*"—A Deputy Magistrate having discharged a person accused of an offence, on the ground that the evidence was

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insufficient for conviction, the Magistrate of the district recorded an order stating that, in his opinion, the accused had been improperly discharged, and directing, under s. 437, Criminal Procedure Code, that further inquiry should be made, and the accused called on to enter upon his defence. The accused was not called upon to show cause why a further inquiry should not be made, but a summons, in the terms of s. 68 of the Criminal Procedure Code, was issued to him. On his appearance, he was tried by the Magistrate of the district, convicted, and sentenced. The witnesses for the prosecution were not re-called, but the Magistrate relied upon their evidence as recorded in the first trial, and also upon the statement of a witness for the defence which was not receivable in evidence.

Held, that the proceedings of the Magistrate of the district were irregular, first, because notice to show cause why action should not be taken against him in the terms of s. 437 of the Code of Criminal Procedure was not served upon the accused person before proceedings, ostensibly under that section, were commenced; and secondly, because the subsequent proceedings of the Magistrate were not such as are contemplated by the provisions of s. 437, inasmuch as the conviction was practically based upon evidence which was not recorded in the course of a "further inquiry" before the Magistrate of the district, but upon evidence which was recorded by the Deputy Magistrate, and had been adjudicated upon by that officer; and such irregularities were fatal to the conviction. QUEEN-EMPRESS v. HASNU, 6 A. 367=4 A.W.N. (1884) 130 ... 686

(18) S. 392—See ACT VI OF 1864 (WHIPPING), 6 A. 482.

(19) *Ss.* 417, 429—*Appeal by Local Government—Application for revision by Local Government—Delay—High Court's powers of revision.*—It is not an inflexible rule that where either Government on the one side or an accused on the other has a right of appeal, and does not exercise it, the powers of the High Court under s. 439 of the Criminal Procedure Code cannot be exercised; but, in such cases, these powers should be sparingly used, and, save in very exceptional circumstances, not at all in reference to questions of fact.

Where an application was made by the Local Government to the High Court for revision of an order of acquittal, under s. 439 of the Criminal Procedure Code, nearly ten months after the Sessions trial, and upwards of twleve months after the commission of the alleged crime, and where there was, upon the face of the Judge's judgment, no error in law, and no appeal had been preferred upon a question of fact,—*held* that, under such circumstances, the Court did not feel called upon to enter into the case at large upon the merits, under a petition for revision. QUEEN-EMPRESS v. ALA BAKHSH, 6 A. 484=4 A.W.N. (1884) 206 ... 769

(20) Ss. 421, 423—See APPEAL (CRIMINAL), 5 A. 386.

(21) *S.* 439—*Enhancement of sentence so as to alter its nature—High Court's powers of revision.*—The High Court, in the exercise of its powers of revision, can enhance a sentence so as to alter its nature. QUEEN-EMPRESS v. RAM KURIAS, 6 A. 622 (F.B.)=4 A.W.N. (1884) 252 ... 863

(22) S. 439—See REVISION, 6 A. 40.

(23) *S.* 477—*False evidence—"Judicial proceeding"—Act* XLV *of* 1860 (*Penal Code*), *ss.* 191, 193.—A man died leaving some money due to him in the hands of the Telegraph authorities. *P* wrote a letter to those authorities claiming the money, as the sole heir of the deceased. This letter was sent to the District Judge for verification and orders. *P* supported his claim before the Judge by the evidence on oath of *C*. *C's* evidence being, in the opinion of the District Judge, false, the District Judge, in his capacity as Sessions Judge, tried him for giving false evidence and convicted him of that offence. *Held* that as the reference to the District Judge by the Telegraph authorities of *P's* letter for verification, and the subsequent action in regard thereto, did not constitute a "judicial proceeding," and as the District Judge had not any authority to administer an oath to *C*, the conviction was illegal.

Held also, that the District Judge had no jurisdiction, under s. 477 of the Criminal Procedure Code, to try *C*. EMPRESS v. CHAIT RAM, 6 A. 103 =3 A.W.N. (1883) 227 ... 503

(24) S. 503—See PENAL CODE, (ACT XLV OF 1860), 6 A. 224.

Custom. PAGE

"*Haqqi-i-chaharum*"—*Private sale—Sale in execution of decree.*—Proof of a custom whereby the zamindar of a village is entitled to one-fourth of a purchase-money when a house in the village is sold privately, is not proof of a similar custom in respect of sales in execution of decrees. KALIAN DAS v. BHAGIRATHI, 6 A. 47 (F.B.)=3 A.W.N. (1883) 198 ... 462

Damage.

(1) *Contingent—Removal of trees—Cause of action.*—The plaintiff claimed the removal of certain trees, planted by the defendant on his own land, on the ground that the trees had been planted so near his land that when they grew up they would injure his crops. *Held* that until the plaintiff's enjoyment of his own land was directly and immediately interfered with by the growth of the defendant's trees, he had no right to ask for their removal, and he had therefore no cause of action. RAMLAL v. DALGANJAN, 5 A. 369=3 A.W.N. (1883) 58 ... 256

(2) See SMALL CAUSE COURT SUIT, 5 A. 518.

Debtor and Creditor.

See INSOLVENT, 5 A. 392.

Declaratory Decree.

Consequential relief—Act I *of* 1877 (*Specific Relief Act*), *s.* 42.—*S* sued *B* in a Court of Small Causes for arrears of ground-rent of a house. The latter denied *S*'s proprietary right to the land and his liability to pay ground-rent, and *S*'s suit was in consequence dismissed. Thereupon *S* sued *B* in the Civil Court for a declaration of proprietary right to the land and of his right to receive ground-rent.

Held, that the suit was not barred by the proviso to s. 42 of the Specific Relief Act because it did not include a claim for arrears of ground-rent; and that the suit was one in which the specific relief claimed might properly be granted. SOMKALI v BHAIRO, 5 A. 55=2 A.W.N. (1882) 152 ... 38

Declaratory Suit.

(1) *Suit for possession of immoveable property—Relinquishment of part of claim—Act* VIII *of* 1859 (*Civil Procedure Code*), *ss.* 7, 15—*Adverse possession—Limitation—Declaration of title—*"*Relief.*"—In 1868 *B* made, it was alleged, a gift of a zamindari estate to *K*. In 1869 *B* died, and *K*'s name was recorded in the revenue registers in the place of *B*'s name in respect of the estate. In 1870 *K* died and her daughter *S* applied to have her name recorded in the revenue registers in respect of the estate. *M*, the illegitimate son of *B*, objected, claiming to have his name recorded. His objection having been disallowed and *S*'s name having been recorded, *M*, in 1876, sued *S* for a declaration of his proprietary right to the estate, and on the 29th June, 1878, obtained such declaration. In January, 1880, *M* sold a moiety of the estate, and in December, 1880, *S* sold the entire estate. In February, 1881, *M*'s transferees sued *S* and her transferee for possession of the moiety of the estate transferred to them by *M*.

Held, by the Full Bench (STUART, C.J., *dissenting*) that such suit was not barred by the provisions of s. 7 of Act VIII of 1859, by reason that *M* had omitted to claim in the suit of 1876 possession of the estate.

Held, also, that the possession of *S* and her transferee could be considered adverse only from the date of the decree of the 29th June, 1878, declaring *M*'s proprietary title to the estate.

Held, by STUART, C.J., that such suit was barred by the provisions of s. 7 of Act VIII of 1859, by reason of such omission. SARSUTI v. KUNJ BEHARI LAL, 5 A. 345 (F.B.)=3 A.W.N. (1883) 81 ... 239

(2) *Suit to obtain a declaratory decree—Suit to set aside a summary order—Attachment of property—Suit to establish right—Act* VII *of* 1870 (*Court Fees Act*), *s.* 7 (viii) and *sch.* ii, *No.* 17 (i) *and* (iii).—Certain immoveable property having been attached in execution of two Rent Court decrees, the wife of the judgment-debtor, under s. 173 of the N.-W.P. Rent Act (XII of 1881), objected to the attachment, on the ground that the property had previously been conveyed to her by her husband under a deed of gift. The

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objection was disallowed, and she thereupon brought a suit, with reference to the provisions of s. 181 (*b*) of the Rent Act to establish her right to the property to set aside the order passed on her objection.

Held, that, looking at the nature of the reliefs sought, cls. (i) and (iii), art. 17, sch ii of the Court Fees Act, 1870, were applicable, and that the plaintiff should pay a ten rupee stamp on each of her claims. MANRAJ KUARI v. MAHARAJAH RADHA PRASAD SINGH, 6 A. 466=4 A.W.N. (1884) 175 ... 756

(3) *Suit to set aside mortgage—Court-fee—Act* VII *of* 1870 (*Court Fees Act*), *s.* 17 (*iv*), *cl.* (*c*)—*Act* I *of* 1877 (*Specific Relief Act*), *s.* 39.—*C's* father mortgaged certain land to *D*. *A* purchased the instrument of mortgage and sued *C*, whose father had died, upon it, and obtained a decree enforcing the mortgage. *C* then mortgaged a moiety of the land to *B*, and subsequently sold the same moiety to *A*. *A* sued *B* for the cancellation of the instrument of mortgage to *B*. *Held*, that the suit was in the nature of a simple declaratory suit. KARAM KHAN v. DARYAI SINGH, 5 A. 331 (F.B.)=3 A.W.N. (1883) 55=8 Ind. Jur. 53 ... 229

(4) See CANTONMENT, 6 A. 148.

(5) See JURISDICTION, 6 A. 403.

(6) See LANDLORD AND TENANT, 6 A. 110.

Defamation.

Act XLV *of* 1860 (*Penal Code*), *s.* 499, *Eighth Exception—Privileged communication — Good faith — Justification — Practice—Cross-examination of complainant.*—*Held*, on the evidence in this case, in which the question was whether a person accused of defamation was protected by the *Eighth Exception* to s. 499 of the Indian Penal Code, that the accused had failed to establish that he acted in good faith.

Where the accused in a case of defamation intends to bring evidence to prove the truth of the defamatory matter, his advocate should cross-examine the complainant upon every matter upon which evidence is intended to be brought. If he does not do so, it is a subject of serious consideration whether he should subsequently be allowed to tender proof as to the material incidents of which he has not cross-examined. QUEEN-EMPRESS v. DHUM SINGH, 6 A. 220=4 A.W.N. (1884) 53 ... 584

Dhardhura Custom.

See REGULATION XI OF 1825, 6 A. 479.

Diluvion.

See LANDLORD AND TENANT, 5 A. 260.

Discharge.

Improper—See CRIMINAL PROCEDURE CODE (1872), 5 A. 161.

Disqualified Proprietor.

(1) *Power to enter into contracts—Act* VIII *of* 1879, *ss.* 23, 24—*Act* XIX *of* 1873 (*N.-W.P. Land Revenue Act*), *s.* 205.—A suit was brought against a disqualified proprietor for money due on a bond given while her property was under the superintendence of the Court of Wards. The Collector was made a defendant to this suit "because the property of the defendant obligor had come under the superintendence of the Court of Wards before the execution of the bond" *Held*, that the Collector's *status* in the suit, namely, as representative *ad litem* of the defendant, was sufficiently described to entitle him to raise the question of the legal capacity of the defendant to enter into the bond.

The mere disqualification of a proprietor to manage his estate does not carry with it a general and absolute disqualification to enter into any contracts at all.

Held, therefore, where a person whose property was under the superintendence of the Court of Wards, borrowed money, and gave a bond for the payment of the same, and was sued on the bond in the name of the Collector, that the Court was competent to make a decree against such disqualified proprietor. THE COLLECTOR OF BENARES v. SHEO PRASAD, 5 A. 487=3 A.W.N. (1883) 63 ... 336

Disqualified Proprietor—(*Concluded*). PAGE

(2) *Suit by, and against—Act* XIX *of* 1873 (*N.-W.P. Land-Revenue Act*), *s.* 205—*Act* VIII *of* 1879, *s.* 23.—Under s. 205 of Act XIX of 1873, as amended by s. 23 of Act VIII of 1879, a disqualified proprietor, whose property is in charge of the Court of Wards must sue and be sued in the Civil Courts by and in the name of his guardian, where a guardian has been appointed, or by and in the name of the Collector of the District in which the suit is brought, where a guardian has not been appointed, whether or not the suit has for its object to set aside an act done by the ward before the date when his property came under the charge of the Court of Wards. SHEO DIAL CHAUBEY v. COLLECTOR, GORAKHPUR, 5 A. 264=3 A.W.N. (1883) 17 ... 181

(3) See REGULATION LII OF 1803, 5 A. 142 (P.C.).

Easement.

See HOLI MUHARRAM, 6 A. 497.

Ejectment.

(1) See CANTONMENT, 6 A. 148.

(2) See CIVIL PROCEDURE CODE, 1882, 6 A. 68.

(3) See LANDLORD AND TENANT, 5 A. 245.

(4) Suit by tenant against sub-tenant for—See LANDLORD AND TENANT, 6 A. 81.

Escape from Custody.

See ARREST, 5 A. 318.

Estoppel.

(1) See EXECUTION OF DECREE, 5 A. 289.

(2) See HUNDI, 5 A. 302.

(3) See TRUSTEE, 6 A. 24.

Evidence Act (I of 1872).

(1) *Ss.* 25, 26, 27—*Confession made to a Police officer.*—*B* and *R*, accused of offences under s. 414 of the Penal Code, gave information to the Police which led to the discovery of the stolen property. This information was to the effect that the accused had stolen a cow and calf, and sold them to a particular person at a particular place.

Held by the Full Bench (MAHMOOD, J., *dissenting*) that s. 27 of the Indian Evidence Act is a proviso not only to s. 26, but also to s. 25 and that, therefore, so much of the information given by the accused to the Police officer, whether amounting to a confession or not, as related distinctly to the facts thereby discovered, might be proved.

Per MAHMOOD, J., that s. 27 of the Indian Evidence Act is not a proviso to s. 25, but only to s. 26 and that, therefore, the statements in question were wholly inadmissible in evidence.

Per STRAIGHT, Offg. C.J., that where a statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding.

Observations by STRAIGHT, Offg. C J., as to the mode in which the testimony of witnesses should be recorded in cases where two persons are being tried.

Observations by STRAIGHT, Offg. C J., and DUTHOIT, J., upon the nature of confessions by accused persons in India, and the circumstances in which such confessions are made. QUEEN-EMPRESS v. BABU LAL, 6 A. 509 (F.B.)=4 A.W.N. (1884) 229 ... 788

(2) S. 32—See PENAL CODE (ACT XLV OF 1860), 6 A. 224.

(3) S. 50—See PENAL CODE (ACT XLV OF 1860), 5 A. 233.

(4) S. 106—See PRE-EMPTION, 5 A. 184.

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(1) *Act* X *of* 1877 (*Civil Procedure Code*), *s.* 230—*Act* XIV *of* 1882 (*Civil Procedure Code*), *s.* 230.—The holder of a decree applied for execution under s. 230 of Act X of 1877, and the application was granted. Within three years after the passing of Act XIV of 1882, by which Act X of 1877 was repealed, he applied, for the first time, under s. 230 of the former Act, for execution of the decree. At the time this application was made more than twelve years had elapsed from the date of the decree.

Held by STRAIGHT, BRODHURST and TYRRELL, JJ., that the application might be granted, it being the first made under s. 230 of Act XIV of 1882, and the first made after the expiration of twelve years from the date of the decree, and not being barred by the last paragraph of s. 230 of that Act, read in conjunction with the 3rd paragraph of s. 230 of Act X of 1877, the "law in force" mentioned in the last paragraph of s. 230 of Act XIV of 1882, referring to the law of limitation in force at the time the Act was passed, and not to the third paragraph of s. 230 of Act X of 1877.

Held by STUART, C.J., and OLDFIELD, J., that the application should not be granted, the effect of the last paragraph of s. 230 of Act XIV of 1882 being to bar any proceedings to enforce a decree under that Act which would have been barred under s. 230 of Act X of 1877, if taken thereunder, on the ground that the period of twelve years had elapsed from the dates specified in that section. MUSHARRAF BEGAM v. GHALIB ALI, 6 A. 189 (F.B.)=4 A.W.N. (1884) 22 ... 562

(2) *Act* XV *of* 1877 (*Limitation Act*), *sch. ii, No.* 179 (2)—"*Where there has been an appeal, &c.*"—Where an application for appeal was presented to the High Court, but rejected, owing to the memorandum of appeal being insufficiently stamped,—*held*, that, under such circumstances, there had not been an appeal or a final decree or order of an appellate Court within the meaning of No. 179 (2) of the Limitation Act, so as to give a period from which limitation for execution of the decree appealed from could run. DIANAT-ULLAH BEG v. WAJID ALI SHAH, 6 A. 438=4 A.W.N. (1884) 163 ... 736

(3) *Agreement to give time—Suit on agreement.*—The parties to a decree presented a petition to the Court executing the decree, in which they stated that they had agreed that the principal amount of the decree was to be paid within eight years; that a sum of Rs. 50 was to be paid annually as interest on the principal amount; and that upon default of payment of the interest the whole amount due should be realized by execution of the decree. On this petition being presented the Court struck the case off its file. *Held* that, upon default being made, the decree-holder's remedy was by execution of his decree, and not by suit to enforce the terms of the agreement. CHAMPAT RAI v. PITAMBAR DAS, 6 A. 16=3 A.W.N. (1883) 174 ... 439

(4) *Appellate order in execution*—*Act* XV *of* 1877 (*Limitation Act*), *sch. ii, No.* 179 (3).—The holder of a decree for possession and partition of a share of certain immoveable property, dated the 19th January 1878, applied for execution on the 2nd February 1878. An order was made by the Court of first instance, from which the decree-holder appealed. The appellate Court, on the 18th September 1878, reversed the order of the first Court and directed that the partition of the property should be effected by lots, and remanded the case for that purpose. The first Court proceeded to carry out the order of the appellate Court, but eventually struck off the case, on the 15th February 1879, as the decree-holder failed to appear personally when ordered to do so. On the 13th September 1881, the legal representative of the deceased decree-holder, who had meantime died, applied, with reference to the order of the appellate Court dated the 18th September 1878, to have lots drawn in accordance with that order.

Held, on the question whether this application was barred by limitation, that, if it were regarded as nothing more than an application for execution of the original decree, it might be barred, inasmuch as it had been made more than three years after the date of the last application, and it was doubtful whether the 2nd clause in the 3rd column of No. 179, sch. ii of Act XV of 1877 would apply, since the appeal there referred to is probably an appeal from the decree or order of which execution is being taken, referred to in the 1st clause of that article, and not an appeal in

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course of execution of that decree or order; that, however, the order of the appellate Court dated the 18th September 1878 was itself of the nature of a decree and capable of execution, and for the execution of which an application could be made to which that article would apply; that the application in question should be regarded as one for execution of that order and that, therefore, so regarding it, it was within time. HULASI v. MAIKU, 5 A. 236=3 A.W.N. (1883) 5 ... 161

(5) *Application for execution—Intermediate suit—Fresh application—Revival of application—Act* XV *of* 1877 (*Limitation Act*), *sch. ii, Nos.* 178, 179.—On the 27th March, 1878, the holder of a decree applied for execution. On the 27th May, 1878, the Court made an order directing that the application should be struck off, as the record of the former execution-proceedings was in the appellate Court, and that the decree-holder should make a fresh application when such record was returned. On the 28th May, 1881, the decree-holder renewed the application in accordance with such order.

Held, on the question whether this application was barred by limitation, that it was not an application within the meaning of No. 179, sch. ii of Act XV of 1877, but one to which No. 178 would apply; that limitation began to run when the record was returned; and that, therefore (three years not having elapsed from that time), the application in question was within time. RAGHUBANS GIR v. SHEOSARAN GIR, 5 A. 243=3 A.W.N. (1883) 8 ... 166

(6) *Arrest of judgment-debtor—Warrant directed to Nazir—Indorsement to peon—Civil Procedure Code*, s. 343—*Indorsement of particulars of arrest by Naib Nazir.*—Where a warrant issued by a Subordinate Court, directing the Nazir to arrest a judgment-debtor in execution of a decree, was entrusted by the Nazir to a subordinate for execution by indorsing his name upon it, *held* that there is nothing in the Civil Procedure Code to prohibit a Nazir from authorizing a deputy to execute a warrant of arrest for him, and that his indorsement must be regarded as *prima facie* evidence of the authority of the person to whom the warrant is delivered to execute it.

Held, that it is most desirable, when the Nazirs of the Subordinate Courts delegate the duty of executing warrants of arrest that they should confer the authority in more clear and explicit terms than are expressed by a mere indorsement, and that they should be careful in selecting proper persons to discharge that duty, bearing in mind, as far as circumstances permit, the position and caste of the party to be arrested, so as to avoid through the medium of Court process subjecting any such party to personal indignity or offence. Further, that it is important that the person chosen should be made acquainted with the contents of the warrant, in order that he may be able to inform the judgment-debtor at whose suit and for what amount he is being taken into custody.

Where a warrant for the arrest of the judgment-debtor had been executed, and an indorsement thereon, professedly under s. 343 of the Civil Procedure Code, was irregularly made by the Naib Nazir, he not having been "the officer entrusted with the execution of the warrant," *held* that such irregularity did not invalidate the arrest. ABDUL KARIM v. BULLEN, 6 A. 385=4 A.W.N. (1884) 133=8 Ind. Jur. 692 ... 699

(7) *Civil Procedure Code, s.* 257-*A—Act* XV *of* 1877 (*Limitation Act*), *sch. ii, Nos.* 178, 179.—On the 27th August, 1878, the holder of a decree for money and the judgment-debtor agreed that the amount of the decree should be payable by instalments, and that, if default were made in payment of any one instalment, the whole decree should be executed. The Court executing the decree sanctioned this agreement. On the 28th November, 1881, default having been made, the decree-holder applied for recovery of the whole amount of the decree. *Held*, that the application was not one to which No. 179, sch. ii of the Limitation Act, 1877, was applicable, but No. 178, and the period of limitation began to run from the date of default. SHAM KARAN v. PIARI, 5 A. 596=3 A.W.N. (1883) 143 ... 411

(8) *Compromise—Civil Procedure Code, Ss.* 210, 257-*A.*—The parties to a decree for money, dated the 14th July, 1871, entered into a compromise whereby, in lieu of a portion of the decretal money, the decree-holder was placed in possession of certain property, and the remainder of the decretal money was to be paid by fixed annual instalments, and, in case of default

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in the payment of any instalment, it was agreed that the entire amount should become immediately realizable by execution of the decree. On the 11th December, 1882, the decree-holder, alleging default in payment of the instalments, applied for execution of the compromise.

Held that such an agreement could not be treated as an instalment decree, and, as such, capable of execution. RAMLAKHAN RAI v. BAKHTAUR RAI, 6 A. 623=4 A.W.N. (1884) 207 ... 864

(9) *Contract superseding decree— Fresh suit.*—In the course of proceedings in execution of a decree, by which a simple mortgage of immoveable property was enforced, the judgment-debtor made an application to the Court executing the decree dated in April, 1877, stating that the decree had been partially satisfied by the sale of a part of the mortgaged property; that the decree-holder had remitted a portion of the decree; that the balance should be paid by a certain date; and that a certain banker had given a note of hand for the payment of interest on the balance at a certain rate. The judgment-debtor then stated as follows:—"So long as the petitioner does not pay the money to the decree-holder, *i.e.*, during the term fixed above, the banker shall pay interest to the decree-holder, the decree-holder shall not have power to take out execution within the said term, but after the expiry thereof he shall be at liberty to realize his money together with interest from the petitioner and his property by executing the decree; excepting the property sold all the property mortgaged and attached under the decree shall continue so mortgaged and attached; the decree-holder's pleader has affixed his signature at the foot of this petition showing that he consents to it: the petitioner therefore prays that the case may be struck off as partially executed." The decree-holder subsequently sued the judgment-debtor to recover the balance of the decree, claiming under the arrangement set forth in the petition of April, 1877, as a contract superseding the decree.

Held, having regard to the terms of that petition, that no new contract superseding the decree was either intended or effected, and the suit was consequently not maintainable. MAKUND RAM v. MAKUND RAM, 6 A. 228=4 A.W.N. (1884) 41=8 Ind. Cas. 523 ... 590

(10) *Costs—Decree to be executed where there has been an appeal.*—The original decree in a suit dismissed the suit with costs which were specified. On appeal the appellate Court directed that the original decree should be affirmed and the appeal dismissed, and that the appellant should pay the respondent's costs in the appellate Court, which were specified. The decree of the appellate Court did not contain any specification of the costs of the original Court. *Held*, that the Court executing the appellate decree might execute it for the costs of the original Court, looking to the decree of the Court to ascertain the amount thereof. BEHARI LAL v. KHUB CHAND, 6 A. 48=3 A.W.N. (1883) 202 ... 463

(11) *Cross-decrees—Simple money-decree — Decree enforcing mortgage — Civil Procedure Code, ss. 246, 247.*—S. 246 of the Civil Procedure Code is applicable to cross-decrees and not to cross-claims under one decree. To make s. 247 of the Code applicable in the case of cross-claims under one decree, the parties entitled thereunder to recover from each other must hold the same character and possess identical rights of enforcing execution, and enforcement of the decree can only be refused, or satisfaction entered up, when this is the case.

Held, therefore, where a decree for money of a Court of first instance directed that the money should be realizable from certain specific property of the defendant, and exempted his person and other property, and the lower appellate Court modified this decree by extending it to the person of the defendant, and in second appeal the High Court set aside the lower appellate Court's decree and restored that of the first Court, directing that the costs of the defendant in the lower appellate Court and in the High Court should be paid by the plaintiff that, inasmuch as the plaintiff was only entitled to recover the judgment-debt due to him from the defendant from such specific property, whereas the defendant was entitled to recover the judgment-debt due to him from the plaintiff from his person and property, the provisions of s. 247 were not applicable. KALKA PRASAD v. RAM DIN, 5 A. 271=3 A.W.N. (1883) 20=7 Ind. Jur. 619 ... 187

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(12) *Decree for enforcement of mortgage—Execution limited to mortgaged property—Equity.*—*K* brought to sale in execution of a simple decree for money which he held against *P* certain property and purchased it himself. The property was subject to a mortgage at the time it was sold. Subsequently a decree was obtained against *P* enforcing this mortgage, of which *K* became the holder. *K* sought to have this decree executed, not against the mortgaged property, but against other property belonging to *P*.

Held, that if *K* purchased the property knowing that it was mortgaged, or if in consequence of the mortgage he purchased it for a less sum than it would otherwise have fetched, it would be inequitable to allow him to obtain satisfaction of the decree out of the other property of *P*. GOLAB SINGH v. PEMIAN, 5 A. 342=3 A.W.N. (1883) 56 ... 237

(13) *Decree for money—Sale of property without attachment—Invalidity of sale—Civil Procedure Code, Ch.* XIX, *and s.* 254.—A regularly perfected attachment is an essential preliminary to sales in execution of simple decrees for money, and where there has been no such attachment any sale that may have taken place is not simply voidable but "*de facto*" void. MAHADEO DUBEY v. BHOLA NATH DICHIT, 5 A. 86 (F.B.)=2 A.W.N. (1882) 186 ... 59

(1 *Decree for share of undivided plot of land and removal of trees thereon—Execution of decree—Separation of share—Civil Procedure Code, s.* 265—*Act* XIX *of* 1873 (*Land Revenue Act*), *ss.* 107-139—*Partition of mahal.*—*M* obtained against *R* a decree for possession of "a one-fourth share of the two fallow lands, Nos. 490 and 541, measuring 7 bighas and 2 bighas 16 biswas respectively, after removal of the trees planted thereon." The Court, in executing the decree, placed the decree-holder in joint possession of the two plots, to the extent of the one-fourth share decreed to him, but declined to remove the trees until the said share had been specifically ascertained and partitioned by the Collector, in reference to s. 265 of the Civil Procedure Code.

Held that the decree could not be understood to entitle the plaintiff to remove the trees from a larger area than that to which he was entitled under that decree; and that, so long as that area remained joint and unascertained, the plaintiff could not execute the decree in the manner sought.

Held also that the decree in the present case could not be called a "decree for the partition or for the separate possession of a share of an undivided estate paying revenue to Government," within the meaning of s. 265 of the Civil Procedure Code, so as to require the intervention of the Collector for the purpose of executing the decree: and that the Court of first instance, in order to meet the exigencies of the decree, should have separated the one-fourth to which the plaintiff was declared entitled, and, in executing the decree, should have ordered that the trees standing on the one fourth area should be uprooted. RAM DAYAL v. MEGU LAL, 6 A. 452=4 A.W.N. (1884) 166 ... 746

(15) *Decree payable by instalments—Default—Waiver—Estoppel—Application for execution as provided for in case of default—Application to recover instalments—Act* XV *of* 1877 (*Limitation Act*), *Sch. ii, No.* 179.—A decree for the payment of money directed that an amount less than the amount sued for should be paid by instalments, and that if default were made in payment of one instalment, the amount sued for should be payable. Default having been made the decree-holder, on the 7th May 1877, applied for execution of the decree for the larger amount. It appeared that at this time, although the instalments had not been paid regularly, the decree-holder had received in full all the instalments which had fallen due excepting the instalment falling due in the previous September, that is September 1876, of which he had received only a part. The application of the 7th May 1877, was struck off the file. The decree-holder subsequently accepted the remaining instalments, which were paid on due dates. On the 28th August 1878, the decree-holder applied for payment of an instalment which had been paid into Court. On the 8th September 1881, the decree-holder applied for execution of the decree for the larger amount payable thereunder in case of default, with reference to the default in respect of the instalment for September 1876. The Court refused to

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allow execution to issue for such amount but allowed it to issue for the balance of the instalment for September 1876.

Per OLDFIELD, J.—That the acceptance by the decree-holder of the instalments falling due after September 1876, notwithstanding default had been made in respect of the instalment for September 1876, amounted to a waiver of his right to execute the decree for the larger amount payable thereunder in case of default, and by such waiver he was estopped from recovering such larger amount in execution of the decree.

Per STRAIGHT, J.—That, having by his application of the 7th May 1877, sought to execute the decree for the larger amount payable thereunder in case of default in payment of the instalments of the smaller amount, the decree-holder was not competent afterwards to seek to execute the decree in respect of such instalments; that therefore his application of the 28th August 1878, was not a step-in-aid of execution of the decree in the share in which he had previously sought execution, from the date of which limitation could be computed; and that consequently his application of the 8th September 1881, was barred by limitation.

Per Curiam.—That the decree-holder was not entitled to recover the balance of the instalment for September 1876, regard being had to the limitation prescribed by No. 179 (6), sch. ii of the Limitation Act, 1877. RADHA PRASAD SINGH v. BHAGWAN RAI, 5 A. 289=3 A.W.N. (1883) 33 ... 199

(16) *First and second mortgagees—Sale of property in execution of decree obtained by second mortgagee for sale of property—Holder of prior decree enforcing first mortgage, how to proceed—Fresh suit—Civil Procedure Code, s. 244 (c)—Meaning of "representative" of judgment-debtor.*—A decree enforcing a first mortgage of certain property not being satisfied, the property was sold in execution of a decree of a later date enforcing a second mortgage of the property.

Per STUART, C.J., that the decree enforcing the first mortgage could not be executed against the property, but the holder of such decree was bound to bring a fresh suit against the purchaser of the property to enforce his decree.

Per STRAIGHT, BRODHURST and TYRRELL, JJ., that a fresh suit was the most convenient and expeditious remedy.

Per OLDFIELD, J., that, the purchaser not being the "representative" of the judgment-debtor, within the meaning of s. 244 (c) of the Civil Procedure Code, the holder of such decree must bring a fresh suit to enforce it. JAGAT NARAIN v. JAG RUP, 5 A. 452 (F.B.)=3 A.W.N. (1883) 79 ... 312

(17) *Joint decree-holders—Conditional decree—Refusal of some to join in applying for execution—Civil Procedure Code, s. 231.*—The provisions of s. 231 of the Civil Procedure Code are not applicable to the case of joint decree-holders, the execution of whose decree is conditional on their joint performance of a particular act. FARZAND v. ABDULLAH, 6 A. 69=3 A.W.N. (1883) 211 =8 Ind. Jur. 320 ... 479

(18) *Limitation—Act* XV *of* 1877 (*Limitation Act*), *sch. ii, No.* 179 (2).—*B*, the mortgagee of certain property, sued *N*, the mortgagor, and *T*, to whom a part of the mortgaged property had been transferred by sale, for the mortgage money, and the sale of the mortgaged property. On the 24th September he obtained a decree, which directed *N* to pay the money, and that it might be realized by the sale of the mortgaged property. *T* appealed, contending that as the instrument of mortgage was not registered, it was not receivable as evidence of the mortgage, and therefore the sale of the property had been improperly ordered. *N* did not appeal. The Court of first appeal allowed this contention and set aside the order for the sale of the property. The mortgagee preferred a second appeal, and on the 15th January, 1880, the Court of last appeal modified the decree of the lower Court, directing that a part of mortgage-money might be recovered by the sale of the mortgaged property. On the 14th September, 1882, *B* applied for execution of the decree against *N*. *Held* that the period of limitation for the application was governed by art. 179 of the Limitation Act, and such period would run from the final decree of the appellate Court. BASANT LAL v. NAJMUNISSA BIBI, 6 A. 14=3 A.W.N. (1883) 179 ... 437

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(19) *Execution of joint decree—Application by one joint decree-holder for execution in respect of his own share—Transfer of decree to judgment-debtor—Civil Procedure Code*, ss. 231, 232.—A joint decree cannot be executed by one of the several joint holders in respect only of his share of the decree.

When by operation of law one of several joint judgment-debtors acquires the position of decree-holder in respect of the whole judgment-debt, the effect is to extinguish the liability of the other judgment-debtors, and the decree cannot be executed against them. But when one of them so acquires only a partial interest in the decree, the effect is not to extinguish the entire judgment-debt, but so much only of it as such judgment-debtor has so acquired.

Held, therefore, where one of several joint decree holders applied for execution in respect of his own share only, and the joint judgment-debtors under the decree had inherited the right therein of one of the joint decree-holders, that the application was contrary to law; that so much of the judgment-debt as had devolved upon such persons had been extinguished; and that application should have been made for execution in respect of the entire unextinguished portion of the judgment-debt. BANARSI DAS v. MAHARANI KUAR, 5 A. 27=2 A.W.N. (1882) 140=7 Ind. Jur. 374 ... 19

(20) *Objection to attachment—Civil Procedure Code*, ss. 281, 282, 283—*Appeal.*—The heirs of the deceased obligor of a bond were sued thereon on the ground that they were in possession of the property of the deceased, and a decree was made in this suit for the recovery of the amount claimed "from the property of the deceased." In execution of this decree, the plaintiff caused certain property to be attached as belonging to the deceased. The defendants objected to the attachment, on the ground that the property belonged to them. The Court executing the decree, proceeded to investigate this objection, and finding that the property did not belong to the defendants, but to the deceased, disallowed it. *Held*, that the proceedings upon such objection were taken under s. 281 of the Civil Procedure Code, and the order disallowing it was therefore not appealable. AWADH KUARI v. RAKTU TIWARI, 6 A. 109=3 A.W.N. (1883) 230 ... 507

(21) *Objection to attachment of property—Objection allowed—Costs—Suit to establish right—Appeal—Refund of costs—Civil Procedure Code*, ss. 244, 280, 283.—An objection to the attachment of property attached in execution of a decree was allowed, the decree-holder being ordered to pay the costs of the objector. The decree-holder thereupon brought a suit to contest the order allowing the objection. He did not seek in this suit relief in respect of the costs. He obtained a decree setting aside the order allowing the objection. He then applied to the Court which had made the order to order a refund of the amount of the costs which had been paid to the objector. *Held* that the application being regarded as one with regard to a portion of an order made under s. 280 of the Civil Procedure Code, the Court was *functus* in the matter and could not make or enforce such an order as was sought for; and that its order disallowing the application was not appealable as it was not one made under s. 244, and if taken to be one passed with reference to s. 280, an appeal was barred by s. 283. *In re* RAGHU NATH DAS v. BADRI PRASAD, 6 A. 21=3 A.W.N. (1883) 177 ... 443

(22) *Power of Court to attach salary—Small Cause Court—Civil Procedure Code*, ss. 223, 268.—A mufassal Court of Small Causes must adopt the machinery of s. 223 of the Civil Procedure Code in all cases where execution is sought against persons or property outside its local jurisdiction.

Such a Court, therefore, cannot attach the salary of a public officer where the same is disbursed outside its local jurisdiction. PARBATI CHARAN v. PANCHANAND, 6 A. 243 (F.B.)=4 A.W.N. (1884) 69 ... 600

(23) *Property attached in execution of decrees of Munsif and District Judge—Sale of property under order of Munsif—Civil Procedure Code*, s. 285.—Where certain immoveable property, which had been attached in execution of two decrees, one made by a Munsif and the other by the District Court to which such Munsif was subordinate, was sold under the order of the Munsif. *Held*, that the sale was bad, by reason of the Munsif's

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want of jurisdiction to order it. AGHORE NATH v. SHAMA SUNDARI, 5 A. 615=3 A.W.N. (1883) 167 ... 425

(24) *Question for Court executing decree—Fresh suit—Question of title between decree-holder and third person.*—The plaintiff in a suit for money obtained a decree against all the defendants except *P* and among them *K*. On appeal the Court of first appeal gave them a decree against *P*. In execution of this decree they attached and were paid, as belonging to *P*, certain money deposited in the Government Treasury in *K*'s name. On appeal by *P* the Court of second appeal reversed this decree, and restored the decree of the first Court dismissing the suit as regards *P*. *P* thereupon applied in execution of his decree for a refund of the money. The plaintiffs objected on the ground that the money belonged to *K*. *Held* that the Court executing *P*'s decree was not competent to decide the question whether the money belonged to *P* or to *K*, such question not being one between *P* and them only, but involving and raising a question of title between him and *K* as to their conflicting claims, *inter se*, to the money. PUSAI v. MAHADEO PRASAD, 6 A. 12=3 A.W.N. (1883) 173 ... 436

(25) *Refusal to execute decree on equitable grounds—The Court executing a decree not competent to go behind it.*—The holders of a decree, made in 1866, against *K* and certain other persons jointly, applied to recover mesne profits in execution thereof. *K* paid the decree-holders the mesne profits claimed, and then sued his co-judgment-debtors for contribution, and in 1878 obtained a decree against them. Subsequently the holders of the decree of 1866 again applied to recover mesne profits in execution thereof, and in the proceedings which followed it was decided that mesne profits were not recoverable under the decree. After this *K*'s representatives applied for execution of the decree of 1878. The lower Courts refused to execute the decree on the ground that, as under the decree of 1866, on which the decree of 1878 was based, mesne profits were not recoverable, it would not be equitable to allow a decree for contribution passed on a contrary supposition to be executed. *Held* that the lower Courts were not competent to go behind the decree of 1878, but must deal with it as it stood. RAMPHAL RAI v. RAM BARAN RAI, 5 A. 53=2 A.W.N. (1882) 151 ... 36

(26) *Sale in execution of decree of share of mahal—Arrears of Government revenue—Payment of arrears out of surplus sale-proceeds—Liability of purchaser to reimburse judgment-debtor—Act* XIX *of* 1873 (*N.-W.P. Land Revenue Act*), s. 146—*Act* X *of* 1877, s. 316.—A share of mahal, arrears of Government revenue being due in respect of the whole mahal, was sold in execution of a decree. The existence of the arrears was notified at the time of sale. The title of the purchaser to the share vested from the date of the sale, Act X of 1877, s. 316, being in force at that date. The Collector attached and realized the amount of the arrears out of the surplus sale-proceeds. *Held*, that inasmuch as at the date of the realization of the arrears out of the surplus sale-proceeds, the purchaser was the proprietor of the share, and it and he were responsible under s. 146 of Act XIX of 1873 (N.-W.P. Land Revenue Act) for the arrears, the payment of the arrears out of the surplus sale-proceeds must be regarded as a payment made *in invitum* by the judgment-debtor for the purchaser, and the judgment-debtor was entitled to be reimbursed by the purchaser. RAMCHAND v. FATEH SINGH, 6 A. 112=3 A.W.N. (1883) 240 ... 510

(27) *Stay of execution—Revival of execution-proceedings—Act* XV *of* 1877 (*Limitation Act*), *sch. ii, No.* 178.—A decree was made against *B*, *K* and *Z*. On the 13th May, 1879, application was made for execution of the decree against *B* and *K*. In August, 1879, *Z*, who had preferred an appeal in the suit, applied on that ground for the stay of execution, and on the 22nd August, 1879, the Court, on the same ground ordered execution to be stayed. On the 16th December, 1879, *Z*'s appeal was dismissed. On the 24th June, 1882, an application for execution of the decree against *B* and *K* was made. *Held*, that such application might be regarded as one for revival of the proceedings in execution which had been stayed by injunction, to which No. 178, sch. ii of the Limitation Act, 1877, was applicable, and such application was therefore within time. BUTI BEGAM v. NIHAL CHAND, 5 A. 459=3 A.W.N. (1883) 89=8 Ind. Jur. 156 ... 317

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(28) *Suit to establish right—Stay of execution—Limitation—Act* XV *of* 1887 (*Limitation Act*), *sch.* ii, *Nos.* 178, 179.—On the 28th May, 1878, application was made for execution of a decree, in pursuance of which certain property was attached and proclaimed for sale. On the day fixed for the sale the Court issued an injunction to stay the same until a suit, which certain persons who claimed the property had instituted, had been decided. On the 14th September, 1882, the suit having been finally decided on the 24th January, 1881, the decree-holder applied for execution. *Held* that the application might properly be considered to be for revival of the former proceedings, after removal of the injunction, to which art. 178 of the Limitation Act, 1877, rather than art. 179, was applicable, and was within time from the date of accrual of the right to apply on the final decision of the suit. BASANT LAL v. BATUL BIBI, 6 A. 23=3 A.W.N. (1883) 181. 444

(29) *The decree to be executed where there has been an appeal—Costs.*—The defendant in a suit appealed from so much of the decree of the Court of first instance as related to the amount of costs payable by him to the plaintiff. The decree of the appellate Court directed "that the order of the lower Court be upheld, and the appeal be dismissed: the appellant to pay the costs." *Held*, that the amount of costs awarded by the Court of first instance, although they were not specified in the appellate Court's decree, were recoverable in execution of that decree, inasmuch as those costs were the subject-matter of the appeal, and the appellate Court, in affirming the decision of the first Court on that point, made them the substantive portion of its decree. HIMAYAT HUSAIN v. JAI DEVI, 5 A. 589=3 A.W. N. (1883) 128 ... 405

(30) *Transfer to Collector—Appeal to High Court from orders of Collector—Jurisdiction—Civil Procedure Code*, s. 320.—Orders passed by a Collector in the exercise of the powers conferred on him under s. 320 and the following sections of the Civil Procedure Code, relating to the execution of a decree of a Civil Court, after transfer of the decree to him under s. 320 are not appealable to the High Court.

Held, therefore, that the order of a Collector disallowing an application by the judgment-debtor that the amount of the decree might be satisfied by the temporary transfer of his immoveable property, and ordering the sale of such property, and the order of a Collector confirming a sale, were not appealable to the High Court. MADHO PRASAD v. HANSA KUAR, 5 A. 314 (F.B.)=3 A.W.N. (1883) 59 ... 217

(31) *Twelve years' old decree—Act* X *of* 1877 (*Civil Procedure Code*), s. 230—*Act* XIV *of* 1882 (*Civil Procedure Code*), *s.* 230.—Where an application was made under s. 230 of the Civil Procedure Code, 1877, as amended by Act XII of 1879, for execution of a decree more than twelve years old and the application was granted, *held* that a subsequent application for execution of the decree under s. 230 of the Civil Procedure Code, 1882, should have been refused, since the decree had been once allowed the benefit of the three years' grace under the last paragraph of s. 230 of the Code of 1877, and then became dead or unexecutable.

Held, that there is nothing in the Code of 1882 to justify the conclusion that it was intended to revive decrees which had become dead before it became law, and that here the decree-holder's right having already become dead before the enactment of the present Code, the passing of that Code could not bring that right into existence again. BHAWANI DAS v. DAULAT RAM, 6 A. 388=4 A.W.N. (1884) 134=8 Ind. Jur. 693 ... 701

(32) See ACT XXVII OF 1860, 5 A. 212.

(33) See CIVIL PROCEDURE CODE (1877), 5 A. 94 ; 5 A. 492.

(34) See CIVIL PROCEDURE CODE (1882), 6 A. 172 ; 6 A. 173.

(35) See LIMITATION ACT (XV OF 1877), 5 A. 201 ; 6 A. 366.

(36) See MORTGAGE (GENERAL), 6 A. 255.

(37) See STEP-IN-AID OF EXECUTION, 5 A. 344.

Execution Sale.

(1) *Purchaser at execution sale—Suit for possession of property—Proof of title—Sale certificate—Act VIII of* 1859, ss. 257, 259.—*Held*, that it was not incumbent on a purchaser at an execution-sale under Act VIII of 1859,

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which was confirmed in his favour under that Act, when suing for possession of the property, to produce a sale certificate, but it was competent for him to prove his purchase *aliunde*. The confirmation of the sale in his favour was *prima facie* evidence of his title to the property, and was sufficient to pass such title to him, of which a certificate, if afterwards obtained by him, would merely be evidence that the property had so passed. JAGAN NATH v. BALDEO, 5 A. 305 (F.B.) = 3 A.W.N. (1883) 48 ... 210

(2) *Sale in execution of decree—Civil Procedure Code, s.* 306—*Failure to pay deposit of purchase-money required by that section.*—The person declared to be the purchaser of property put up for sale in execution of a decree did not, as required by s. 306 of the Civil Procedure Code, pay a deposit of twenty-five per centum on the amount of his purchase immediately after such declaration, but on a date subsequent to the date on which the property was put up for sale. *Held*, that there was no sale at all of the property. INTIZAM ALI KHAN v. NARAIN SINGH, 5 A. 316 = 3 A.W.N. (1883) 38 ... 219

(3) *Sale set aside—Return of purchase-money—Suit by purchaser for purchase-money—Civil Procedure Code, ss.* 313, 315.—*Per* STRAIGHT, OLDFIELD and TYRRELL, JJ.—That the words in s. 315 of the Civil Procedure Code, "no saleable interest," mean "nothing to sell," and are not intended to confine the cases in which a purchaser at an execution-sale shall be entitled to receive back his purchase-money to those in which the judgment-debtor, though having an interest, such interest is, by prohibition of law or for some other reason, unsaleable.

Held by the Full Bench, that a purchaser at a sale in execution of a decree can maintain a suit against the decree-holder for recovery of his purchase-money, when it is found that the judgment-debtor had no saleable interest in the property sold, and he is not limited to the special procedure in the execution department mentioned in s. 315. MUNNA SINGH v. GAJADHAR SINGH, 5 A. 577 (F.B.) = 3 A.W.N, (1883) 130 = 8 Ind. Jur. 264 ... 398

(4) *Set aside—Suit by purchaser for interest in purchase-money—Act* VIII *of* 1859 (*Civil Procedure Code*)—*Act* X *of* 1877 (*Civil Procedure Code*), *s.* 315.—A judgment-debtor, whose property had been sold in execution of the decree, under Act VIII of 1859, appealed from the order disallowing his application to set aside the sale, after Act X of 1877 (Civil Procedure Code) came into force. The appellate Court set aside the sale. The purchaser sued the decree-holder for interest on the purchase-money and the expenses of the sale, the purchase-money having been returned to him, under the order of the Court executing the decree, without interest and less such expenses.

Held by the Full Bench that the provisions of Act X of 1877, and not of Act VIII of 1859, were applicable to the determination of the matter in dispute in the suit.

Held by the Divisional Bench (STRAIGHT and TYRRELL, JJ.) that, with reference to the ruling of the Full Bench, the suit was maintainable.

Held also by the Divisional Bench that, under the circumstances of the case, the plaintiff ought not to be granted the relief sought. RAGHUBAR DAYAL v. THE BANK OF UPPER INDIA, LIMITED, 5 A. 364 (F. B.) = 3 A.W.N. (1883) 51 ... 252

(5) *Suit by judgment-debtor to set aside execution sale—Question for Court executing decree—Fresh suit—Civil Procedure Code, s.* 244.—A judgment-debtor sued the decree-holder for recovery of possession of certain land which had been sold in execution of the decree, and to set aside the sale on the ground that the land was not liable under s. 9 of the N.-W. P. Rent Act to sale in execution of decree. *Held* that the question at issue between the parties was clearly one relating to the execution and satisfaction of the decree, and that the suit was therefore barred by the provisions of s. 244 of the Civil Procedure Code. JANKI SINGH v. ABLAKH SINGH, 6 A. 393 = 4 A.W.N, (1884) 135 ... 705

(6) *Suit to set aside—Suit for possession of immoveable property—Act* XV *of* 1877 (*Limitation Act*), *sch. ii, No.* 12.—The plaintiff, alleging that certain immoveable property belonging to him had been sold in execution of a decree as the property of another, sued the purchaser to have the sale set

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aside, and to recover possession of the property. *Held*, that the suit was one for possession of immoveable property to which the period of limitation of twelve years was applicable. NATHU v. BADRI DAS, 5 A. 614=3 A. W.N. (1883) 165. ... 424

(7) *Suit to set aside—Suit for possession of immoveable property sold in execution of decree—Act* IX *of* 1871 (*Limitation Act*), *sch. ii, No.* 14—*Act* XV *of* 1877 (*Limitation Act*), *sch. ii, No.* 12.—*P* obtained a decree against *M* in April, 1874, in execution of which property belonging to the latter was sold in 1874, 1875 and 1876. In March, 1880, this decree was reversed by the Court of last appeal. In February, 1881, *M* sued to set aside the sales of his property in execution of the decree, and for possession of the property. *Held* that, both under No. 14, sch. ii of the Limitation Act, 1871, and No. 12, sch. ii of the Limitation Act, 1877, the suit was barred by limitation. MUHAMMAD ASHGAR ALI v. MUHAMMAD ZAIN-UL-ABDIN, 5 A. 573=3 A.W.N. (1883) 158 ... 395

(8) See FRAUD, 6 A. 406.

Ex parte Decree.

Review of judgment—Civil Procedure Code, s. 623.—It is competent to a party against whom an *ex parte* decree has been made to apply for review of judgment. BIBI MUTTO v. ILAHI BEGAM, 6 A. 65=8 Ind. Jur. 321 ... 476

Ex parte Judgment

Ex parte *judgment, application for an order to set aside—Civil Procedure Code, s.* 108 -*Limitation—Act* XV *of* 1877 (*Limitation Act, sch. ii, No.* 164)—"*Execution of process for enforcing the judgment*".—An *ex parte* order was made against *S*, to whom a certificate under Act XL of 1858 had been granted, revoking such certificate, and granting it to A, and directing *S* to deliver the property of the minor to *A* and to render an account of all moneys received and disbursed within thirty days. In pursuance of this order a precept or injunction was served on *S*, informing her that the certificate granted to her had been revoked, and had been granted to *A*, and directing her to deliver the property of the minor to *A*, and to render him accounts of all moneys realized and expended within one month. *Held* that such precept or injunction was a "process for enforcing" such *ex parte* order, and that it was "executed" when it was served on *S*, within the meaning of art. 164 of the Limitation Act, 1877. SUNRAJ KUARI v. AMBIKA PRASAD SINGH, 6 A. 144=4 A.W.N. (1884) 1 ... 532

False Charge.

(1) *Act* XLV *of* 1860 (*Penal Code*), *ss.*182, 211.—*J* complained to the Police that she had been raped by *R*. The Police having reported the charge to be false, criminal proceedings were instituted against her under s. 182 of the Penal Code. In the meantime *J* made a complaint in Court, again charging *R* with rape. This complaint was not disposed of, but the proceedings against her under s. 182 of the Penal Code were continued, and she was eventually convicted under that section.

Held, setting aside the conviction and directing that *J's* complaint should be disposed of, that such complaint should have been disposed of before proceedings were taken against her under s. 182. EMPRESS v. JAMNI, 5 A. 387=3 A.W.N. (1883) 71 ... 268

(2) See PENAL CODE (ACT XLV OF 1860), 5 A. 215.

Forgery.

(1) *Making false entries in account-book with the intention of concealing criminal breach of trust—Act* XLV *of* 1860 (*Penal Code*), *ss.* 24, 25, 465.—Where a clerk, who had committed criminal breach of trust, subsequently made false entries in an account-book, with the intention of concealing such offence, *held* that the making of such entries did not constitute the offence of forgery, and he had therefore been improperly convicted under s. 465 of the Indian Penal Code. EMPRESS OF INDIA v. JIWANAND, 5 A. 221 =2 A.W.N. (1882) 236=7 Ind. Jur. 541 ... 151

(2) *Public servant framing incorrect record—Act* XLV *of* 1860 (*Penal Code*), *ss.* 218, 463.—A public servant, in charge as such of certain documents, having been required to produce them, and being unable to do so,

Forgery—(*Concluded*). PAGE

fabricated and produced similar documents, with the intention of screening himself from punishment. *Held*, that such fabricated documents not being records or writings with the preparation of which such public servant as such was charged, he could not legally be convicted under s. 218 of the Penal Code, nor, such documents not being forgeries, as they were not made with the intent specified in s. 463, could he be legally convicted under s. 471. EMPRESS v. MAZHAR HUSAIN, 5 A. 553=3 A.W.N. (1883) 133 ... 381

(3) *Using a "forged" document—Using "false" evidence—"Dishonestly"—"Fraudulently"—Correction of mistake in document—Act* XLV *of* 1860 (*Penal Code*), ss. 24, 25, 196, 464, 470, 471—*Further inquiry by appellate Court—Act* X *of* 1872 (*Criminal Procedure Code*), s. 282.—The vendees of a plot of land altered the number by which the land was described in the deed of sale, doing so because such number was not the right number. Having made this alteration they used the deed of sale as evidence in a suit. *Held*, that the alteration of the deed did not amount to "forgery" within the meaning of s. 463 of the Indian Penal Code, nor could the deed after the alteration be designated a "forged document" as contemplated by s. 470, the intention to cause wrongful loss or wrongful gain or to defraud being wanting; nor could it be said that in using the deed, the vendees were "dishonestly" or "fraudulently" using as genuine a "forged document," and therefore the use by the vendees of the deed did not constitute an offence under s. 471 of the Indian Penal Code. Further, that their use of it did not render them liable to conviction under s. 196 of that Code.

Observations as to the exercise by an appellate Court of the powers conferred on it by s. 282 of Act X of 1872 (Criminal Procedure Code). EMPRESS OF INDIA v. FATEH, 5 A. 217=2 A.W.N. (1882) 227 ... 148

Fraud.

Suit for relief on the ground of fraud—Suit to set aside execution-sale—Suit for possession of immoveable property—Act XV *of* 1877 (*Limitation Act*), *sch.* ii, *Nos.* 12, 95, 144—*Pleadings—Verbal admissions—Knowledge of fraud—Evidence—Burden of proof.*—*Z* and his three minor sons were joint owners of a village. This *Z* hypothecated by deed of simple mortgage to *J*. Subsequently *Z* executed another deed of mortgage to *J*, part of the consideration whereof was the cancellation of the former bond, which was paid off and extinguished accordingly. *J*, however, fraudulently caused it to appear from the novating document that the former mortgage was still alive, and, after the death of *Z*, put the bond in suit against *Z*'s widow who, being ignorant of the fraud, confessed judgment as guardian of her minor sons. The entire rights and interests of *Z*'s heirs were sold in execution of the decree so obtained by *J*. Subsequently the fraud was discovered, and *Z*'s sons brought a suit to set aside the execution-sale, and to recover possession of the property first mortgaged. In regard to three-fourths of this property, they prayed that "possession might be awarded to them by establishment of their right and share, by amendment of the revenue papers." In regard to the remaining one-fourth, they prayed for possession "by right of inheritance to *Z*," by cancelment of the execution-sale, and of the fraudulent decree. They further alleged that they had first become aware of the fraud upon the day when they obtained from the registration office a copy of the novating instrument in which the fraudulent entries were contained.

Held that pleadings in the Indian Courts must not be construed with the same strictness as in English Courts; that, although in an informal and loose way, what the plaint substantially set out, as the primary relief sought, was the entire avoidance of the decree and the proceedings resulting therefrom as vitiated by fraud, and, as secondary relief, to be granted if the Court should not see its way to setting aside those proceedings, a declaration that they took effect only as regards one-fourth of the property.

Held, also, that the law of limitation applicable to the case was not that contained in art. 12, nor in art. 144, but that contained in art. 95 of sch. ii of Limitation Act, inasmuch as fraud vitiates all things, and prevents the application of any other law of limitation than that specially provided for relief from its consequences.

Fraud—(*Concluded*). PAGE

Held, again applying the principle above enunciated as to the construction of pleadings, that the defendants could not be held, by reason of their not having denied it, to have admitted the truth of the plaintiffs' allegation as to the date upon which knowledge of the fraud was acquired.

Held also, in reference to the terms of certain statements made by the plaintiffs' pleader, from which the lower appellate Court had inferred that the plaintiffs must have become aware of the fraud at a date earlier than that alleged by them, that verbal admissions made by the pleader of a party to a suit must be received with caution, must be taken as a whole, and must not be unduly pressed.

Held, further, that the knowledge predicated by the terms of art. 95 of sch. ii of the Limitation Act is not mere suspicion, but such definite knowledge as enables the person defrauded to seek his remedy in Court.

Held, under the circumstances of the present case, that the burden of proving such knowledge on the part of the plaintiffs, prior to the date alleged by them, lay upon the defendants. NATHA SINGH v. JODHA SINGH, 6 A. 406=4 A.W.N. (1884) 140 ... 714

Fraudulent Decree.

See LIMITATION ACT (XV OF 1877), 5 A. 294.

Further Enquiry.

See FORGERY, 5 A. 217.

Ghat.

Right to sue for collecting religious offerings.—Certain Brahmans, on the allegation that a custom existed whereby they had an exclusive right to use a *ghat* for the purpose of collecting alms, the land of which did not belong to them, sued for a declaration of their exclusive right to the use of the *ghat* for that purpose. *Held* that, as the plaintiffs had no right of any kind in the land of the *ghat*, the suit was not maintainable. HUSAIN ALI v. MATUKMAN, 6 A. 39=3 A.W.N. (1883) 185 ... 456

Gift.

Condition subsequent—Void condition.—To a gift divesting the donor of all his interest in certain property, a condition cannot afterwards be attached.

Where a gift completed by transfer rested on a valid consideration at the time when it was made: *Held* that even assuming that a condition could be afterwards imported into the transaction, and that condition an immoral one, this would not invalidate the gift, the general rule of law being that a gift to which such a condition is attached remains a good gift while the condition is void.

A gift of villages was complete, being followed by transfer of possession. Afterwards, in a petition to the Collector for "*dakhil kharij*" between the parties, the donor, stating the gift, added that it was on certain conditions. *Held*, that the petition must be treated as ineffective for the purpose of adding any condition. THE SAME v. THE SAME, 6 A. 313 (P.C.)=11 I.A. 44=4 Sar. P.C.J. 493=8 Ind. Jur. 160 ... 649

Gratuity.

See CIVIL PROCEDURE CODE (1882), 6 A. 172, 6 A. 634.

Guardian and Minor.

Security-bond—Suit on minor's behalf against guardian's sureties—Assignment of security-bond—Act XL of 1858—*Act IX of* 1861—*Act X of* 1865, s. 257. —*B*, having been granted by a District Court a certificate under Act XL of 1858 in respect of the estate of a minor, the Judge of such Court called on her to furnish security, and certain persons accordingly gave security-bonds to the Judge on her behalf. Subsequently *B*'s certificate was taken from her, and was granted to *A*, who brought a suit on the minor's behalf against *B*'s sureties for the value of the property intrusted to *B*. The security-bonds in question were not assigned by the Judge to *A*.

Held, that, inasmuch as the plaintiff was seeking to enforce contracts which were never made with him or any other person in the character of legal representative of the minor, he had no legal *status* to maintain the suit.

Guardian and Minor—(*Concluded*). PAGE

Also, that no equitable rights were created in the minor by the bonds, which would render the suit maintainable.

Quære.—Whether the Judge of a District Court is competent to call upon a person to whom he grants a certificate under Act XL of 1858 to furnish security; and whether where he has done so, and security-bonds have been given to him, he can assign them in the manner provided in s. 257 of the Succession Act, 1865. AMARNATH v. THAKUR DAS, 5 A. 248=3 A. W.N. (1883) 12 ... 170

Hindu Law.

1.—ADOPTION.
2.—ALIENATION.
3.—DEBTS.
4.—GUARDIAN AND MINOR.
5.—INHERITANCE.
6.—JOINT FAMILY.
7.—MAINTENANCE.
8.—PARTITION.
9.—REVERSIONER.
10.—STRIDHAN.
11.—WIDOW.

——1.—Adoption.

Dakhani Brahmans—Brother's son—Ceremonies.—In the case of Dakhani Brahmans the "*datta homam*" or any other religious ceremony is not required to give validity to the adoption of a brother's son: the giving and taking of the child is sufficient for that purpose. ATMA RAM v. MADHO RAO BY HIS NEXT FRIEND BALKISHEN, 6 A. 276 (F.B.)=4 A.W.N. (1884) 82=8 Ind. Jur. 583 ... 623

—— 2.—Alienation.

(1) *By Hindu widow—Reversionor—Acquiescence—Right to sue—Daughter.*—A reversioner of the estate of a deceased Hindu sued for cancellation of a sale-deed executed by the widow, on the ground that it was executed without legal necessity, and for a declaration that the alienation was void and incapable of affecting his right of succession. A daughter of the deceased was still living, and had taken no steps to set aside the sale.

Per MAHMOOD, J., that mere delay by a reversioner in instituting a suit to set aside an illegal sale made by a childless Hindu widow, cannot be understood to amount to acquiescence in the sale. The acquiescence which would entitle a more remote reversioner to maintain the suit must be such as would amount to an equitable estoppel, precluding the first reversioner from contesting the validity of the sale made by the widow.

Also *per* MAHMOOD, J., that the existence of female heirs, whose right of succession cannot surpass a "widow's estate," does not affect the status of the nearest presumptive reversionary heir to the *full ownership* of the estate, and that such presumptive heir can maintain a suit for declaratory relief, such as was prayed for in the present suit, irrespective of the question of collusion or concurrence by such female heirs in the alienation by a childless Hindu widow or other female heir holding a similar estate.

Per OLDFIELD, J., that, the nearest reversioner being the widow's daughter, who herself could only take a limited interest in the property, and who had herself taken no steps to set aside the sale, the Court would be exercising a proper discretion in permitting the plaintiff, as the next reversioner after the daughter, to bring the suit. BALGOBIND v. RAMKUMAR, 6 A. 431=4 A.W.N. (1884) 155=9 Ind. Jur. 43 ... 731

(2) *By Hindu widow—Reversioner—Right to sue—Daughters.*—The reversioners of the estate of a deceased Hindu sued his widow to set aside an alienation of the property by her, as not justified by legal necessity. The deceased had two daughters, who were still living.

Held that, in the absence of any proof of collusion of connivance between the widow and her daughters, the plaintiffs, in the presence of the latter, were not competent to maintain the suit. MADARI v. MALKI, 6 A. 428 =4 A.W.N. (1884) 151 ... 729

Hindu Law—2.—Alienation—(*Concluded*). PAGE

(3) *Transfer of shares in joint family estate, by the head of the family and his son, to minor grandson—Construction of gift partial failure not invalidating the whole.*—In joint family, under the Mitakshara, consisting of a grandfather, his son, and that son's son, in pursuance of a family arrangement, the first, with the consent of the second, made by deed a gift of the whole ancestral estate to the third, including with him possible brothers that might be born thereafter. The father, in lieu of his share in the ancestral estate, received money for the payment of debts incurred by him. Possession was given to the minor, through his mother, appointed by the deed of gift to be his guardian. The minor then died, and the mother retained possession.

The family estate, on the death of the grandfather, was attached by one of the father's creditors, who held a decree against him; and, in a suit to avoid the deed of gift, it was *held*, that the transfer to the minor, having been made in good faith, and for good consideration, was valid; and that, though the gift to possible brothers could not take effect, the gift by the head of the family, with the consent of the son, to the next generation, of which the only existing member, *viz.*, the minor grandson, was put into possession, was valid. It was not a partition; (for according to the Mitakshara, Chap. I, s. V., verse 31) there could be no partition directly between grandfather and grandson while the father was alive. But it was a family arrangement, partaking so far of the nature of a partition that the father received a portion, and was thenceforth totally excluded; and, *quoad ultra*, the grandfather surrendered his interest to the grandson. ROY BISHEN CHAND v MUSST. ASWAIDA KOER, 6 A. 560 (P.C.) = 11 I.A. 164 = 4 Sar. P.C.J. 512 = 8 Ind. Jur. 326 ... 821

(4) See HINDU LAW (JOINT FAMILY), 5 A. 384; 6 A. 193.

(5) See HINDU LAW (WIDOW), 5 A. 310 (F.B.); 6 A. 116; 6 A. 288.

——3,—Debts.

See HINDU LAW (JOINT FAMILY), 6 A. 234.

——4,—Guardian and Minor.

Sale of minor's property—Legal necessity.—Where a guardian conveyed the property of her minor son by a deed of sale in which she did not in terms describe herself as his guardian,—*held* that the omission was immaterial, since it clearly appeared from the deed that it was the minor's property which formed the subject of sale.

A widow, guardian of her minor son, being left after her husband's death in a state of extreme poverty, sold the entire property of the minor for less than one-fourth of its real market value, by a sale deed reciting that the object of the sale was the minor's maintenance and marriage. It was found that the sale was obtained by the vendee by taking advantage of the guardian's poverty, and that there was nothing to show that, in purchasing the property, he had satisfied himself of the actual existence of the necessities for which the sale purported to be made.

Held that the recital in the deed of the objects of sale was in itself no evidence of the necessity of the alienation.

Held also, that the needy circumstances of the minor did not, by themselves, constitute a sufficient legal necessity for such an alienation. Under the Hindu Law, the maintenance or marriage of a minor may be a legitimate cause for the alienation of his property by the guardian, but cannot justify a Court of Equity in upholding a bargain obviously imprudent and reckless. The best test is whether the alienation would have been reasonably and prudently made by the minor himself, had he been of full age.

Held further, that upon such an alienation being set aside in consequence of a suit brought by the minor, the vendee was entitled to be recouped by the plaintiff to the extent of any portion of the purchase-money which had been appropriated to the latter's benefit. MAKUNDI v. SARABSUKH, 6 A. 417 = 4 A.W.N. (1884) 144 ... 721

Hindu Law—5.—Inheritance. PAGE

(1) *Insanity.*—A person is disqualified under Hindu Law from succeeding to property, if he is insane when the succession opens, whether his insanity is curable or incurable.

Under the same law, when property has once vested by succession in a person, his subsequent insanity will not be a ground for its resumption.

Under the same law, although a person becomes qualified to succeed to property, after the disqualification of insanity ceases, he cannot resume property from an heir who has succeeded to it in consequence of his disqualification when the succession opened. DEO KISHEN v. BUDH PRAKASH, 5 A. 509 (F.B.) = 3 A.W.N. (1883) 105 = 8 Ind. Jur. 203 ... 351

(2) *Mitakshara—Sister.*—According to the law of the Mitakshara none but females expressly named can inherit, and the sister of a deceased Hindu, not being so named, is therefore not entitled to succeed to his estate. JAGATNARAIN, GUARDIAN OF JAGESRA KUARI, MINOR v. SHEO DAS, 5 A. 311 (F.B.) = 3 A.W.N. (1883) 51 = 7 Ind. Jur. 671 ... 215

(3) *Relinquishment—Admission on pleadings.*—A plaintiff suing two defendants, *N* and *L*, for the possession of certain property by right of inheritance, admitted in his plaint the right by inheritance of the defendant *M* to a moiety of the property, and only made him a defendant because he would not join in bringing the suit. The claim, however, was for the entire property. The defendant *M* filed a written statement setting forth that he had long ago willingly resigned all his rights in favour of the plaintiff, and that the suit had been instituted with his consent.

Held that this statement was only an admission by *M* of the plaintiff's title which could not be used against the other defendant *L*, so as to entitle the plaintiff to a decree for the entire estate; that since *L* did not set up *M*'s title to defeat the plaintiff, he could not be affected by *M*'s disclaimer; and that the plaintiff could not be allowed in this suit to obtain *M*'s share as his representative, for that would be to decree him the share on a title he never set up. LACHMAN SINGH v. TANSUKH, 6 A. 395 = 4 A.W.N. (1884) 136 ... 706

——6.—Joint Family.

(1) *Alienation of ancestral property by father—Suit by son to recover his interest—Obligation of son to pay father's debts—Burden of proof.*—Where a Hindu, a minor, governed by the law of the Mitakshara, sued to set aside an alienation of ancestral property by his father, on the ground that such alienation was made to satisfy a debt contracted for immoral purposes: *Held* by STRAIGHT, J., that the burden of proving that the debt was contracted for such purposes, and that the defendant had notice that it was contracted for such purposes, lay on the plaintiff, and that the plaintiff was not discharged from such burden, because he had proved generally that his father had been guilty of extravagant waste of the ancestral property.

Held also by STRAIGHT, J., that it could not be presumed from such conduct of the father that the debt in question had been contracted for immoral purposes.

Per STUART, C.J., that the plaintiff's father having been guilty of extravagant waste of the ancestral property, the burden of proof in this case lay on the defendant. As, however, there was reason to suspect that the suit was a collusive one, brought at the instance of the plaintiff's father, if not really by him, and it was very doubtful whether the alienation was objectionable on the ground taken in the name of the plaintiff, it would not be safe to give the plaintiff a decree. HANUMAN SINGH, MINOR, BY HIS MOTHER AND GUARDIAN GAURA v. NANAK CHAND, 6 A. 193 = 4 A.W.N. (1884) 23 = 8 Ind. Jur. 450 ... 566

(2) "*Ancestral property*"—*Right of occupancy at fixed rates—Act* XII *of* 1881 (*N.-W.P. Rent Act*), *s.* 9—*Liability of son for father's debts—Purchaser at execution sale—Notice.*—A decree was made against a Hindu, governed by the law of the Mitakshara, for money which he had criminally misappropriated. The transferee by sale of the decree brought to sale in execution thereof the judgment-debtor's right of occupancy in certain land as a tenant at fixed rates. The judgment-debtor's two sons brought a suit against the purchaser to recover two-thirds of the holding. *Held*

Hindu Law—6.—Joint Family—(*Continued*). PAGE

that the right of occupancy at fixed rates in such land was ancestral property, that is, property in which under Hindu Law the sons took a vested interest by birth.

Held also, that as the decree was not one to satisfy which the family property could be sold, being a mere money-decree against the father personally, and for a debt which it was not the duty of the sons to pay, and as the purchaser was bound to have satisfied himself as to whether the family property was liable to be sold in satisfaction of the decree, the purchaser could not, on the principles laid down in *Girdharee Lall* v. *Kantoo Lall* and *Suraj Bansi Koer* v. *Sheo Prasad Singh*, be protected as a *bona fide* purchaser for value, without notice that the family property was not liable to be sold in satisfaction of the decree, but must be taken to have had constructive notice of that fact. MAHABIR PRASAD, MINOR, BY NEXT FRIEND PARBATI v. BASDEO SINGH, 6 A. 234=4 A.W.N. (1884) 47=8 Ind. Jur. 525 ... 594

(3) *Execution of bond by father on minor son's behalf—Registration of bond without the minor being represented—Act* III *of* 1877 (*Registration Act*), s. 35—*Minor son's right in ancestral property.*—At the registration of a bond executed by *H* and *B*, and by *H* on behalf of *J*, a minor, the minor was not represented for the purpose of registration by any one. *Held*, that the bond should not affect any immoveable property comprised therein in so far as *J* was interested in the same. SHANKAR DAS v. JOGRAJ SINGH, 5 A. 599=3 A.W.N. (1883) 155 ... 414

(4) *Mitakshara—Impartible Raj—Power of Rajah to alienate—Primogeniture—Suit by eldest son to set aside alienation.*—Where there is no local or family custom overriding the general law, the succession to a Raj or impartible zamindari, according to Hindu Law, goes by primogeniture.

In the absence of any custom to the contrary, a Raj or impartible zamindari is, according to Hindu Law, not separate property but joint family property.

According to the law of the Mitakshara, joint family property cannot be alienated by any member of the family, save for urgent and necessary expenses of the family, without the consent of all the members.

Held, therefore, where the holder of an impartible Raj made an absolute gift of a portion of the estate appertaining to the Raj to one of his wives, "in token of his love for her," and his eldest son sued to set aside the alienation, that, the parties being members of a joint Hindu family, and governed by the law of the Mitakshara, the son was entitled to bring the suit, and that the alienation, not being made for necessary purposes, was void.

Held also, on the evidence in this case, that a custom entitling the holder of the Raj to make such an alienation was not established. BHAWANI GHULAM v. DEO RAJ KUARI, 5 A. 542=3 A.W.N. (1883) 121 ... 374

(5) *Mitakshara—Joint family property—Alienation by a member of his share.*—One member of a joint and undivided Hindu family, governed by the law of the Mitakshara, cannot mortgage or sell his share of the family property without the consent, express or implied, of the other members. RAMA NAND SINGH v. GOVIND SINGH, 5 A. 384=3 A.W.N. (1883) 61=8 Ind. Jur. 102 ... 266

(6) *Joint property—Execution of decree against one brother—Rights of other brothers.*—*J* purchased a 10 biswas share in a village, and *Y* purchased a village, both of which properties were, at the time they were respectively purchased, mortgaged to secure one debt. *J* died, leaving four sons. After *J*'s death *Y*, whose village had been sold in execution of a decree for the sale of the mortgaged property, sued *R*, eldest son of *J* for rateable contribution, in respect of the debt secured by the mortgage, and he obtained a decree for Rs. 210 and costs, and directing the 10 biswas share to be sold in satisfaction of the decretal amount. Upon attachment of the share in execution of the decree, the three younger sons of *J* claimed 7½ biswas as belonging to them, and prayed that the same might be released from attachment. This objection was disallowed as made too late, and the sale in execution of the decree took place. The sale certificate showed that the property sold was "the rights and interests" of *R* in the

Hindu Law—6.—Joint Family—(*Concluded*). PAGE

10 biswas. The three younger sons of *J* subsequently brought a suit to establish their right to 7½ biswas out of the 10, and to set aside the sale to that extent.

Held that the shares of the plaintiffs were unaffected by the sale, and all that passed thereunder to the purchaser was the 2½ biswas share of the judgment-debtor. The plaintiffs were not bound by the decree in a suit to which they were not parties, and by a sale to which they objected, and in the teeth of the terms of the sale certificate put forward to defeat them. SUNDAR LAL v. YAKUB ALI, 6 A. 362=4 A.W.N. (1884) 117 ... 683

(7) *Separation—Joint property — Act* XV *of* 1877 *(Limitation Act), sch.* ii, *Nos.* 62, 127.—After the separation of *P* and *T*, two members of a joint Hindu family, certain bonds continued to be held by them jointly. Four years after the separation, *P* obtained a decree in respect of one of these bonds (which had been obtained in his name alone), and realized the amount decreed in the same year. Eight years afterwards, *T*, brought a suit against *P* claiming to be entitled to a share in the money realized.

Held that art. 62, and not art. 127, of sch. ii of the Limitation Act, was applicable to the suit. THAKUR PRASAD v. PARTAB, 6 A. 442=4 A.W.N. (1884) 154 ... 739

——7.—Maintenance.

(1) *Hindu widow—Maintenance—Suit for maintenance fixed by decree—Small Cause Court suit—Jurisdiction—Liability of purchaser of ancestral property.*—A suit by a Hindu widow for arrears of maintenance, based on a decree charging immoveable property with the payment of the maintenance allowance, is not a suit of the nature cognizable in a Court of Small Causes.

A decree obtained by a Hindu widow for maintenance directed that certain ancestral property, which *D* and *S* had purchased, should be liable in their hands for the payment of the maintenance allowance. *Held*, that the widow was not entitled, by virtue of such decree, to recover arrears of the allowance from *D* and *S* personally, after such property had left their hands. DHARAM CHAND v. JANKI, 5 A. 389=3 A.W.N. (1883) 73=8 Ind. Jur. 103 ... 270

(2) *Hindu wife—Maintenance—Charge on husband's estate—Transfer of estate for payment of debts.*—The *bona fide* purchaser for value of the estate of a Hindu husband, sold in order to satisfy the husband's debts, does not take such estate subject to the wife's maintenance, even if such maintenance is fixed and charged on the estate. GUR DAYAL v. KAUNSILA, 5 A. 367=3 A.W.N. (1883) 65=8 Ind. Jur. 100 ... 254

(3) *Illegitimate son.*—According to Hindu law and usage, illegitimate sons are entitled to maintenance from their father, and his estate is liable for its payment.

It is immaterial whether the illegitimate sons have been begotten on a female slave or on a concubine.

The test by which the continuance of the right to receive maintenance must be decided, is not the age of the illegitimate descendant, or his capacity to earn his own livelihood, but obedience to the head of the family. This test cannot be applied till he has reached full age. By docility or obedience, in the sense of the texts, is meant the rendering to the head of the family such reasonable service as is ordinarily rendered by cadets of a family in that station of life to which the parties belong. HARGOBIND KUARI v. DHARAM SINGH, 6 A. 329=4 A.W.N. (1884) 100=8 Ind. Jur. 628 ... 659

(4) *Widow—Daughter—Maintenance — Residence — Marriage expenses.*—*J*, a Hindu, embraced the Muhammadan religion, and married a Muhammadan woman, whom he took to live with him. At the time of his conversion, he had a Hindu wife who, together with her minor daughter, now instituted a suit against him, praying (1) for an allowance by way of maintenance, (2) that the allowance might be fixed as a charge on specific property belonging to the defendant, (3) for an order compelling the defendant to provide the plaintiffs with a separate house for their residence, and (4) that a sum of Rs. 4,000 might be awarded to them, to defray the marriage expenses of the minor plaintiff.

Hindu Law—7.—Maintenance—(*Concluded*). PAGE

Held that the defendant ought not to be compelled to provide residence for the plaintiffs, inasmuch as the allowance awarded to them should cover all such expenses as maintenance and house-rent.

Held that the claim of Rs. 4,000 for the minor plaintiff's marriage expenses should be rejected, since it was not shown that any marriage expenses had been incurred or were at present required for her, and since, if she lived to reach a marriageable age, the matter would then be in the hands of her guardian.

Held further, that the right of the wife and daughter to be maintained out of the husband's and father's property was undoubted, and that when the Court has made an order directing a sum to be paid by way of maintenance, it has undoubtedly the power to ensure the enforcement of its order, and this could best be done by fixing the allowance to be a charge on specific property. MANSHA DEVI v. JIWAN MAL *alias* ABDUL RAHMAN, 6 A. 617=4 A.W.N. (1884) 192 ... 860

(5) See HINDU LAW (WIDOW), 6 A. 632.

——8.——Partition.

(1) *Grandson—Interest in ancestral property—Right to enforce partition.*—In a joint Hindu family governed by the Mitakshara Law a grandson has by birth a vested interest in ancestral property, which entitles him to enforce partition in the lifetime of his father and grandfather; and such interest is saleable in execution of decree. JOGUL KISHORE v. SHIB SAHAI, 5 A. 430 (F.B.)=3 A.W.N. (1883) 102=8 Ind. Jur. 149 ... 297

(2) *Hindu widow—Adverse possession—Limitation—Reversioners—Cause of action—Act* I *of* 1877 (*Specific Relief Act*), s. 42—*Joint Hindu family—Partition.*—On the death of *P*, a Hindu widow, who had been in possession of the estate of her deceased husband, *D*'s daughter *B* was entitled to succeed to the estate, if it were *D*'s separate property. *S*, however, alleging that the estate was ancestral property, to which he was entitled to succeed, took possession of it. Thereupon the sons of another daughter of *D*, alleging that the estate of *D* was his separate property, that *B* was entitled to succeed to it, that they were the next reversioners, and that *B* was acquiescing in a possession on the part of *S* which was adverse to her and to them as next reversioners, sued *B* and *S* for a declaration of their reversionary right, and for possession of *D*'s estate or such relief in this respect as the Court might think fit to give. *Held*, that the plaint disclosed a right to sue on the part of the plaintiffs and a cause of action.

In order to show separation in a Hindu family, it is not necessary to establish a partition of the joint estate into separate shares or holdings; it is enough that there has been ascertainment and definition of the extent of right and interest of the several co-sharers in the whole, and of the proportion of participation each of them is to have in the income derived from the property, to effect a severance and destruction of the joint tenancy, so to speak, and to convert it into a tenancy in common.

Held, therefore, where, although the ancestral property of a Hindu family had not been formally and completely partitioned by metes and bounds, the income of it had been enjoyed by the different members of it in distinct and defined shares, that the family was not a joint and undivided Hindu family.

It being decided that *B* was entitled to the estate of *D* and that she should be in possession of it, the Court, having regard to *B*'s conduct, gave the plaintiffs a declaration of their reversionary right to *D*'s estate and directed that possession of it should be given to *B*, and, if she declined to accept possession, then that *A*, one of the plaintiffs, should be put in possession for her as manager on her behalf, and he should act under the orders and directions of the lower Court, filing accounts in, and paying the income to her, through such Court, whose receipts should be a sufficient discharge. ADI DEO NARAIN SINGH v. DUKHARAN SINGH, 5 A. 532=3 A.W.N. (1883) 117=8 Ind. Jur. 206 ... 367

——9.—Reversioners.

(1) See HINDU LAW (ALIENATION), 6 A. 428; 6 A. 431.

(2) See HINDU LAW (PARTITION), 5 A. 532.

(3) See HINDU LAW (WIDOW), 6 A. 116; 6 A. 283.

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See HINDU LAW (WIDOW), 5 A. 310 (F.B.).

——11.—Widow.

(1) *Alienation made with consent of next reversioner—Remoter reversioners.*—A gift by a Hindu widow, who has succeeded to the separate estate of her deceased husband, of such estate, is not valid and does not create a title which cannot be impeached by the remoter reversioner, because it has been made with the consent of the next reversioner. RAMPHAL RAI v. TULAKUARI, 6 A. 116 (F.B.) = 3 A.W.N. (1883) 243 ... 512

(2) *Alienation with the consent of next reversioner—Right of alienees—Remoter reversioners.*—An alienation by a Hindu widow of her husband's estate does not, because it is made with the consent of her daughter, the next reversioner, and in favour of the daughter's sons, the heirs presumptive, so far as remoter reversioners are concerned, pass anything more than the widow's interest in such estate. MADAN MOHAN v. PURAN MAL, 6 A. 288 = 4 A.W.N. (1884) 81 = 8 Ind. Jur. 587 ... 631

(3) *Daughter — Maintenance — Marriage expenses — Misjoinder.*— A Hindu widow, with her two daughters as co-plaintiffs, sued the son of her deceased husband by another wife, alleging that he was in possession of his father's property, for maintenance and for the marriage expenses of the daughters, both of whom were of marriageable age. The Court of first instance gave the plaintiffs a decree for a monthly allowance, and Rs. 540 to the widow as arrears of maintenance, and Rs. 1,000 for the marriage expenses of the daughters.

Held that, inasmuch as the mother was the natural guardian of the two other plaintiffs, and it was proper for them to reside with and be provided for by her, and the common maintenance was, so to speak, a joint matter, the suit was not, at any rate at the stage of appeal, open to objection on the ground of misjoinder of parties and causes of action ; nor, looking at the peculiar circumstances of the family, which made the mother the most natural and proper person to arrange the marriages of the two minor plaintiffs, was the prayer for marriage expenses improperly added.

Held further, that the Court of first instance should have separated the maintenance to which it considered the three plaintiffs respectively entitled, and that, as to the two minor plaintiffs, it should have declared that such maintenance should cease upon their marriage. TULSHA v. GOPAL RAI, 6 A. 632 = 4 A.W.N. (1884) 208 = 9 Ind. Jur. 155 ... 871

(4) *Immoveable property acquired from deceased uterine brother*—Stridhan—*Alienation—Husband's heirs.*—Immoveable property acquired by a childless Hindu widow from her deceased uterine brother is her *stridhan* and *stridhan* with which the heirs to her husband have nothing to do. Over such property her control is absolute and unimpeachable, and the relations of her husband have no such reversionary *status* in respect of it as will entitle them to sue to set aside an alienation of it by her. MUNIA v. PURAN, 5 A. 310 (F.B.) = 3 A.W.N. (1883) 47 = 7 Ind. Jur. 670 ... 214

(5) See HINDU LAW (ALIENATION), 6 A. 428 ; 6 A. 431.

(6) See HINDU LAW (MAINTENANCE), 5 A. 389.

(7) See HINDU LAW (PARTITION), 5 A. 532.

Holi Muharram.

Suit to restrain the use for tazias of land used for the purposes of the Holi—Cause of action—Easement—Customary right.—*A*, a Muhammadan, purchased a house adjacent to a piece of waste land, on which, after such purchase, he caused a tazia to be erected, at the time of the Muharram. *J* and others, Hindus, instituted a suit against *A*, alleging in their plaint that, for a long time previously, they had been in the habit going upon the land at the time of the Holi festival, for the purpose of burning the Holi and celebrating the ceremonies incident thereto, and praying that the defendant " be restrained from improper interference, and that the plaintiffs be put in possession, by maintaining the observance of the Holi rights, according to the ancient usage, on the land." It was found that the plaintiffs had, for a period of twenty years prior to the institution of the suit, exercised the right of going on to the land at the time of the Holi festival, without interruption or interference. It was also proved

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that neither the plaintiffs nor the defendant had any proprietary right in the land, and that it belonged to the zamindars of the *kasba*, who did not appear to object to its use by the defendant and other Muhammadans at the time of the Muharram, for the erection of tazias.

Held, that the plaintiffs' claim appeared to be a claim to a right by custom of the nature described in *Mounsey* v. *Ismay* and *Abbot* v. *Weekly*, and could not strictly be regarded as for an easement, the right not being set up in respect of any dominant tenement to which it was appurtenant, over a servient tenement subject to it.

Held further, that inasmuch as the nature of the right claimed was to come on the land for a few days at one period of the year, it by no means followed that the plaintiffs were entitled to object to the defendant's use of the land at another period; and that, looking to the extent and nature of the said right, and to the form in which the plaint was shaped, the laying of a tazia upon the land at the Muharram could not be held to be any interference with such right sufficient to afford a cause of action on which to come into Court. ASHRAF ALI v. JAGAN NATH, 6 A. 497=4 A.W.N. (1884) 136=9 Ind. Jur. 82 ... 778

Horse Race.

Betting on—See WAGE, 5 A. 443.

Hundi.

(1) *Forged hundi—Fraudulent indorsement—Estoppel.*—The *bona fide* holder for value of a forged hundi, to whom, after it had been dishonoured, it had been transferred by indorsement, by the payees, who at the time of indorsement knew that the hundi was forged, sued the payees on the hundi to recover the amount he had paid them for it. *Held* that the payees were estopped from setting up the forgery of the hundi as a bar to the suit. BISHEN CHAND v. RAJENDRO KISHORE SINGH, 5 A. 302=3 A.W.N. (1883) 50=7 Ind. Jur. 674 ... 208

(2) *Notice of dishonour—Act* XXVI *of* 1881 (*Negotiable Instruments Act*), *ss.* 93, 94, 98 (*c*).—In the absence of any local usage to the contrary it is just and equitable that the doctrine of notice of dishonour propounded in the Negotiable Instruments Act (XXVI of 1881) should be applied to a hundi in the vernacular, the "reasonable time" within which such notice is to be given being determined according to the circumstances of the case. *Held*, therefore, that where the holder of such a hundi, which had been dishonoured, sued the prior indorsers on it, without having given them such notice, and did not prove that they could not suffer damage for want of such notice, the suit must fail. MOTI LAL v. MOTI LAL, 6 A. 78=3 A.W.N. (1883) 216 ... 485

(3) *Transfer of hundi—Accommodation bill—Transferees for value—Liability of party accommodated.*—*P* drew a hundi on *S* (which *S* accepted for *P*'s accommodation), which he transferred for value to *B*, who transferred it for value to *C*, who transferred it for value to *R*. *N*, at *R*'s request, and on his behalf, presented the hundi to *S* for payment, and *S* paid it. *Held* that *S* was entitled to recover the amount of the hundi from *P*, but not from *N*. NAND RAM v. SITLA PRASAD; RAM PRASAD v. SITLA PRASAD, 5 A. 484=3 A.W.N. (1883) 62=8 Ind. Jur. 204 ... 334

Injunction (Perpetual).

To restrain ejectment of tenant—See LANDLORD AND TENANT, 5 A. 429.

Insolvency.

See STATUTE 11 AND 12 VIC., CAP. 21, 6 A. 84 (P.C.).

Insolvent.

(1) *Agreement by creditors to give time—Failure of consideration—Mortgage to creditors as security for payment of debts—Construction of instrument—Suit by creditor before expiration of time—Separate suits by creditors.*—A certain firm gave its creditors jointly, and not severally a mortgage on certain immoveable property as security for the payment of the debts due to them by the firm, the consideration for such mortgage being a promise by all the creditors not to sue the firm for their debts for a certain time. Before the expiration of such time several of the creditors sued for their

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debts. Subsequently several of the creditors brought separate suits against the firm to enforce the mortgage in respect of their debts.

Held, that the consideration for the contract of mortgage, *viz.*, the forbearance of all the creditors not to sue for their debts for a fixed time, having failed, the firm was discharged from liability on the mortgage.

Held, also, that had the contract of mortgage remained in force, it would not have been competent for individual creditors to come into Court and enforce the contract in respect of their separate debts. SIDH GOPAL v. AJUDHIA PRASAD, 5 A. 392=3 A.W.N. (1883) 75 ... 272

(2) *Creditor when to prove debt—Application by "unscheduled" creditor—Civil Procedure Code, ss. 352, 353—Meaning of "then" in s. 352.*—A judgment-debtor was declared an insolvent, and a receiver of his property appointed, under s. 351 of the Civil Procedure Code, and his creditors were ordered to come forward and prove their claims within a certain time. No creditor came forward for that purpose within such time, and in consequence the case was struck off the file, and the order appointing a receiver cancelled, and no schedule was framed under s. 352. Subsequently a creditor applied to have his name entered in such schedule. *Held*, that the applicant, notwithstanding no schedule had been framed, was an "unscheduled" creditor, and was therefore entitled, under s. 353 of the Civil Procedure Code, to make the application. MADHO PRASAD v. BHOLA NATH, 5 A. 268=3 A.W.N. (1883) 15 ... 184

(3) *Discharge from liability—Agreement to satisfy debts in full—Civil Procedure Code, s. 358.*—An insolvent, who had procured, and taken, and acted on an insolvency order, which had been granted to him, because of the withdrawal of the opposition of his creditors, by reason solely of his engagement to pay a certain sum monthly until the whole of his debts should be discharged, after his scheduled debts had been satisfied to the extent of one-third, applied under s. 358 of the Civil Procedure Code, to be declared discharged from further liability in respect of his debts. *Held* that, under the circumstances, his application had been properly refused. DOWNES v. RICHMOND, 5 A. 258=3 A.W.N. (1883) 11 ... 177

(4) *Judgment-debtor—Application by creditor to prove claim—Act XV of 1877 (Limitation Act), sch. ii, No. 178—Civil Procedure Code, ss. 352, 353.*—In July, 1878, a person was declared an insolvent under the provisions of Chap. XX of the Civil Procedure Code. Only one creditor then proved his debt, and no schedule was framed. This creditor having applied for the sale of property belonging to the insolvent, another creditor, in May, 1883, applied to prove his debt and to have his name inserted in the schedule which the Court then ordered to be framed.

Held that such application could not be treated as made under s. 353, as no schedule had been framed, but must be regarded as in the nature of a tender of proof of debt under s. 352; that it was governed by art. 178 of the Limitation Act, 1877; and that, the right to apply having accrued at the date of the declaration of insolvency, the application was beyond time. PARSHADI LAL v. CHUNNI LAL, 6 A. 142=3 A.W.N. (1883) 264 ... 530

(5) *Judgment-debtor—Civil Procedure Code, s. 344—Application to be declared an insolvent—Application not in accordance with law—Rejection of application.*—When an application to be declared an insolvent, under s. 344 of the Civil Procedure Code, was preferred, the requirements of that section had not been fulfilled, as the applicant had not been arrested or imprisoned in execution of a decree for money, nor had his property been attached in execution of such a decree. Eleven days after the application had been preferred the applicant's property was attached in execution of such a decree. One of the criditors subsequently objected to the application on the ground that when it was preferred the requirements of s. 344 had not been fulfilled. *Held* that the application should not on that ground have been dismissed. MAKHAN LAL v. GULZARI MAL, 6 A. 289=4 A.W.N. (1884) 86=8 Ind. Jur. 588 ... 632

Instalment Decree.

See EXECUTION OF DECREE, 5 A. 289.

Interest.

See MORTGAGE (REDEMPTION), 5 A. 463.

Joinder of Charges. PAGE

See STAMP ACT (I OF 1879), 5 A. 17.

Jurisdiction.

Jurisdiction of Civil Court—Resumption of rent-free grant—Suit for a declaration that land is "garden land" and for possession—Act XII *of* 1881 (*North-Western Provinces Rent Act*), *ss.* 10, 30, 95 (*a*), (*c*), (*n*).—A zamindar applied to the Revenue Court under s. 30 of the North-Western Provinces Rent Act, and obtained an order for the resumption of certain plots of land, on the finding that they were resumable rent-free grants. The occupiers of the land were ejected, and the zemindar obtained possession. Subsequently the occupiers brought a suit in the Civil Court to obtain a declaration that they held the plots in question, under a license from the zamindar's predecessor in title as orchard land, without payment of any rent or other allowance to the landlord, and that they were entitled to retain the land on this footing, so long as it should, continue to be occupied with trees. They sought to recover possession of the soil and timber, asking also for "a determination of the nature of their tenure" therein.

Held that the cognizance of the suit by the Civil Court was not barred by the provisions of s. 13 of the Civil Procedure Code inasmuch as the jurisdiction of the Civil Court to entertain it was not ousted by s. 95 of the Rent Act, since the "matter" presented by the plaintiffs was not one "on which an application of the nature mentioned in that section" could by them have been made to a Court of Revenue; clauses (*a*), (*c*) and (*n*) of the section not being applicable to the case. AJUDHIA PRASAD v. SHEODIN, 6 A. 403=4 A.W.N. (1884) 75 ... 711

Lambardar and Co-sharer.

uit by heirs of deceased co-sharer against heirs of deceased lambardar for profits—Jurisdiction—Act XII *of* 1881 (*N.-W.P. Rent Act*), *ss.* 93 (*h*), 208.—A suit by the heirs of a deceased co-sharer against the heirs of a deceased lambardar for money claimed as profits due to the deceased co-sharer by the deceased lambardar is a suit which is cognizable in the Civil Courts and not the Revenue.

Where a suit instituted in the Revenue Court is dismissed by the Court of first instance on the ground that it should have been instituted in the Civil Court, and the appellate Court affirms the decision of the first Court, the appellate Court should, under s. 208 of the N.-W.P. Rent Act, 1881, remand the case to the Civil Court competent to entertain it for disposal on the merits. AHMAD-UDDIN KHAN v. MAJLIS RAI, 5 A. 438 (F.B.)= 3 A.W.N. (1883) 69 ... 302

Landlord and Tenant.

(1) *Ejectment of tenant—Suit by tenant for declaration of right—Jurisdiction—* Res judicata—*Act* XVIII *of* 1873 (*N.-W.P. Rent Act*). *s.* 93 (*b*)—*Civil Procedure Code*, s. 13.—An occupancy-tenant, who had been ejected, under ss. 34 and 93 (*b*) of the North-Western Provinces Rent Act, on the ground that he had committed an act mentioned in those sections, which rendered him liable to ejectment, sued in the Civil Court for a declaration of his right of occupancy and to have the decree of the Revenue Court directing his ejectment declared of no effect, on the ground that his act was not one of those rendering him liable to ejectment, being authorised by local custom. RADHA PRASAD SINGH v. SALIK RAI, 5 A. 245=3 A.W.N. (1883) 10 ... 167

(2) *Ex-proprietary tenant—Rent—Damages—Act* XII *of* 1881 (*N.-W.P. Rent Act*), *ss.* 14, 95 (*l*), 206.—*T*, who had acquired the proprietary rights of *D* in a certain mahal, sued *D* in a Civil Court for damages for the use and occupation of sir land of which *D*, on losing such rights, had become by law the ex proprietary tenant. *Held* that, *T* being *D's* landlord, such suit was not maintainable in the Civil Courts.

Held also that the provisions of s. 206 of the N.-W.P. Rent Act were not applicable, it not being possible to treat the suit as being in any respect the claim that alone *T* was entitled to make on *D*, which was a claim for rent assessed or ascertained in the mode provided in that Act. DHIAN RAI v. THAKUR RAI, 5 A. 25=2 A.W.N. (1882) 138 ... 18

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(3) *Ex-proprietary tenant—Suit for arrears of rent—Determination of rent—Act* XII *of* 1881 (*N.W.P. Rent Act*), *ss.* 14, 95 (1)—*Act* XIX *of* 1873 (*N.-W. P. Land Revenue Act*), *s.* 190—Res judicata.—Except when there has been an arrangement or agreement between the parties, a landholder cannot sue his ex-proprietary tenant for rent until as a precedent, he or the tenant has obtained a determination of the amount thereof, either by application to the Settlement Officer under s. 14, or to the Revenue Court under cl. (*l*), s. 95, of the Rent Act, or it has been fixed by the Collector or Assistant Collector according to s. 190 of Act XIX of 1873.

A Revenue Court cannot entertain a suit to determine the rate of rent payable by an ex-proprietary tenant, but an application only.

Held, therefore, where a landholder sued an ex-proprietary tenant for arrears of rent at a certain rate, and obtained an *ex-parte* decree for arrears of rent at that rate, and again sued the tenant for arrears of rent at the same rate, that the Revenue Court had not jurisdiction to determine the rate of rent in the first suit, and that therefore the tenant was not precluded from setting up as a defence to the second suit that it was not maintainable, as the rate of rent had not been fixed. PHULAHRA v. JEOLAL SINGH, 6 A. 52=3 A.W.N. (1883) 203 ... 466

(4) *Leave—Suit by one of several joint lessors for balance of rent—Act* XII *of* 1881 (*N.-W.P. Rent Act*), *s.* 106.—*M* and *S* were joint lessors of certain land by a *kabuliyat* which did not contain any specification of the shares of the lessors. *M*, stating that the share of rent due to *S* had already been paid, sued the lessee for the recovery of his own share. The amount claimed was all that remained due on the lease.

Held that the plaintiff was entitled, as one of the joint lessors, to sue for the balance of rent, and that his suit was therefore not barred by the terms of s. 106 of the N.-W.P. Rent Act (XII of 1881).

Quære.—Whether the *kabuliyat* whereon the suit was based might not be called a "special contract" within the meaning of s. 106 of the Rent Act, so as to render that section inapplicable. MURLIDHAR v. ISHRI PRASAD, 6 A. 576=4 A.W.N. (1884) 181 ... 832

(5) *Perpetual injunction to restrain ejectment of tenant—Jurisdiction—Act* XII *of* 1881 (*N.-W.P. Rent Act*), *s.* 95—*Act* I *of* 1877 (*Specific Relief Act*), *s.* 56 (*b*) *and* (*f*).—A tenant, on whom a notice of ejectment had been served under the N.-W.P. Rent Act, 1881, and whose suit to contest his liability to ejectment, brought under that Act, had failed, sued in the Civil Court for a perpetual injunction to prevent his ejectment, basing his suit on an agreement that he should not be ejected so long as he paid a certain rent. *Held* that the suit was not maintainable, the jurisdiction of the Civil Court being excluded by s. 95 of the Rent Act and by s. 56 (*b*) and (*f*), of the Specific Relief Act. MAHIP SINGH v. CHOTU, 5 A. 429=3 A.W.N. (1883) 67 ... 296

(6) *Relinquishment by occupancy-tenant of his holding—Effect of relinquishment on co-sharers—Act* XVIII *of* 1873 (*N.-W.P. Rent Act*), *ss.* 8, 9, 95—*Jurisdiction—Specific performance of contract.*—*K*, the occupancy-tenant of certain land, to whom the landholder had granted a lease thereof for a certain term, gave the latter a kabuliyat containing the following clause:—"On the expiration of the term the landholder shall have the power to keep the said land under my cultivation at the former rent, or at an enhanced rent as may be agreed upon between the parties, or he may make over the land to some other cultivator at an enhanced rent fixed by himself." *K* died before the expiration of the lease, and was succeeded by his sons. On the expiration of the lease the landholder sued *K*'s sons in the Civil Court for possession of the land, claiming under the kabuliyat.

Per MAHMOOD, J.—That, inasmuch as the plaintiff did not seek the determination of the class of the defendants' tenure, and the suit could not be regarded as one for ejectment of a tenant in the manner provided by the Rent Act, but was one for specific performance of a contract, based on the kabuliyat, according to the terms of which the plaintiff was entitled, it was alleged, to oust the defendants, the suit was cognizable in the Civil Court.

Per CURIAM.—That whatever might have been the effect of the kabuliyat as regards *K*, it could not defeat the rights of his sons, who had become

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by inheritance co-sharers in the right of occupancy or had succeeded thereto under the provisions of the Rent Act.

Per TYRRELL, J.—That a relinquishment by an occupancy-tenant of his holding is not a "transfer" within the meaning of s. 9 of the Rent Act. LALJI v. NURAN, 5 A. 103=2 A.W.N. (1882) 196 ... 71

(7) *Right of occupancy—Mortgage—Act* XVIII *of* 1873 (*N.-W.P. Rent Act*), *s.* 9—*Meaning of "transfer."—Held*, by the Full Bench (MAHMOOD, J., *dissenting*) that an hypothecation by an occupancy tenant of his right of occupancy was not a "transfer" within the meaning of s. 9 of the N.-W.P. Rent Act, 1873. GOPAL PANDEY v. PARSOTAM DAS, 5 A. 121 (F.B.)= 2 A.W.N. (1882) 128 ... 83

(8) *Submergence of occupancy-tenant's land—Diluvion—Liability for rent—Resumption by landholder—Custom—Jurisdiction—Act* XII *of* 1881 (*N.-W. P. Rent Act*), *ss.* 18, 31, 34 (*b*), 95 (*n*).—A landholder, alleging that by local custom when land was submerged, and the tenant ceased to pay rent for the same, his right to it abated, and when the land re-appeared the landholder was entitled to possession thereof; that certain land belonging to him had been submerged and the occupancy-tenant thereof had ceased to pay rent for it; and that such land had re-appeared and had come into his possession under such custom; sued such tenant in the Civil Court for a declaration of his right to the possession of it.

Held, that, inasmuch as ss. 18 and 31 of the N.-W.P. Rent Act, 1881, showed that, notwithstanding the submergence of the land, the tenancy still subsisted; and as the tenant could not lose his right to the land except by relinquishment or ejectment under the provisions of that Act; and as the custom set up by the landholder was opposed to the provisions of s. 34 (*b*) of that Act; the suit was not maintainable. Further that, with reference to the provisions of s. 95 (*n*) of that Act, the suit was not cognizable in the Civil Courts. KUPIL RAI v. RADHA PRASAD SINGH, 5 A. 260=3 A.W.N. (1883) 14 ... 178

(9) *Suit by tenant against sub-tenant for ejectment—Act* XII *of* 1881 (*N.-W.P. Rent Act*). *Ch.* II (*B*), *ss.* 93, 95, 148—*Jurisdiction of Civil Court.*—The plaintiffs, alleging that they were the occupancy-tenants of certain land, that they had sub-let its cultivation to the defendant, and that the defendant had denied their title and set up a claim to be the tenant-in-chief under the zamindar, sued in the Civil Court to establish the right they claimed to the land and for possession of the land. *Held*, that the cognizance of the suit in the Civil Court was not barred by s. 93 or 95 of the N.-W.P. Rent Act. RIBBAN v. PARTAB SINGH, 6 A. 81=3 A.W.N. (1883) 222 ... 488

(10) *Suit for declaration of proprietary right to land—Suit for a declaration that tenant is a tenant-at-will and liable to have his rent enhanced at will—Jurisdiction of Civil Court—Act* XII *of* 1881 (*N.-W.P. Rent Act*), *ss.* 10, 95 (*a*) *and* (*l*).—A suit for a declaration that the plaintiffs are the proprietors of a village and the defendants are tenants thereof, at the will of the plaintiffs, and liable to have the rent enhanced at the will of the plaintiffs, is, as regards the claim for a declaration of right, cognizable in the Civil Courts, but not as regards the other claims, such claims raising questions under ss. 10 and 95 (*a*) and (*l*), N.-W.P. Rent Act, 1881, exclusively cognizable in the Revenue Court. ANTU v. GHULAM MUHAMMAD KHAN, 6 A. 110=3 A.W.N. (1883) 239 ... 508

(11) *Suit for rent where the right to receive it is disputed—Act* XII *of* 1881 (*N.-W.P. Rent Act*), *s.* 148—*Third person.*—In a suit for rent between a landholder and a tenant under the N.-W.P. Rent Act, 1881, where the right to receive rent is disputed, any rights which the landholder may have against the third person, who has been made a party to the suit, under s. 148 of the Act, can only be enforced through the medium of the Civil Court by a suit for declaration of title and for recovery of any rents improperly collected by such person.

Held, therefore, where in such a suit it was found that the third person had actually and in good faith received the rent sued for, the claim should not have been decreed against him but should have been dismissed. MADHO PRASAD v. AMBAR, 5 A. 503=3 A.W.N. (1883) 103 ... 347

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(12) *Transfer by occupancy-tenant of his holding—Effect on occupancy right—Transfer of trees—Act* XII *of* 1881 (*N.-W.P. Rent Act*), *s.* 9.—The presumption of law and the general rule is that property in timber on a tenant's holding rests in the landlord in the same way as, and to no less an extent than, the property in the soil itself.

Held, therefore, where an occupancy-tenant transferred his holding, that the transfer was not only invalid in respect of the holding, but in respect also of the trees on the holding.

Where an occupancy-tenant, under the impression that he was a tenant at fixed rates, sold his holding, and the landholder sued the tenant and his vendee to set aside the transfer, as contrary to law, and for possession of the holding, *held*, that the transfer could not be treated as a relinquishment by the tenant of the holding to the landholder, and that the proper decree to make was that the transfer should be cancelled, that the plaintiff was entitled to eject the vendee from the land, but the plaintiff was not entitled to take the holding from the vendor. KASIM MIAN v. BANDA HUSAIN, 5 A. 616=3 A.W.N. (1883) 169 ... 426

(13) *Trees planted by occupancy-tenant with landholder's consent—Sale of trees in execution of decree—Transfer of right of occupancy—Act* XII *of* 1881 (*N.-W.P. Rent Act*), *s.* 9.—An occupancy-tenant, whose orange trees, planted with the landholder's consent had been sold in execution of a decree against him, made a collusive resignation of his land to the landholder, who thereupon sued the purchaser and the occupancy-tenant for possession of the land with or without the trees. *Held* that as the purchase did not involve a transfer of the tenancy of the land in the sense of s. 9 of the N.-W.P. Rent Act, nor any change in the relations between the landholder and the occupancy-tenant such as was prohibited by that law, the landholder was not entitled to possession of the land. LALMAN v. MANNU LAL, 6 A. 19 =3 A.W.N. (1883) 175 ... 441

(14) *Usufructuary mortgage by occupancy tenant—"Transfer"—Act* XII *of* 1881 (*N.-W.P. Rent Act*), *s.* 9.—A mortgage with possession by an occupancy-tenant of his cultivatory holding is a "transfer" within the prohibition of s. 9 of the N.-W.P. Rent Act, 1881. GANGA DIN v. DHURANDHAR SINGH, 5 A. 495 (F.B.)=3 A.W.N. (1883) 89 ... 341

(15) See CIVIL PROCEDURE CODE (1877), 6 A. 68.

Lease.

(1) *For a term of years—Death of lessee before expiration of term—Lease binding on representatives of lessee—Construction of lease—Separate liability of lessee—Jurisdiction—Suit partly cognizable in the Revenue Court and partly in the Civil Court—Act* XII *of* 1881 (*N.-W.P. Rent Act*), *ss.* 206, 207. —A suit was instituted in a Court of revenue which was partly cognizable in the Civil Courts: *held*, on the question, raised on appeal, whether the Revenue Court had jurisdiction to entertain the suit, that the provisions of ss. 206 and 207 of the Rent Act (North-Western Provinces) 1881, rendered the plea in respect of jurisdiction ineffective.

In the absence of words to the contrary, a lease of zamindari rights for a term of years does not terminate before the expiration of the term by the mere fact of the death of either the lessor or lessee. On the question whether the lessees in this case were jointly as well as severally liable, *held*, that the terms of the lease indicated that the liability of the lessees was intended to be several, but equal in extent. BADRINATH v. BAJAN LAL, 5 A. 191=2 A.W.N. (1882) 216 ... 130

(2) *Granted to a cultivator—Kabuliyat—Exemption from stamp duty—Act* I *of* 1879 (*Stamp Act*), *sch. ii, No.* 13 (*b*) *and* (*c*).—By the term "cultivator" in No. 13, sch. ii of the Stamp Act, 1879, only those persons are connoted who actually cultivate the soil themselves or who cultivate it by members of their household, or by their servants, or by hired labour, and with their own or hired stock. The class of husbandmen or actual agriculturists is meant; not farmers, middlemen, or lessees, even though cultivation may be carried on to some extent by such persons in the area covered by their lease.

Held therefore, where the land, the subject of a kabuliyat (counterpart of a lease) was for a large part not cultivable or susceptible of being treated

Lease—(*Concluded*). PAGE

as a "cultivator's" holding in any legitimate sense of that word, that such kabuliyat was not exempted from stamp-duty under No. 13 (*c*), sch. ii of the Stamp Act, 1879. STAMP REFERENCE, 5 A. 360=3 A.W.N. (1883) 113... 249

(3) *Suit by one of several joint lessors for his share of rent—Co-sharer.*—One of several joint lessors of certain land sued the lessee for his share of the rent payable under the lease to all the lessors, making the other lessors defendants. *Held* that the suit was not maintainable, and the making of the other lessors defendants did not cure the defect in the suit. MANOHAR DAS v. MANZUR ALI, 5 A. 40=2 A.W.N. (1882) 143 ... 28

(4) See LANDLORD AND TENANT, 6 A. 576.

Limitation.

(1) See CANCELLATION, 6 A. 260.

(2) See DECLARATORY SUIT, 5 A. 345.

Limitation Act (IX of 1871).

(1) *S.* 10, *and Nos.* 118, 123 *and* 145—*Limitation of suit relating to property held in trust.*—A suit in order to fall within Act IX of 1871, s. 10, excepting suits against trustees from limitation, must be brought for the purpose of recovering the trust property for the benefit of the trust; that section meaning that when trust property is used for some purpose other than that of the trust, it may be recovered, without any bar of time, from the hands of those in whom it has been vested in trust.

Where the plaintiff sued to enforce his own personal right to manage an endowment, dedicated to religious purposes, there being no question whether or not the property was being applied to such purposes by the manager in possession, the above section was *held* inapplicable.

The possession of the defendant having been adverse for more than twelve years, *held*, that the suit might fall within art. 123 or 145 of the 2nd schedule of Act IX of 1871, in force when the suit was brought. Had it fallen within neither of the above, it would be barred under art. 118. BALWANT RAO v. PURAN MAL, 6 A. 1 (P.C.)=13 C.L.R. 39=10 I.A. 90=4 Sar. P.C.J. 435=7 Ind. Jur. 329 ... 429

(2) *Sch. ii, No.* 145—*Collector's possession not adverse to true owner.*—Act IX of 1871, sch. ii, No. 145, enacting that suits for possession of immoveable property, or any interest therein, must be brought within twelve years from the time when the possession of the defendant, or some person through whom he claims, has become adverse to the plaintiff, differs from the rule formerly in force under Act XIV of 1859, s. 1, cl. 12. The latter was that the suit must be brought within twelve years from the time when the cause of action arose; and thus, the former rule that, where the cause of action arose upon an alleged dispossession, the burden was upon the plaintiff to show that he, or some one through whom he claimed, had actual possession within twelve years before the institution of the suit, has been superseded by the above.

Where the Government, in the Revenue Department, has taken possession of land, it is the duty of the Collector, after payment of the revenue, and the expenses of the collection, to pay over the surplus proceeds of the estate to the true owner. The Collector's possession does not become adverse to the owner, by reason of his making this payment to another claimant. KARAN SINGH v. BAKAR ALI KHAN, 5 A. 1 (P.C.)=9 I.A. 99=4 Sar. P.C.J. 332=5 Shome L.R. 80 ... 1

Limitation Act (XV of 1877).

(1) *Ss.* 5, 14—*Appeal—Limitation—Admission beyond time—Specific enforcement of contract—Expiration of time for enforcement.*—The circumstances contemplated in s. 14 of the Limitation Act, 1877, will ordinarily constitute a sufficient cause in the sense of s. 5 for not presenting an appeal within the period of limitation.

A bond for money provided that on failure on the part of the obligor to pay interest as agreed in the bond, and within a certain period from the date of the bond, the obligee might sue for possession of the immoveable property mortgaged in the bond. Default was made in the payment of

Limitation Act (XV of 1877)—(*Continued*). PAGE

interest as agreed, but the obligee deferred bringing a suit for possession of the mortgaged property so long that the time mentioned in the bond expired before he could obtain a decree.

Held, that under these circumstances a decree for possession of the property should not be granted to him. BALWANT SINGH v. GUMANI RAM, 5 A. 591=3 A.W.N. (1883) 142 ... 407

(2) *Ss.* 10, 18, *sch. ii, No.* 95—*Suit to set aside a decree obtained by fraud—Suit against express trustee.*—Certain of the grantees of lands, granted for the maintenance of the grantees and support of a mosque and other religious purposes, sued for the removal of the superintendent of the property from his office. The parties to this suit entered into a compromise which made certain arrangements for the management of the property, and a decree was made in accordance with the compromise. The grantees who were not parties to this suit then sued the grantees who were to set aside the compromise and decree on the ground of fraud.

Held that the suit fell within the terms of No. 95, sch. ii of the Limitation Act, 1877, and there was nothing about it which made the exemption of s. 10 of that Act applicable to it. MUHAMMAD BAKHSH v. MUHAMMAD ALI, 5 A. 294=3 A.W.N. (1883) 40 ... 203

(3) *Ss.* 19, 20, *sch. ii, No.* 179—*Execution of decree—Acknowledgment in writing—Part-payment.*—A decree for money, dated the 24th June 1878, directed that a certain instalment should be paid on the 22nd July 1878, and a like one on the 20th December 1878, and the balance by certain instalments commencing from a certain date; and that, in case of default, the decree-holder might realize the whole amount of the decree. The instalments were not paid at the fixed dates, but part-payments of the amount of the decree were made by the judgment-debtor from time to time out of Court. On the 7th May 1879 he made a part-payment and an endorsement on the decree to the following effect:—" I,G, judgment-debtor of this decree, have myself paid Rs. ——, and have endorsed this payment on the decree in my own handwriting." On the 5th September 1881 the decree-holder applied for execution of the whole decree.

Held, by the Court, that the application was governed by the rule contained in S. 19 of the Limitation Act, 1877; that the endorsement made by the judgment-debtor on the decree was an acknowledgment of liability under the decree; and that consequently the period of limitation for the application should be computed from the time such endorsement was made, and the application was therefore within time.

Per MAHMOOD, J.—That, following the *ratio decidendi* in *Ramhit Rai* v. *Satgur Rai* (3 A. 247), the part-payment made and endorsed on the decree by the judgment-debtor fell within the terms of s. 20 of the Limitation Act, 1877.

Also *per* MAHMOOD, J.—That it was doubtful whether in this case the decree-holder was bound to execute the whole decree when the first default occurred, as the terms of the decree appeared to give the decree-holder an option in the matter, and therefore whether the application for execution was barred because it was made more than three years after that date. JANKI PRASAD v. GHULAM ALI, 5 A. 201=2 A.W.N. (1882) 221 ... 137

(4) Sch ii, Nos. 10, 120—See PRE-EMPTION, 5 A. 187.

(5) Sch. ii, No. 12—See EXECUTION SALE, 5 A. 573; 5 A. 614.

(6) Sch. ii, Nos. 12, 95, 144—See FRAUD, 6 A. 406.

(7) Sch. ii, No. 14—See EXECUTION SALE, 5 A. 573.

(8) *Sch. ii, No.* 48.—*R* sued *M* for a certain sum of money on the ground that he had given such sum to *M* to deliver to his (*R*'s) family; that *M* had not delivered the money and that when this fact became known to *R* and he demanded the money, *M* denied having received the same. *Held*, that the limitation law applicable to the suit was that provided by No. 48, sch. ii of the Limitation Act, 1877, and the time from which the period of limitation began to run was when *R* first learnt that *M* had retained the money in his possession instead of paying it as directed. RAMESHAR CHAUBEY v. MATA BHIKH, 5 A. 341=3 A.W.N. (1883) 48 ... 236

(9) Sch. ii, Nos. 62, 127—See HINDU LAW (JOINT FAMILY), 6 A. 442.

Limitation Act (XV of 1877)—(*Continued*). PAGE

(10) *Sch. ii, No.* 91—*Suit for cancellation of instrument—Declaratory decree—Act* I *of* 1877 (*Specific Relief Act*), *s.* 39.—The plaintiff alleging that he was the proprietor of certain land; that defendant No. 2 had wrongfully and fraudulently mortgaged it to defendant No. 1; and that defendant No. 1 had applied for foreclosure of the mortgage, and notice of foreclosure had issued; claimed "that, the mortgage-deed being set aside, the land be protected from the illegal foreclosure, by cancelment of the foreclosure proceedings."

Held, that the suit was not strictly one for the cancelment or setting aside of an instrument to which the limitation in No. 91, sch. ii of the Limitation Act, 1877, would apply, (which relates to suits of the nature of those referred to in s. 39 of the Specific Relief Act), but rather one for a declaratory decree. SOBHA PANDEY v. SAHODRA BIBI, 5 A. 322=3 A.W.N. (1883) 49 ... 223

(11) *Sch. ii, No.* 91—*Suit for cancellation of instrument—Muhammadan Law—Gift—Suit for possession of immoveable property.*—One of the heirs of a deceased Muhammadan sued for her share, under the Muhammadan Law, of the estate of the deceased, and to set aside a gift of his estate by the deceased, as invalid under that law, by reason that possession of the property transferred by the gift had not been delivered by the donor to the donee. *Held* that, because the suit was not brought within three years from the date of the gift, it did not necessarily follow that the suit was barred by art. 91 of the Limitation Act, 1877, inasmuch as the plaintiff's title to impeach the gift could only accrue from the moment when, by receipt of possession, the gift had become operative by law. MEDA BIBI v. IMAMAN BIBI, 6 A. 207 (F.B.)=4 A.W.N. (1884) 34 ... 575

(12) Sch. ii, Nos. 91, 95, 138—See POSSESSION, 6 A. 75.

(13) Sch. ii, Nos. 91, 142—See MORTGAGE (BY CONDITIONAL SALE), 5 A. 490.

(14) *Sch. ii, Nos.* 91, 144—*Suit to cancel instrument—Champerty.*—The plaintiffs sued for possession of certain immoveable property, "by avoidance of a spurious deed of gift" executed by one *N*, deceased, in favour of the defendant. *H*, one of the plaintiffs, joined in the suit under an agreement with the other plaintiffs that he should defray the costs of the suit from the Court of first instance up to the Privy Council, and that he should then become Proprietor of one-half of the property in suit and be entitled to half the costs.

Per STRAIGHT, J.—That the suit was governed by No. 144, and not No. 91, sch. ii of the Limitation Act, 1877.

Per STUART, C.J.—That the suit was governed by No. 91, and not No. 144, sch. ii of that Act.

Held, by the Court, that *H* had no right to join in the suit. HAZARI LAL v. JADAUN SINGH, 5 A. 76=2 A.W.N. (1882) 180 ... 52

(15) Sch. ii. No. 113—See CONTRACT, 6 A. 457.

(16) Sch ii, No. 113—See SPECIFIC PERFORMANCE, 5 A. 263.

(17) Sch. ii, Nos. 113, 114—See VENDOR AND PURCHASER, 6 A. 231.

(18) *Sch. ii, Nos.* 116, 132—*Mortgage-suit by mortgagee to recover mortgage-money—Suit for money charged on immoveable property—Relief against the person of mortgagor.*—In a suit by a mortgagee to enforce the mortgage, No. 132, sch. ii of the Limitation Act, 1877, is not applicable, so far as relief against the mortgagor personally is claimed. RAGHUBAR DAYAL v. LACHMIN SHANKAR, 5 A. 461=3 A.W.N. (1883) 114 ... 318

(19) Sch. ii, Nos. 132, 147—See MORTGAGE (SALE), 5 A. 551.

(20) Sch. ii, Nos. 144, 178—See POSSESSION, 5 A. 297.

(21) Sch. ii, No. 178—See EXECUTION OF DECREE, 5 A. 459.

(22) Sch. ii, No. 178—See INSOLVENT, 6 A. 142.

(23) Sch. ii, Nos. 178, 179—See EXECUTION OF DECREE, 5 A. 248; 5 A. 596 6 A. 23.

(24) Sch. ii, No. 179—See EXECUTION OF DECREE, 5 A. 289.

(25) Sch. ii, No. 179 (2)—See EXECUTION OF DECREE, 6 A. 14; 6 A. 438.

(26) Sch. ii, No. 179 (3)—See EXECUTION OF DECREE, 5 A. 236.

Limitation Act (XV of 1877)—(*Concluded*). PAGE

(27) *Sch. ii, No.* 179 (4)—*Execution of decree*—"*Step-in-aid of execution*"—*Application for sale-proceeds.*—An application by a decree-holder to be paid the proceeds of a sale of property in execution of the decree is a "step-in-aid of execution" of the decree within the meaning of No. 179 (4), sch. ii of Act XV of 1877 (Limitation Act). PARAN SINGH v. JAWAHIR SINGH, 6 A. 366=4 A.W.N. (1884) 118 ... 685

(28) Sch. ii, No. 179 (4)—See STEP-IN-AID OF EXECUTION, 5 A. 344; 5 A. 576.

Liquidated Damages.

See CONTRACT ACT (IX OF 1872), 5 A. 238.

Lis pendens.

(1) *Registered and unregistered documents—Transfer of property* "*pendente lite*"—*Act* IV *of* 1882 (*Transfer of Property Act*), *s.* 52—*Act* III *of* 1877 (*Registration Act*), *s.* 50.—*B* held a decree for the sale of property which had been mortgaged to him by an instrument which was not compulsorily registrable and was not registered. *N* purchased the same property *pendente lite*, by a registered deed of sale.

Held, that there was here no competition between a registered and an unregistered instrument to which s. 50 of the Registration Act could apply; and that *N's* purchase was, by s. 52 of the Transfer of Property Act, subject to the decree passed in *B's* favour. BHAGWAN DAS v. NATHU SINGH, 6 A. 444=4 A.W.N. (1884) 158 ... 740

(2) See CIVIL PROCEDURE CODE (1882), 6 A. 506.

Mahomedan Law.

1.—CUSTOM.
2.—DIVORCE.
3.—DOWER.
4.—GIFT.
5.—INHERITANCE.
6.—MAINTENANCE.
7.—PRE-EMPTION.
8.—WAKF.

——1.—Custom.

See MAHOMEDAN LAW (PRE-EMPTION), 5 A. 110.

——2.—Divorce.

See MAHOMEDAN LAW (MAINTENANCE), 5 A. 226.

——3.—Dower.

See MAHOMEDAN LAW (INHERITANCE), 6 A. 50.

——4.—Gift.

(1) *Reservation of income—Condition against alienation—Undivided property—Indivisible property.*—*B* owned a one-twelfth share of a *muafi* estate and a dwelling-house. As owner of the dwelling-house, she owned a share in a stair-case, privy, and door, which were held by her jointly with the owners of adjoining dwelling-houses. She made a gift of her property, transferring the dominion over it to the donees, but reserving the income of the share of the *muafi* estate for life, and stipulating against its alienation.

Held, that the gift of the one-twelfth share of the *muafi* estate, being a gift of a specific share was not open to objection under Muhammadan Law, and such gift was not vitiated by the mere reservation of the income of the share, or by the condition against alienation.

Held, also, that the gift was not invalid under Muhammadan Law, so far as it related to the stair-case, privy, and door, as these things, though undivided property, were incapable of division, and a gift of part of an indivisible thing was valid under that law. KASIM HUSAIN v. SHARIF-UN-NISSA, 5 A. 285 =3 A.W.N. (1883) 31=7 Ind. Jur. 672 ... 196

(2) *Transfer of absolute estate—Condition—Sunni Law—Shia Law.*—The owner of a house made a gift thereof to certain persons "for their residence, and that of their heirs, generation after generation," declaring that if the donees

Mahomedan Law—4.—Gift—(*Concluded*). PAGE

sold or mortgaged the house, he and his heirs should have a "claim" to the house, but not otherwise. *Held*, that under Muhammadan Law, whether that by which the Shias, or that by which the Sunnis, were governed, the house passed by the gift to the donees absolutely, the declaration by the donor as to the effect of an alienation by the donees being in the nature of a recommendation, and not having the effect of limiting the estate in the house itself. DEO KISHEN v. BUDH PRAKASH, 5 A. 505=3 A.W.N. (1883) 106 ... 349

(3) See LIMITATION ACT (XV OF 1877), 6 A. 207.

——5.—Inheritance.

Dower—Transfer by widow in possession in lieu of dower—Right of purchaser—Heirs.—Held, that a purchaser of a deceased husband's estate from a Muhammadan widow, in possession thereof, pending payment of her dower, is not entitled to plead non-satisfaction of her dower-debt to a claim by her husband's heirs for their share of his inheritance, as the widow's right to dower is personal to herself and does not pass to a purchaser of the estate. ALI MUHAMMAD KHAN v. AZIZULLAH KHAN, 6 A. 50=3 A.W.N. (1883) 204 ... 464

——6.—Maintenance.

Maintenance of wife—Act X of 1872 (Criminal Procedure Code) s. 536—Muhammadan Law—Divorce—" Iddat "—An order for the maintenance of a wife, passed under Chap. XLI of Act X of 1872, becomes inoperative, in the case of a Muhammadan, by reason of his lawfully divorcing his wife, and thus putting an end to the conjugal relation, but it does not become so before the expiration of the divorced wife's "*iddat.*"

The Muhammadan law of divorce relating to the maintenance of a divorced wife during her "*iddat*" referred to. *In re* DIN MUHAMMAD, 5 A. 226=2 A.W.N. (1882) 237=7 Ind. Jur. 544 ... 154

——7.—Pre-emption.

(1) *Custom—Hindu vendor and purchaser—Muhammadan pre-emptor—Muhammadan Law*—"Talab-ishtihad"—*Invocation of witnesses.*—A Muhammadan sued to enforce a right of pre-emption in respect of a sale between Hindus, founding such right on local custom. The formality of "*ishtihad*," or express invocation of witnesses, required by the Muhammadan law of pre-emption, was not one of the incidents of such custom. *Held*, that the circumstance that the plaintiff was a Muhammadan did not preclude him from claiming to enforce such right against the defendants who were Hindus; and that the formality of "*ishtihad*" not being one of the incidents of such custom, it was not necessary that the plaintiff should have observed that formality as a condition precedent to the enforcement of such right. ZAMIR HUSAIN v. DAULAT RAM, 5 A. 110 =2 A.W.N. (1882) 199 ... 75

(2) "*Stranger*"—"*Sale*"—*Assignment by way of dower—Assignment in lieu of dower—Debt.*—The heirs to a Muhammadan have no legal interest or share in his property so long as he is alive and cannot therefore be regarded as in any sense co-sharers or co-parceners in his property, so as to be entitled to claim the right of pre-emption in case of a sale by him of his property.

Held, therefore, where a husband sold his share of an undivided estate to his wife, that, although one of his heirs, she had not on that account a right of pre-emption in respect of such sale.

A husband transferred certain property to his wife in consideration of a certain sum which was due by him to her as dower. *Held*, that such transfer was a "sale", within the meaning of the Muhammadan law of pre-emption, and gave rise to the right of pre-emption.

The meaning of "stranger" and "sale," as used in the Muhammadan law of pre-emption, explained. FIDA ALI v. MUZAFFAR ALI, 5 A. 65=2 A.W.N. (1882) 175 ... 45

(3) *Suit by pre-emptor and "stranger" to enforce right—Effect on pre-emptor's right—Justice, equity and good conscience—Muhammadan Law.—Held*

Mahomedan Law—7.—Pre-emption—(*Concluded*). PAGE

applying the doctrine of the Muhammadan law of pre-emption, such doctrine being in accordance with justice, equity and good conscience, that a co-sharer in a village, who had under the *wajab-ul-arz* a right of pre-emption in respect of the sale of a share who joined a "stranger," (that is, a person who had not such right), with himself in suing to enforce such right, thereby forfeited such right. BHAWANI PRASAD v. DAMRU, 5 A. 197 = 2 A.W.N (1882) 217 = 7 Ind. Jur. 487 ... 134

(4) *Transfer by pre-emptor to "stranger"—Effect on right—"Justice, equity and good conscience."—Held*, applying the doctrine of the Muhammadan law of pre-emption, such doctrine being in accordance with justice, equity and good conscience, that a co-sharer in a village who had under the *wajab-ul-arz* a right to the mortgage of a share in such village, who, in anticipation of obtaining the mortgage, mortgaged such share to a "stranger" (that is, a person who had not a preferential right to mortgage), thereby forfeited such right. RAJJO v. LALMAN, 5 A. 180 = 2 A.W.N. (1882) 210 = 7 Ind. Jur. 485 ... 121

——8.—Wakf.

"Wakf" *property—Suit relating to public charity—Civil Procedure Code, s.* 539 *—Religious endowment—"Religious institution"—Act* VI *of* 1871 (*Bengal Civil Courts Act*), *s.* 24.—Certain Muhammadans sued to set aside a mortgage of endowed property belonging to a mosque, the decree enforcing the mortgage, and the sale of the mortgaged property in execution of that decree, and for the demolition of buildings erected by the purchaser, and the ejectment of the purchaser. *Held*, that the plaintiffs, as Muhammadans entitled to frequent the mosque and to use the other religious buildings connected with the endowment, could maintain the suit, and s. 539 of the Civil Procedure Code had no application to the case, the endowment being a religious institution, within the meaning of s 24 of Act VI of 1871 and therefore governed by Muhammadan Law ZAFARYAB ALI v. BAKHTAWAR SINGH, 5 A. 497 = 3 A.W.N. (1883) 91 ... 343

Maintenance.

See CRIMINAL PROCEDURE CODE (1872), 5 A. 224.

Malikana.

Government Revenue—Jurisdiction—Act XIX *of* 1873, *ss.* 3 (1), 53-55, 241 (*b*).—At the settlement of a certain village, a malikana allowance of 10 per cent on the revenue was reserved for *C*, the talukdar to whom the village belonged. At the same settlement, the maufi holding of *A* in the village was resumed, and assessed to revenue; but *A* refused to engage for it, and it was therefore merged for revenue purposes in the mahal of the village, though still held by *A*. In 1872, *A* obtained in the Civil Court a decree by which he was declared to be the proprietor of his holding, and to be entitled to engage for it separately; and thereupon the Collector constituted the holding a separate mahal, by causing a *khewat* to be prepared, and fixing the proportion of the revenue assessed upon the entire mahal, which the muafi holding should bear. Subsequently the zamindars of the village applied to the Collector that *A* might be made to contribute towards the payment of the malikana allowance of the talukdar. The Collector passed an order declaring *A* to be liable to such contribution; and *A* then instituted a suit for cancelment of the Collector's order, for a declaration of his non-liability to contribute to the malikana allowance of the talukdar, and for a refund of contribution already paid.

Held that inasmuch as the decree of the Civil Court in 1872 and the proceedings of the Collector consequent thereto constituted the muafi holding a "mahal" in the terms of s. 3 (1), Act XIX of 1873, and by the terms of ss. 53-55 of the same Act, a malikana allowance, such as that under reference, is "revenue," and s. 241 (*b*) bars the jurisdiction of the Civil Courts in matters regarding the amount of revenue to be assessed on any mahal, the suit was not cognizable by a Civil Court. GUYADAT v. KUTUB-UN-NISSA, 6 A. 578 = 4 A.W.N. (1884) 182 ... 833

Marriage.

Dissolution of—See ACT IV OF 1869 (DIVORCE), 5 A. 71.

Misjoinder. PAGE

Of cause of action—"Multifarious" suit—Act X *of* 1877 (*Civil Procedure Code*), *ss.* 28, 45.—Defendant No. 1, the tenant of certain land at fixed rates, on the 12th November 1877 sold his interest in the land to the plaintiff. At the time of the sale the land was in the actual possession of defendant No. 2, defendant No. 1's sub-tenant, against whom however defendant No. 1 had obtained an order for ejectment on the 25th June preceding. On the 25th March 1878 defendant No. 1 applied a second time for the ejectment of defendant No. 2, and while this matter was pending the plaintiff endeavoured to obtain possession of the land, but was resisted by defendant No. 2. He thereupon instituted a charge of criminal trespass against the latter. This criminal proceeding was pending when, on the 14th September 1878, defendant No. 1 obtained a second order for defendant No. 2's ejectment. Under this order he obtained possession of the land, and also of the crop planted by defendant No. 2, which he sold to defendant No. 3 on the 22nd September 1878. On the 25th of the same month the plaintiff's charge of criminal trespass against defendant No. 2 was dismissed, on the ground that defendant No. 1 was in possession, and the plaintiff had never obtained possession under his purchase. Defendant No. 1 subsequently let the land to defendant No. 4. The plaintiff, alleging that three causes of action had accrued to him— *viz.*, (i) on the 12th November 1877 the date of the sale to him—(ii) on the 30th March 1878, when defendant No. 1 applied a second time for the ejectment of defendant No. 2 —and (iii) on the 22nd September 1878, when defendant No. 1 took possession of the land—sued defendants Nos. 1, 2, 3 and 4 claiming (i) possession of the land as against them all; (ii) mesne profits by way of damages for the year 1285 Fasli (September 1877—September 1878) as against defendants Nos. 1 and 2; (iii) mesne profits by way of damages for 1286 Fasli (September 1878—September 1879) against defendants Nos. 1 and 3; and (iv) mesne profits by way of damages for 1287 Fasli (September 1879—September 1880) against defendants Nos. 1 and 4.

Held by the Full Bench (MAHMOOD, J., *dissenting*) that the Court of first instance had properly rejected the plaint, the suit being open to the objection that different causes of action against different defendants separately had been joined, for which procedure no sanction was to be found in the Code of Civil Procedure. NARSINGH DAS *v.* MANGAL DUBEY, 5 A. 163 (F.B.) = 2 A.W.N. (1882) 202 ... 111

Mortgage.

1.—CONSTRUCTION.
2.—GENERAL.
3.—BY CONDITIONAL SALE.
4.—EQUITY OF REDEMPTION.
5.—FORECLOSURE.
6.—REDEMPTION.
7.—SALE.
8.—USUFRUCTUARY.

——1.—Construction.

Charge on immoveable property—Ambiguity.—A, to whom the Government had made a grant of certain villages, executed an instrument in favour of his brother charging the payment of an annual allowance to him and his heirs for ever on the "granted villages." The instrument did not name the villages which had been granted to *A*, but there was no doubt as to the particular villages which had been granted to him. *Held*, that the fact that such instrument did not specify the villagas which had been granted to *A* did not constitute such an ambiguity in such instrument as to render the charge created thereby invalid. KHANHIA LAL *v.* MUHAMMAD HUSAIN KHAN, 5 A. 11 = 2 A.W.N. (1882) 159 ...

——2.—General.

(1) *Act* III *of* 1877 (*Registration Act*). *ss.* 17, 50—*Act* VIII *of* 1871 (*Registration Act*), *s.* 17—*Registered and unregistered documents.—Held*, by the majority of the Full Bench (STRAIGHT and OLDFIELD, JJ., *dissenting*) that the principal sum secured by a mortgage of immoveable property is alone to be considered for the purpose of deciding whether the registration of the

Mortgage—2.—General—(*Continued*). PAGE

instrument of mortgage is optional or compulsory under the Registration Act, 1877.

Held, therefore where an instrument of mortgage by way of conditional sale, dated the 2nd July, 1871, secured the payment of a principal sum of Rs. 72, with interest at Rs. 2 per cent. per mensem, on the 12th May, 1873, the whole amount thus secured exceeding Rs. 100, that the registration of such instrument was optional and not compulsory.

Held, by the Divisional Bench (STUART, C.J., and BRODHURST, J.) that, under s. 50 of the Registration Act, 1877, an instrument the registration of which under the Registration Act, 1871, was compulsory and which was registered under that Act took effect, as regards the property comprised therein, as against an instrument relating to the same property, the registration of which under the Registration Act, 1871, was optional and which was not registered under that Act. HABIB-ULLAH v. NAKCHED RAI, 5 A. 447 (F.B.)=3 A.W.N. (1883) 87=8 Ind. Jur. 152 ... 308

(2) *First and second mortgagees—Civil Procedure Code, ss.* 234, 285, 295, 368—*Execution of decree—Death of judgment-debtor prior to sale.*—The first mortgagee of certain immoveable property obtained a decree for the sale of the property, caused the property to be attached, and then ceased to prosecute the execution-proceedings. The second mortgagee then obtained a decree for the sale of the property, caused it to be attached and put up for sale, and purchased it himself. The first mortgagee then applied for the sale of the property, and the property was put up for sale and was purchased by him. After the order for this sale was made, and before it took place the judgment-debtor died, and the sale took place without his legal representatives being made parties to the execution-proceedings. The Courts which executed these decrees were of two different grades, the Court which executed the first mortgagee's decree being of the lower grade.

In a suit by the first mortgagee against the second mortgagee for possession of the property, *held* that the sale to the first mortgagee was not invalid, with reference to the provisions of s. 285 of the Civil Procedure Code, because it had not been ordered and held by the Court of the higher grade, inasmuch as when such sale was ordered by the Court of the lower grade, the property was not under attachment in execution of the decree of the Court of the higher grade, that decree having been executed by the sale of the property, and therefore the provisions of that section were not applicable.

Per OLDFIELD, J., that there was nothing in the provisions of s. 285 or s. 295 of the Civil Procedure Code to support the contention that the first mortgagee, after allowing the property to be sold, was debarred from enforcing execution of his decree against it, and was only entitled to look to the assets realized at the sale for the satisfaction of his decree.

Per OLDFIELD, J., that the sale to the first mortgagee was not void because the judgment-debtor had died before it took place, and it took place without his legal representatives being made parties to the execution-proceedings, inasmuch as the provisions of s. 368 of the Civil Procedure Code were not applicable to the case of the death of a judgment-debtor, and there was nothing in s. 234, even if that section is applicable to a case where the judgment-debtor dies while execution is proceeding and after sale of his property has been ordered, to imply that the sale is absolutely void, if no legal representative has been brought on the record.

Per STRAIGHT, J., that there was no legal obligation on the first mortgagee to resort to the procedure of s. 234 of the Civil Procedure Code, since the sale to the second mortgagee had passed to him the rights and interests of the judgment-debtor, and the legal representatives of the judgment-debtor had none of his property in their hands, and there is no provision in the Code of Civil Procedure which required the first mortgagee to make the second mortgagee a party to the proceedings in execution of the former's decree, and the latter could not have successfully objected to the sale in execution of that decree, and therefore that sale was not voided by the death of the judgment-debtor antecedent to its taking place. STOWELL v. AJUDHIA NATH, 6 A. 255=4 A.W.N. (1884) 67 ... 608

Mortgage—2.—General—(*Concluded*). PAGE

(3) *Receipt for payment of mortgage-money—Registration—Act* VIII *of* 1871 (*Registration Act*), *s.* 17.—The payment of money by a mortgagor to a mortgagee in satisfaction of the mortgage-debt is a payment of consideration on account of the extinction of the mortgagee's right within the meaning of cl. (c), s. 17 of Act VIII of 1871 (Registration Act). A receipt for such payment is therefore a document of which the registration is compulsory, and which if unregistered is inadmissible in evidence under s. 49. IMDAD HUSAIN v. TASADDUK HOSAIN, 6 A. 335=4 A.W.N. (1884) 107=8 Ind. Jur. 631 ... 664

(4) See CIVIL PROCEDURE CODE (1877), 5 A. 566.

(5) See EXECUTION OF DECREE, 5 A. 452.

(6) See LIMITATION ACT (XV OF 1877), 5 A. 461.

——3.—By Conditional Sale.

(1) *Joint mortgage by conditional sale of two villages—Sale of the equity of redemption—Foreclosure in respect of one village.*—*B* mortgaged by conditional sale two villages to *L* for a certain sum He subsequently sold one village to *L* and the other to *S*. *L* having foreclosed the mortgage in respect of the village sold to *S*, for a proportionate amount of the mortgage-money, sued *S* for possession of that village. *Held* that the suit was maintainable. BISHESHAR SINGH v. LAIK SINGH, 5 A. 257=3 A.W.N. (1883) 10=7 Ind. Jur. 617 ... 175

(2) *Regulation* XVII *of* 1806, *s.* 8—*Foreclosure—Title of mortgagee when absolute—Pre-emption—Purchase-money—Burden of proof.*—*Held* that a proceeding under Regulation XVII of 1806 foreclosing a mortgage by conditional sale was not conclusive as to the amount of the mortgage-money against persons subsequently claiming to enforce a right of pre-emption and raising the question as to the amount of the purchase-money.

Also that, on general principles, a decree in a suit to foreclose a mortgage by conditional sale cannot bind a person not a party to the suit claiming to enforce right of pre-emption and raising a similar question.

Held also that a person claiming a right of pre-emption in respect of a mortgage by conditional sale was bound to pay as the price of the property the entire amount due on such mortgage at the time it became absolute. Also that on the expiration of the year of grace allowed by Regulation XVII of 1806 the ownership of the mortgaged property vested absolutely in the mortgagee, even though he might not have obtained a decree establishing or declaring his right.

Bhagwan Singh v. *Mahabir Singh* (5 A. 184) followed as to the rule of *onus probandi*, where the plaintiff in a suit to enforce a right of pre-emption impugns the correctness of the price stated in the instrument of sale. In determining the amount of the price which a pre-emptor has to pay, the Court is not called upon to assess the amount which would be a fair and reasonable price for the property, but to ascertain what amount actually changed hands as consideration for the sale. TAWAKKUL RAI v. LACHMAN RAI; TAWAKKUL RAI v. SHEO GHULAM RAI, 6 A. 344=4 A.W.N. (1884) 110 ... 670

(3) *Suit for possession of immoveable property—Suit for cancellation of instrument—Act* XV *of* 1877 (*Limitation Act*), *sch.* ii, *Nos.* 91, 142.—The plaintiff sued to set aside a mortgage by conditional sale of certain immoveable property belonging to him, made on his behalf during his minority, and for possession of the property. *Held*, that the suit was one as described in No. 142, sch. ii, Limitation Act, 1877, and not in No. 91 of that schedule. RAMAUSAR PANDEY v. RAGHUBAR JATI, 5 A. 490=3 A.W.N. (1883) 64 ... 338

(4) See PRE-EMPTION, 5 A. 187.

——4.—Equity of Redemption.

(1) See MORTGAGE (BY CONDITIONAL SALE), 5 A. 257.

(2) See MORTGAGE (REDEMPTION), 5 A. 276.

Mortgage—5.—Foreclosure. PAGE

(1) *Demand for payment of mortgage-money—Regulation* XVII *of* 1806, s. 8.—Section 8 of Regulation XVII of 1806 contemplates a previous demand of payment of the mortgage-money, and non-compliance therewith as a kind of cause of action for commencing foreclosure proceedings, and such demand must therefore necessarily be made before the mortgagee has the right of applying for foreclosure, and the omission to make such demand vitiates the foreclosure proceedings altogether. KARAN SINGH v. MOHAN LAL, 5 A. 9=2 A. W. N. (1882) 149 ... 6

(2) *Suit for foreclosure of mortgage—Regulation* XVII *of* 1806, *ss.* 7, 8—*Act* IV *of* 1882 (*Transfer of Property Act*), ss. 2, 67-86—*Act* I *of* 1868 (*General Clauses Act*), s. 6.—A mortgagee by conditional sale, under an instrument executed while Regulation XVII of 1806 was in force, and before the Transfer of Property Act, 1882, which repealed that Regulation, came into force, sued, after the repeal of that Regulation, for foreclosure of the mortgage, not having proceeded in accordance with the provisions of s. 8 of that Regulation. *Held* (STUART, C.J., dissenting), that the procedure of that section was not saved by cl. (*c*) of s. 2 of the Transfer of Property Act, but the provisions of that Act were applicable to the suit. GANGA SAHAI v. KISHEN SAHAI, 6 A. 262 (F.B.)=4. A.W.N. (1884) 79 ... 614

(3) See MORTGAGE (BY CONDITIONAL SALE), 5 A. 257 ; 6 A. 344.

——6.—Redemption.

(1) *Interest—Construction of deed.*—In Chait 1275 fasli (March 1868) *M*, having borrowed Rs. 11,200 from *S*, gave him a mortgage by way of conditional sale of certain immoveable property for a term of seven years, that is to say, extending over the years 1276, 1277, 1278, 1279, 1280, 1281 and 1282 fasli. The sum payable as the interest of each of these years, was fixed at Rs. 1,680. The mortgagee obtained payment of his interest for four years from 1276 to 1279 fasli inclusive by bringing suits against the mortgagor. The interest for 1280, 1281 and 1282 fasli, as well as the principal sum, remaining unpaid, the mortgagor sued for redemption of the mortgaged property on payment of the principal sum, and the interest of the last year, 1282 fasli, only, contending that the interest of the other years, 1280 and 1281 fasli, was not secured on the mortgaged property, but was, under the terms of the instrument of mortgage, realizable by suit from his non-hypothecated property and person.

Held, on the construction of the instrument of mortgage, that the mortgage was not redeemable on payment of the last year's interest only, but on payment of the interest of the other years as well. SURJU PRASAD v. MANSUR ALI KHAN, 5 A. 463=3 A.W.N. (1883) 27 ... 320

(2) *Purchase by one of several mortgagees of a share of the mortgaged property—Redemption by one of the mortgagors of his own share.*—The fact that one of several mortgagees has acquired the equity of redemption of the share of one of the mortgagors in the mortgaged property does not give another of the mortgagors the right to redeem his share in the mortgaged property. MAHTAB RAI v. SANT LAL, 5 A. 276=3 A.W.N. (1883) 31=7 Ind. Jur. 620 ... 190

(3) *Regulation* XVII *of* 1806, ss. 7, 8—*Tender of mortgage-money.*—Where in a suit for foreclosure of a mortgage by conditional sale, a notice of foreclosure had been issued under Regulation XVII of 1806, and the mortgagors deposited in Court the money due on the mortgage before the expiry of the year of grace, but at the same time denied the mortgagee's right to receive the money and threatened them with legal proceedings if they took it from the Court,—*held* that the deposit was not an unconditional tender of the money due on the mortgage, that it was vitiated by the conditions under which it was made, that the mortgagees were not bound to accept a deposit so vitiated, and that therefore it was not valid to prevent foreclosure. MAKHAN KUAR v. JASODA KUAR, 6 A. 399=4 A.W.N. (1884) 138 ... 709

(4) *Suit for redemption—Valuation of suit—Jurisdiction.*—The purchaser of the equity of redemption of certain land sued to redeem the same. He made the mortgagor and vendor of the land a "*pro forma*" defendant. *Held*, that the value of the subject-matter of the suit was not the market-value of the land, but the amount of the mortgage-money. KUBAIR SINGH v. ATMA RAM, 5 A. 332=3 A.W.N. (1883) 47 ... 230

Mortgage—6.—Redemption—(*Concluded*). PAGE

(5) *Usufructuary mortgage—Accounts—Government revenue—Mode of taking accounts—Annual rests—Surplus receipts—Wrongful payments by mortgagee—Act* IV *of* 1882 (*Transfer of Property Act*), s. 76 (*c*) *and* (*h*).—By the terms of a usufructuary mortgage, it was provided that the annual profits of the mortgaged property should be taken to be a certain amount; that out of this amount the revenue should be paid annually by the mortgagee; that the balance should be taken by the mortgagee as representing interest on the principal amount of the mortgage-money; and that the mortgage should be redeemed on payment of the principal of the mortgage-money in a lump sum. It was further provided that the mortgagor should not be entitled to claim mesne profits nor the mortgagee to claim interest.

J, alleging that he had purchased the equity of redemption of the mortgaged property in 1869; that since the purchase the mortgagee had not paid any revenue and therefore he, *J*, had been compelled to pay it; and that consequently the mortgage-money had been paid out of the profits of the mortgaged property and a surplus was due, sued the original mortgagor and the mortgagee for possession by redemption of the mortgaged property, and for surplus profits, or for possession of the mortgaged property on payment of any sum which might be found due. One of the defences to the suit was that the mortgage had already been redeemed in 1877 by the original mortgagor, and the suit was therefore not maintainable.

Held, (i) that, assuming that such redemption had taken place, that fact could not prejudice the plaintiff's rights arising out of the mortgage, whatever the effect of such redemption might be as between the original mortgagor and the mortgagee, and such redemption was therefore not a bar to the suit; (ii) that the plaintiff was entitled to take into account the amount of revenue which he had been compelled to pay by reason of the mortgagee's default; (iii) that in the accounting the plaintiff was entitled to avail himself of annual rests; and (iv) that the mortgagee, having had notice of the plaintiff's purchase, any payments which he might have made to the original mortgagor on account of revenue after the purchase were improperly made, and could not be taken into account against the plaintiff. JAIJIT RAI v. GOBIND TIWARI, 6 A. 303=4 A.W.N. (1884) 92. 642

(6) See MORTGAGE (USUFRUCTUARY), 5 A. 419.

——7.—Sale.

Suit to enforce payment of money charged upon immoveable property—Suit by a mortgagee for sale—Act XV *of* 1877 (*Limitation Act*), *sch.* ii, *Nos* 132, 147.—A suit upon a bond for money payable on demand, by which immoveable property is hypothecated as security for the debt, wherein the relief prayed is recovery of the amount with interest by establishment of the right to enforce the hypothecation by auction-sale of the interest of the obligor in such property, is governed by art. 147, and not by art. 132, of Act XV of 1877 (Limitation Act). SHIB LAL v. GANGA PRASAD, 6 A. 551 (F.B)=4 A.W.N. (1884) 188 ... 815

——8.—Usufructuary.

(1) *Redemption—Interest—Regulation* XV *of* 1793, *ss.* 3, 4, 10, 11—*Stat.* 13, *Geo.* III, *c.* 63, *s.* 30—*Act* XXVIII *of* 1855, *s.* 7—*Novation of contract—Recital of mortgage.*—*J*, the usufructuary mortgagee for Rs. 1,250 of certain land, of one-ninth of which he had purchased the equity of redemption, in 1854 gave a usufructuary mortgage of the land to *N* for Rs. 2,700, of which Rs. 1,950 represented the mortgage-money of the land he held as mortgagee, and Rs. 750 of the land he held as proprietor. By the instrument of mortgage it was provided that the mortgagee should take all the profits in lieu of interest and the mortgage should be redeemable on payment by the mortgagor of the principal money. In 1880 *F*, the representative of the original mortgagor in respect of eight-ninths of the land sued, with reference to Regulation XV of 1793, for possession of the land, on the ground that the mortgage had been redeemed, as the principal money and interest at twelve per cent. had been received out of the profits, and claimed an account. *N* set up as a defence that the provisions of that Regulation were not applicable, as after its repeal by Act XXVIII of 1855 the mortgagor had agreed not to claim an account. This agreement, he

Mortgage—8.—Usufructuary—(*Concluded*). PAGE

alleged, was contained in the *wajib-ul-arz* of 1871. MAHTABKUAR v. THE COLLECTOR OF SHAHJAHANPUR, 5 A. 419=3 A.W.N. (1883) 43 ... 289

(2) *Right of mortgagee to sue for mortgage money—Act* IV *of* 1882 (*Transfer of Property Act*), *s.* 68 (*b*) *and* (*c*).—A usufructuary mortgagee, to whom possession of the mortgaged property had been delivered, sued the mortgagor for the mortgage-money on the ground that the mortgagor had sold a part of the mortgaged property, and the purchaser had deprived him of possession of such part. One of the conditions inserted in the deed of mortgage was that if " on the part of the mortgagor, or other persons any kind of dispute or any interference or obstruction took place in obtaining of possession by the mortgagee of the mortgaged property," the mortgagee should be entitled to sue for the mortgage-money.

Held, that such condition contemplated the case of the mortgagor in the first instance, in breach of the conditions of the mortgage, failing to deliver possession to the mortgagee, or to secure his possession from any obstruction or disturbance by other persons, but not the case of the mortgagee being deprived of possession after it had been once obtained and secured, and therefore the mortgagee was not entitled by virtue of such condition to sue for the mortgage-money.

Held, further, that the mortgagee's case being that he had been deprived of possession of a part of the mortgaged property, he would be entitled to sue for the mortgage-money only if he had been deprived thereof by or in consequence of the wrongful act or default of the mortgagor, and not if he had been deprived thereof by or in consequence of the wrongful act or default of other persons; that the sale by the mortgagor was not a wrongful act, there being no condition against alienation, and the sale by a mortgagor of his equity of redemption not being rendered wrongful or unlawful by any rule of law, nor being in itself a wrongful act; that a wrongful act by the purchaser, though committed under colour of the purchase, could not be said to have taken place "in consequence of the wrongful act or default of the mortgagor;" and that therefore the mortgagee had no cause of action. JHABHU RAM v. GIRDARI SINGH, 6 A. 298 = 4 A.W.N. (1884) 97 ... 638

(3) See LANDLORD AND TENANT, 5 A. 495.

(4) See MORTGAGE (REDEMPTION), 6 A. 303.

Muafidar.

Government revenue, assignee of—Mahal not charged where the revenue is assigned—Act XII *of* 1881 (*N.-W.P. Rent Act*), *ss.* 93 (*i*), 171, 177—*Act* XIX *of* 1873 (*N.-W.P. Land Revenue Act*), *s.* 167.—Maufidars or assignees of Government revenue are not in precisely the same position as Government itself would have been, and possessed of identical rights and powers, in respect of the recovery of arrears of revenue due to them. An arrear of assigned revenue is not a prior charge on the property in respect of which it is payable, against all the world. The effect of the provisions of ss. 93 (*i*), 171, and 177 of the N.-W.P. Rent Act (XII of 1881) is to show that what the Legislature contemplated was to place the revenue assigned to a muafidar upon the same footing as rent; that therefore, in order to recover an arrear of revenue, a maufidar must bring a suit in the Revenue Court; that, upon obtaining a decree, he may apply for execution against the immoveable property of the judgment-debtor; that, where such property is a mahal, the Collector may make certain arrangements for discharge of the debt; and that, failing such arrangements, such immoveable property may be sold, subject to any incumbrances there may be upon it. BITHAL DAS v. HARPHUL, 6 A. 503=4 A.W.N. (1884) 176 ... 783

Negotiable Instruments Act (XXVI of 1881).

Ss. 93, 94, 98 (c)—See HUNDI, 6 A. 78.

Novation.

Of contract—See MORTGAGE (USUFRUCTUARY), 5 A. 419.

Occupancy Right. PAGE

(1) *Ex-proprietary tenant—"Transfer" of—Act* XII *of* 1881 (*N.-W.P. Rent Act*), ss. 7, 9.—The words of s. 7 of the N.-W.P Rent Act, "shall have a right of occupancy in the land held by him as *sir*," are intended by operation of law to confer upon the proprietor who has sold his proprietary rights in a mahal, irrespective of whether he claims it or not, the *status* of an occupancy tenant, to whom the prohibition of s. 9 will apply.

Held, therefore, that where a proprietor in a mahal holding *sir* land, who is selling his proprietary rights, at the same time transfers all his rights, actual, vested or contingent in such *sir* land, such transfer is one of his rights of occupancy in such *sir* land, and as such is prohibited by s. 9 of the N.-W.P. Rent Act. GULABI RAI v. INDAR SINGH, 6 A. 54 (F.B.) = 3 A.W.N. (1883) 207 ... 467

(2) See HINDU LAW (JOINT FAMILY), 6 A. 234.

(3) See LANDLORD AND TENANT, 5 A. 616.

(4) Transfer of—See LANDLORD AND TENANT, 6 A. 19.

Offence.

See PENAL CODE (ACT XLV OF 1860), 6 A. 121.

Pardanashin.

(1) *Woman—Examination by commission—Personal appearance in Court—Act* X *of* 1872 (*Criminal Procedure Code*), s. 330.—*Semble* that in criminal cases "*pardah-nashin*" women are not *of right* exempted from personal attendance at Court. Also that the word "inconvenience" in s. 330 of the Criminal Procedure Code (Act X of 1872) empowers the Courts to allow examination by commission in criminal cases where a witness, according to the manners and customs of the country, ought not to appear in public.

The complainant in a case of defamation, alleging that she was a "*pardah-nashin*," applied to be examined by commission. *Held*, that the fact that she was a complainant, and not merely a witness, materially altered her position as regards the question whether she ought not to be exempted from personal appearance in Court, and that, under the circumstances, she ought not to be examined by commission, but ought to attend personally to be examined in Court.

Direction to the Magistrate to make such arrangements for the examination of the complainant in Court as should secure her privacy, consistent with the recording of her evidence, according to law, in the presence of the accused.

Witnesses in criminal cases should not be examined by commission except in extreme cases of delay, expense, or inconvenience. *In re* FARID-UN-NISSA, 5 A. 92 = 2 A.W.N. (1882) 184 ... 63

(2) *Woman—Personal attendance of accused person—Criminal Procedure Code*, s. 205.—*Held*, where a Magistrate had issued a summons to a "*pardah-nashin*" woman, alleged to be of good position, who was accused of an offence, that the Magistrate should have dispensed with the personal attendance of the accused and permitted her to appear by pleader, until such time as he had before him clear, direct, and reliable *prima facie* proof that the accused had a real charge to answer. *In the matter of the petition of* RAHIM BIBI, 6 A. 59 = 3 A.W.N. (1883) 207 ... 471

Parties.

To suit—Suit by "the Muhammadan Association of Meerut"—Civil Procedure Code, ss. 30, 535 —The "*Majlis Islamia*" or "Muhammadan Association" of Meerut instituted a suit in its own name by its secretary. *Held* that, as such Association had not *per se* any *status* in law so to sue, the suit was not maintainable.

Semble that had such Association empowered one or more of its number to act for it in the matter of the suit, in the manner provided by s. 30 of the Civil Procedure Code, the permission mentioned in that section might have been granted. THE MUHAMMADAN ASSOCIATION OF MEERUT v. BAKHSHI RAM, 6 A. 284 = 4 A.W.N. (1884) 76 = 8 Ind. Jur. 585 ... 628

Partnership. PAGE

Suit for dissolution of—Jurisdiction—Arbitration—Finality of decree in accordance with award—Civil Procedure Code, s. 215, Chap. XXXVII—*Act* IX *of* 1872 *(Contract Act), s.* 265.—A suit for dissolution of a partnership, taking the accounts of the firm, and a declaration of the plaintiff's right to a certain share in the debts due to the firm, was, with reference to the value of the subject-matter of the suit, instituted in the Court of a Munsif. The matters in difference in the suit were eventually referred to arbitration under Chap. XXXVII of the Code of Civil Procedure, and an award was made declaring the plaintiff entitled to recover a certain sum from the defendant. Judgment and a decree were given in accordance with the award. *Held* that, the award notwithstanding, the question whether the suit was cognizable in the Munsif's Court was entertainable.

Held, also, that the suit was not an application of the nature mentioned in s. 265 of the Contract Act, 1872, but a suit of the nature mentioned in s. 215 of the Civil Procedure Code, and was therefore not cognizable in the District Court, but in the Court of the Munsif. KALIAN DAS v. GANGA SAHAI, 5 A. 500=3 A.W.N. (1883) 100 ... 345

Patent.

Suit for infringement—Jurisdiction—Transfer of suit—Civil Procedure Code, s. 25—*Particulars of breaches—Act* XV *of* 1859, *ss.* 22, 34.—A suit for the infringement of certain inventions, instead of being instituted in the Court having, by virtue of s. 22 of Act XV of 1859, jurisdiction to entertain it, was instituted in a Court subordinate to such Court not having such jurisdiction. The Court having jurisdiction to entertain such suit, at the joint request of the parties, transferred it for trial to itself under s. 25 of the Civil Procedure Code, and tried it.

The plaintiff did not, as required by s. 34 of Act XV of 1859, deliver with his plaint particulars of the breaches complained of in the suit. In his plaint, after describing his inventions, he alleges generally that the defendant had made and used them at a certain place without his license.

Held that, inasmuch as the parties had assented to the transfer of the suit, and its transfer brought it into the right Court, the fact that the suit had been originally instituted in the wrong Court did not render the transfer illegal, and the Court having jurisdiction had properly tried the suit.

Held also that, as required by s. 34, Act XV of 1859, the plaintiff should have delivered with his plaint particulars of the breaches complained of; that the general allegation as to infringement contained in the plaint did not amount to such particulars; and that under these circumstances the plaintiff came into Court with a case which could not be tried. PETMAN v. BULL, 5 A. 371=3 A.W.N. (1883) 59 ... 257

Penal Code (Act XLV of 1860).

(1) Ss. 24, 25, 465—See FORGERY, 5 A. 221.

(2) Ss. 24, 25, 196, 464, 470, 471—See FORGERY, 5 A. 217.

(3) S. 67—See SUMMARY TRIAL, 6 A. 61.

(4) S. 73—See CRIMINAL PROCEDURE CODE (1882), 6 A. 83.

(5) *S.* 111—*Abetment—Knowledge of abettor—Probable consequence of abetment.*—*M* and *C* were proved to have connived at a robbery in which excessive violence was used, resulting in the death of the persons robbed. The Sessions Judge convicted *M* and *C* of abetment of murder, on the ground that the death was "a probable consequence of the intention known and abetted" by them.

Held that the test of guilt in charges of abetment must always be whether, having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one which, according to ordinary experience and common sense, the abettor must have foreseen as probable; and that, having regard both to the strictness of the tests which should be applied to the interpretation of a penal statute, and especially of a section such as s. 111 of the Penal Code, and also to the necessary difficulty of questions as to the state of a man's mind at a particular moment, it could not, in the present case, be said that, because the accused knew of and connived

Penal Code (Act XLV of 1860)—(*Continued*). PAGE

at the intended robbery, they must be presumed to have foreseen that such excessive violence as was used was probable. QUEEN-EMPRESS v. MATHURA DAS, 6 A. 491=4 A.W.N. (1884) 251=9 Ind. Jur. 119 ... 774

(6) *Ss.* 146, 147, 149, 329—*Offence made up of several offences—Rioting—Grievous hurt—Criminal Procedure Code, s.* 235—*Act* VIII *of* 1882, *s.* 4.—A member of an unlawful assembly, some members of which have caused grievous hurt, cannot lawfully be punished for the offence of rioting as well as for the offence of causing grievous hurt. EMPRESS v. RAM PARTAB, 6 A. 121=3 A.W.N. (1883) 241 ... 516

(7) *S.* 174—*Non-attendance in obedience to a summons—Summons, what it should contain—Omission to state place and time of attendance.*—A summons should be clear and specific in its terms as to the title of the Court, the place at which, the day, and the time of the day when, the attendance of the person summoned is required, and it should go on to say that such person is not to leave the Court without leave, and, if the case in which he has been summoned is adjourned, without ascertaining the date to which it is adjourned.

Where a summons did not mention the place at which, or the time of the day when, the attendance of the person summoned was required, *held*, that such person could not lawfully be punished under s. 174 of the Penal Code for non-attendance in obedience to such summons. EMPRESS OF INDIA v. RAM SARAN, 5 A. 7=2 A.W.N. (1882) 145=7 Ind. Jur. 324 ... 5

(8) *Ss.* 177, 182, 415—*Furnishing false information—Cheating.*—A person attempted to obtain his recruitment in the police of a district by giving certain information which he knew to be false to the District Superintendent of Police. *Held* that such person had not thereby committed an offence punishable under s. 177 or s. 188 of the Indian Penal Code, or the offence of attempting to "cheat" within the meaning of s. 415 of that Code. EMPRESS v. DWARKA PRASAD, 6 A. 97=3 A.W.N. (1883) 224 ... 498

(9) Ss. 181, 193—See STAMP ACT (I OF 1879), 5 A. 17.

(10) *Ss.* 182, 211—*Prosecution under s.* 182—*Complaint—Rejection with reference to police-report.*—*K* made a report at police-station accusing *R* of a certain offence. The police having reported to the Magistrate having jurisdiction in the matter that in their opinion the offence was not established, the Magistrate ordered the case to be "shelved." *K* then preferred a complaint to the Magistrate again accusing *R* of the offence. The Magistrate rejected the complaint with reference to the police-report. Subsequently *R*, with the sanction of the police authorities, instituted criminal proceedings against *K*, under s. 182 of the Penal Code, in respect of the report which he had made at the police station, and *K* was convicted under that section.

Held that, before proceeding against *K*, the Magistrate should have fully investigated and sifted his complaint for himself, and should not have abrogated the functions imposed on him by law, because the police had reported against the entertainment of the case.

Held also that *K*'s conviction under s. 182 of the Penal Code was illegal as the Magistrate had no power to entertain a complaint under that section at the instance of *R*, the application of s. 182 and the institution of prosecutions under it being limited to the public servant against whom the offence had been committed or to his official superior, as mentioned in s. 467 of Act X of 1872, and it not being intended that those provisions should be enforced at the instance of private persons. Moreover, if *K*'s complaint was false, his offence was against *R*, and not against the public servant to whom the complaint was made, and fell within s. 211 of the Penal Code.

Ordered that the complaint made by *K* should be investigated. EMPRESS OF INDIA v. RADHA KISHAN, 5 A. 36=2 A.W.N. (1882) 145 ... 25

(11) S. 191—See PLEADINGS, 6 A. 626.

(12) Ss. 191, 193—See CRIMINAL PROCEDURE CODE (1882), 6 A. 103.

(13) *Ss.* 192, 218—*Fabricating false evidence—Public servant framing an incorrect record.*—A police officer, who had suppressed a document intrusted to him to forward to his superior officer, made a false entry in his official

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diary that the document had been so forwarded, intending that if he were prosecuted under the Police Act for suppressing the document such entry might be used as evidence in his behalf that he had so forwarded the document.

Held that inasmuch as to constitute the offence of fabricating false evidence defined in s. 192 of the Penal Code, the evidence fabricated must be admissible evidence, and as, if such police-officer had been prosecuted under the Police Act, the entry in the diary would not have been admissible in his behalf though contrary to his intention it might have been used against him, such police-officer was, improperly convicted in respect of such entry of fabricating false evidence punishable under s. 193 of the Penal Code.

Held also, that such police officer's intention in making such entry being to screen himself from punishment, he was not punishable, under s. 218 of the Code. EMPRESS v. GAURI SHANKAR, 6 A. 42=3 A.W.N. (1883) 189 ... 458

(14) *S.* 211—*False charge.*—The actual institution of criminal proceedings on a false charge is essential to the application of the latter part of s. 211 of the Indian Penal Code, and if a person only makes a false charge, his case falls under the first part of the section irrespective of the fact that the false charge relates to "an offence punishable with death, transportation for life, or imprisonment for seven years or upwards." EMPRESS OF INDIA v. PITAM RAI, 5 A. 215=2 A.W.N. (1882) 225 ... 146

(15) *S.* 211—*False charge.*—Where no criminal proceeding is instituted on a false charge of an offence of the nature described in the latter part of s. 211 of the Indian Penal Code, the person making such charge is punishable only under the first part of that section. EMPRESS v. PARAHU, 5 A. 598=3 A.W.N. (1883) 149 ... 413

(16) S. 211—See FALSE CHARGE, 5 A. 38, 57.

(17) S. 211—See SANCTION TO PROSECUTE, 6 A. 114.

(18) Ss. 218, 463—See FORGERY, 5 A. 553.

(19) *Ss.* 222, 223—*Escape from confinement negligently suffered by public servant—Escape from confinement intentionally suffered by public servant—Criminal Procedure Code, s.* 167.—While a case was being investigated by *A*, a police officer, under the provisions of Chapter XIV of the Criminal Procedure Code, *T* presented a petition to the Magistrate having jurisdiction to try the case, in which he accused *W* of being concerned in the commission of the offence, and prayed that he might be arrested and sent to the police officer investigating the case. *W* was accordingly arrested and brought before the Magistrate, who having examined *T* on oath and taken *W's* statement, made an order on the petition to the following effect:—"As no police report has been made in this matter and the petitioner only has presented this petition, ordered that these papers of *W* be sent to the District Superintendent of Police and if a report of this matter be made, the case may be sent up according to rule with the papers." In accordance with this order *W* was taken to the District Superintendent of Police, and was sent by that officer to *A*. *Held* that the Magistrate's order might be taken to have been passed under s. 167 of the Code and therefore *W* was lawfully committed to the custody of the Police, and *A* was bound to detain him in such custody until released therefrom by due course of law; and that consequently *A*, having negligently suffered *W* to escape had been properly convicted under s. 223 of the Penal Code. EMPRESS v. ASHRAF ALI, 6 A. 129=3 A.W.N. (1883) 257 ... 521

(20) *S.* 304-*A*—*Causing death by a rash or negligent act.*—*N*, a servant of a railway company, charged with moving some trucks by coolies on an incline, discharged this duty negligently, and in consequence lost control of the trucks. Under his orders one of the coolies attempted to stop the trucks and was killed in such attempt. *Held* that *A* had caused the coolie's death by his negligence, within the meaning of s. 304-A of the Penal Code. QUEEN EMPRESS v. NAND KISHORE, 6 A. 248=4 A.W.N. (1884) 71 ... 604

(21) *S.* 377—*Unnatural offence—Charge—Particulars as to time, place, and person—Criminal Procedure Code, s.* 222.—*Held* where a person was tried

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for an unnatural offence and convicted on a charge which did not allege the time when, place where, or point to any known or unknown person with whom, the offence was committed, and without any proof of these particulars, the facts proved against him only being that he habitually wore woman's clothes and exhibited physical signs of having committed the offence, that the conviction was not sustainable. QUEEN-EMPRESS v. KHAIRAT, 6 A. 204=4 A.W.N. (1884) 26 ... 573

(22) S. 411—*Retaining stolen property—Proof that the property is stolen property necessary—Guilty knowledge of retainer—Criminal Procedure Code, s. 503—Commission for the examination of witness—Act I of 1872 (Evidence Act), s. 33.*—Where a person is accused of an offence under s. 411 of the Indian Penal Code, he cannot, where the circumstances do not raise the presumption that he received the property knowing it to be stolen, be convicted of that offence merely because he is in possession of the property and does not account for his possession. The prosecution must prove both that the property was stolen and that the accused received it dishonestly.

At the trial of a person for an offence under s. 411 of the Indian Penal Code, the Court of Session, under s. 33 of the Indian Evidence Act, 1872, used against the accused the evidence of the owner of the property in respect of which the accused was charged and of his wife taken by commission during the inquiry, and the evidence of the servant of those persons taken at the inquiry, and also the evidence of the owner of the property taken during the trial under a commission issued by the Sessions Judge under s. 503 of the Criminal Procedure Code. The grounds upon which the Sessions Judge admitted the evidence taken during the inquiry were that the attendance of the witnesses could not be procured without an expense of Rs. 500, an amount which he considered unreasonable, that the witnesses would be inconvenienced, and that their evidence did not concern the accused personally, having reference only to the identification of the property in respect of which the accused was charged. *Held* that the Sessions Judge had improperly admitted such evidence. Inconvenience to witnesses is no ground allowed under s. 33 of the Evidence Act, and the question of identification was a most material one, and the evidence of the witnesses in question was of the utmost moment, the whole case resting on it; and as regards the ground of expense, it was impossible to consider the amount unreasonable, considering that the entire case rested on the evidence of those witnesses, and that the accused had not cross-examined those whose evidence had been taken by commission, nor, looking at his position, could he arrange for their cross-examination.

Held also that on similar grounds the Sessions Judge was not justified in issuing a commission under s. 503 of the Criminal Procedure Code. QUEEN EMPRESS v. T. BURKE, 6 A. 224=4 A.W.N, (1884) 55 ... 587

(23) S. 497—*Adultery—Evidence of marriage—Act I of 1872 (Evidence Act), s. 50—Prosecution for adultery—Act X of 1872 (Criminal Procedure Code), s. 478.*—*K* was accused by *D* and *P*, alleged to be *D*'s wife of raping *P*, and was committed for trial charged in the alternative with rape or adultery. The evidence of marriage between *D* and *P* consisted of their statements that they were married to each other, and of a statement by *K* that *P* was *D*'s wife. *K* was convicted on the charge of adultery.

Held. that such evidence, having regard not only to s. 50 of the Evidence Act, 1872, but to the principle that strict proof should be required in all criminal cases, was not sufficient to establish the vital incident to the charge of adultery, namely, the marital relation of *D* and *P*.

Also that, as no complaint had ever been actually instituted by *D* against *K* for the offence of adultery, as contemplated by s. 478 of Act X of 1872 (Criminal Procedure Code), (the circumstance of *D*'s appearing as a witness for the prosecution for the offence of rape not amounting to the institution of a complaint within the meaning of that section). *K*'s conviction for adultery must be quashed. EMPRESS OF INDIA v. KALLU, 5 A. 233=3 A.W.N. (1883) 1=7 Ind. Jur. 543 ... 159

(24) S. 499, Expl. (8)—See DEFAMATION, 6 A. 220.

Penalty. PAGE

See BOND, 6 A. 61 ; 6 A. 63 ; 6 A. 64 ; 6 A. 179.

Pleadership Examination.

Notification of a candidate having qualified—Cancellation of Notification on the ground of error—Appeal to Her Majesty in Council—Civil Procedure Code, Chap. XLV.—A candidate at an examination for pleadership, a mistake in the computation of his marks having been made, was erroneously declared qualified for admission as a vakil of the High Court by a Government notification. The mistake having been discovered such notification was, so far as he was concerned, cancelled. He then petitioned the High Court in the matter, and was informed by it that his name must be excluded from such notification as he had not qualified by obtaining the requisite number of marks. The candidate having applied for leave to appeal to Her Majesty in Council, *held* that Chap. XLV of the Civil Procedure Code had no application, and the matter was not one in which the High Court was concerned to grant or refuse leave to appeal to Her Majesty in Council. *In the matter of the petition of* SUKH NANDAN LAL, 6 A. 163 (F.B.) = 4 A.W.N. (1884) 15 ... 544

Pleadings.

Civil Procedure Code, ss. 51, 115—*False verification of written statement—False evidence—Act* XLV *of* 1860 (*Penal Code*), s. 191.—A person filing a written statement in a suit is bound by law to state the truth, and if he makes a statement which is false to his knowledge or belief, or which he believes not to be true, he is guilty of giving false evidence within the meaning of s. 191 of the Penal Code. QUEEN-EMPRESS v. MEHRBAN SINGH, 6 A. 626 = 4 A.W.N. (1884) 253 ... 866

Possession.

(1) *Sale in execution of decree of Revenue Court—Sale-certificate—Delivery of possession—Title of purchaser—Act* XVIII *of* 1873 (*N.-W.P. Rent Act*), s. 76 —*Act* XXII *of* 1881 (*N.-W.P. Rent Act*), s. 172—*Act* XV *of* 1877 (*Limitation Act*), *sch. ii, Nos.* 144, 178.—Property sold in execution of a decree of a Revenue Court vests in the purchaser on the completion of the sale and payment of the full price. In order to perfect his title it is not necessary that he should obtain a sale-certificate or should be put into possession by the Collector.

Held, therefore, that a suit by a purchaser at a sale in execution of a decree of a Revenue Court for possession of the property was maintainable, although his sale-certificate might be an invalid document, and the Collector had not put him into possession. MUZAFFAR HUSAIN v. ALI HUSAIN, 5 A. 297 = 3 A.W.N. (1883) 41 ... 205

(2) *Suit for, of immoveable property—List of properties sued for appended to plaint—Omission to specify in decree properties decreed—Execution of decree—Civil Procedure Code*, s. 206 —The plaintiff in a suit claimed possession of villages said in the plaint to be " detailed below." No details of the villages were given in the plaint itself, but a separate paper containing a list of villages was filed with the plaint. The plaintiff obtained a decree for possession of " all the villages claimed," but there was no indication in the decree what those villages were.

Held that the Court executing the decree was not justified in reading the contents of the list of villages attached to the plaint into the decree, and awarding the decree-holder possession of the villages named in such list. MUHAMMAD SULAIMAN v. MUHAMMAD YAR, 6 A. 30 = 3 A.W.N. (1883) 215 ... 449

(3) *Suit for, of immoveable property—Suit for cancellation of instrument—Act* XV *of* 1877 (*Limitation Act*), *sch. ii, Nos.* 91, 95, 138.—The purchasers of property sold in execution of a decree, having been resisted in obtaining possession of the property by a person claiming under a mortgage from the judgment-debtor, sued for possession by avoidance of the mortgage, alleging that the same was collusive and fraudulent. The plaintiffs did not ask for the cancellation or setting aside of the instrument of mortgage. *Held* that the law of limitation governing the suit was not art. 91 or 95 of the Limitation Act, but art. 138. UMA SHANKAR v. KALKA PRASAD, 6 A. 75 = 3 A.W.N. (1883) 212 ... 483

Practice and Procedure. PAGE

(1) *Conversion of character of suit—Remand.*—A Banksued *H*, its agent, who had appointed *N* to act in the matter of the agency, for money belonging to it which *H* had paid *N* for the purposes of the agency and which was not accounted for by *N*, claiming the same on the ground that *N* had been appointed to act as a sub-agent without authority. The lower appellate Court found that *N* had been appointed by *H* to act in the matter of the agency with authority, but, instead of dismissing the suit with reference to this finding gave the plaintiff Bank a decree against *H* on the ground that he had not exercised ordinary prudence in selecting *N* as an agent for his principal. *Held*, that, inasmuch as the plaintiff Band had not claimed relief on the ground that *H* had failed in his duty in naming *N* as an agent for his principal, but on the ground that *N* had been appointed without authority, and had failed to prove its case, the suit should have been dismissed. HAMILTON v. THE LAND MORTGAGE BANK OF INDIA, 5 A. 456=3 A.W.N. (1883) 99 ... 315

(2) See APPEAL (GENERAL), 5 A. 380.

(3) See ARBITRATION, 6 A. 211.

(4) See REMAND, 6 A. 391.

Pre-emption.

(1) *Bad title of vendor as to part of property—Pre-emptor and preferential pre-emptor—Purchase-money.*—Certain persons sold an eight-anna share of a village. *G* sued the vendors and purchasers of the share to enforce his right of pre-emption in respect of the sale, and obtained a decree. *M*, claiming one anna four pies of the share as his property, sued the vendors and purchasers of the share, and *G* for such one anna four pies, and obtained a decree. He then sued the same parties to enforce his right of pre-emption in respect of the remainder of the share, that is, six annas eight pies, claiming to pay only a proportionate amount of the price paid for the whole share. *Held*, that *M* was not bound to pay the price paid for the whole share, but only the proportionate amount of such price. MUHAMMAD LATIF v. GOBIND SINGH, 5 A. 382=3 A.W.N. (1883) 66=8 Ind. Jur. 102 ... 264

(2) *Conditional decree—Purchase-money—Costs—Set-off—Civil Procedure Code, ss. 214, 221, 247.*—The decree in a suit to enforce a right of pre-emption directed in accordance with the provisions of s. 214 of the Civil Procedure Code, that the plaintiff should obtain possession of the property and recover costs of the suit from the defendants (vendor and vendee), on payment of the purchase-money within a fixed time, but that on default of such payment the suit should stand dismissed. The plaintiff deposited within time the purchase-money with the exception of a sum less than the amount of costs awarded to him. He subsequently applied for delivery of possession of the property in execution of the decree and for the recovery of the costs awarded to him, deducting from such costs the unpaid portion of the purchase-money.

Held, applying, by analogy, of ss. 221 and 247 of the Civil Procedure Code, the equitable doctrine of set-off, that the plaintiff was entitled, when depositing the purchase money under the decree, to deduct therefrom the sum the decree awarded to him as costs, and that therefore the decree did not become null and void by reason that he had not deposited the full amount of the purchase-money within time. ISHRI v. GOPAL SARAN, 6 A. 351=4 A.W.N. (1884) 125=8 Ind. Jur. 635 ... 675

(3) *Hindu widow—Possession of share of village in lieu of maintenance—Right of pre-emption.*—Possession for life by a Hindu widow of a share of a village in lieu of maintenance under a decree of Court does not give her such an interest in the share as to entitle her to enforce the right of pre-emption on the sale of another share of the village DILA KUARI v. JAGARNATH KUARI, 6 A. 17=3 A.W.N. (1883) 177=9 Ind. Jur. 40 ... 440

(4) *Mortgage by conditional sale—Construction of* wajib-ul-arz*—Purchase-money—Limitation—Act* XV *of* 1877 *(Limitation Act), sch. ii, Nos.* 10, 120.—The limitation applicable to a suit to enforce the right of pre-emption in respect to a mortgage by conditional sale of a fractional share of an undivided mahal is that contained in No. 120, sch. ii of the Limitation Act, 1877.

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The *wajib-ul-arz* of a village provided that the right of pre-emption should accrue "not only in respect of absolute sales, but also in regard to conditional sales, mortgages, and '*thika*' leases."

Held that under its terms the right of pre-emption accrued on a mortgage by conditional sale becoming absolute.

The pre-emptor, in the case of a mortgage by conditional sale which has become absolute, is bound to pay as the price of the property the entire amount due on such mortgage at the time it became absolute. ASHIK ALI v. MATHURA KANDU, 5 A. 187=2 A.W.N. (1882) 212 ... 127

(5) *Purchase-money—Burden of proof—Act* I *of* 1872 (*Evidence Act*), *s.* 106.—In a suit to enforce the right of pre-emption, in which the plaintiff impugns the correctness of the price stated in the instrument of sale, although the burden of proof *prima facie* is on him to show that the property has in fact been sold below the stated price, yet very slight evidence is ordinarily sufficient to establish his case, and when such case is established, it rests upon the defendants, the vendor and vendee, to prove by cogent evidence that the stated price is the correct one. BHAGWAN SINGH v. MAHABIR SINGH, 5 A. 184=2 A.W.N. (1882) 213 ... 124

(6) *Construction of* wajib-ul-arz.—The *wajib-ul-arz* of a village, divided into three thoks and comprising also undivided land, contained a clause giving the right of pre-emption to such brothers and nephews of the vendor as were sharers, "and in case of their refusal to the other owners of the thok;" *held*, that under this clause, an owner of one of the three thoks having sold all his interest in the village, no right of pre-emption attached to the ownership of another of the thoks. LACHCHO v. MAYA RAM, 5 A. 158 (P.C.)=10 I.A. 1=4 Sar. P.C.J. 405 ... 107

(7) *Rival pre-emptors—Suit to enforce the right in respect of a part of the property.*—The prior institution of a suit by rival pre-emptors in no way entitles a pre-emptor to depart from the general rule of pre-emption, by suing for a portion only of the property sold. HULASI v. SHEO PRASAD, 6 A. 455=4 A.W.N. (1884) 166 ... 749

(8) *Rival suits to enforce the right—Form of decrees—Civil Procedure Code, s.* 214.—*K* and *R*, two co-sharers of a village, instituted separate suits in which each claimed to enforce the right of pre-emption, based on the *wajib-ul-arz* in respect of the same sale of a share in the village to a stranger. The Court of first instance made the plaintiff in one suit a defendant in the other. The suits were tried together, and *R* being held to have a better right under the terms of the *wajib-ul-arz* than *K*, his suit was decreed, contingent upon payment by him of the purchase-money within one month from the date of the decree. *K*'s suit was dismissed absolutely.

Held, that decrees in cases where two rival pre-emptors of the same degree seek to enforce pre-emption, as each necessarily must do, in respect of the *whole* property conveyed by one transfer, are defective if they dismiss the suit for any proportion of the property without providing for the contingency of the rival pre-emptor decree-holder omitting to enforce his decree in respect of the share decreed to him. *A fortiori*, where the rival decree-holders possess different degrees of pre-emption, the decree, in at least one of the rival suits, must be essentially defective if no provision is made for the contingency of the superior pre-emptor never enforcing his right.

The question what should be the form of the decree in such cases can be dealt with only by exercising the vast and flexible jurisdiction possessed by the Courts of Equity in adapting their decrees to the exigencies of each case, so as to grant the actual relief required by the parties.

Held, applying the principles of equity to the present case, that the Court of first instance acted rightly in adding the name of each rival pre-emptor as party defendant in the suit of the other, and in decreeing the claim of the superior pre-emptor, but that the decree in *K*'s suit was defective and inequitable, inasmuch as it dismissed the suit *in toto*, disallowing his pre-emptive claim wholly irrespective of the contingency of *R*'s omission to enforce the pre-emption decreed to him by depositing the purchase-money within time. As *K* admittedly had pre-emptive right as against the vendee, his suit should have been decreed against the latter in the

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terms of s. 214 of the Civil Procedure Code; subject, however, to the condition that the decree should not take effect, so far as the enforcement of pre-emption was concerned, in the event of *R*'s enforcing the superior pre-emptive right decreed to him. KASHI NATH v. MUKTA PRASAD, 6 A. 370=4 A.W.N. (1884) 119=8 Ind. Jur. 688 ... 688

(9) *Suit to enforce a right of pre-emption—Appeal by purchaser—Court-fee—Act* VII *of* 1870 (*Court Fees Act*), *s*. 7 (i) *and* (vi).—Where, in a suit to enforce a right of pre-emption, a decree was passed against the vendees-defendants, and they appealed from the same on the grounds that they were entitled to receive from the plaintiffs-pre-emptors a sum larger than that found by the Court of first instance to have been the purchase-money, and also that the plaintiffs had estopped themselves from asserting the right by refusing to purchase,—*held* that the nature of the suit was not changed in appeal, and that, on the contrary, the subject-matter of the dispute between the parties was the right of pre-emption, the value of which, for the purposes of Court-fee, was to be determined in manner directed by s. 7, cl. (vi) of the Court Fees Act, VII of 1870.

Where an appeal is preferred in a suit for pre-emption, on the ground that the right to pre-empt has or has not been established, as the case may be, no matter what other pleas may be taken, the value of the subject-matter in dispute, for the purposes of the Court Fees Act, must be determined as in terms provided in art. (vi) of s. 7 of the Act.

Where the question in appeal relates solely to the amount to be paid by the pre-emptor, the court-fee should be calculated *ad valorem* on the difference between the amounts alleged as the sale-price on the one side and the other. HAFIZ AHMAD v. SOBHA RAM, 6 A. 488=4 A.W.N. (1884) 179 ... 772

(10) *Suit to enforce the right in respect of a part of the property sold.*—Every suit for pre-emption must include the whole of the property, subject to the plaintiff's pre-emption, conveyed by one bargain of sale to one stranger; and a suit by a plaintiff pre-emptor, which does not include within its scope the whole of such pre-emptional property, is unmaintainable as being inconsistent with the nature and essence of the pre-emptive right. DURGA PRASAD v. MUNSI, 6 A. 423=4 A.W.N. (1884) 140 ... 725

(11) *Suit to enforce the right of—Misjoinder—Civil Procedure Code, s.* 45.—Two co-sharers of a village, holding separate shares, sold their share separately to the same person, upon which a third co-sharer of the village sued them and the vendor jointly, to enforce his right of pre-emption in respect of the sales. *Held* that the frame of the suit was bad by reason of misjoinder of defendants and causes of action, and the suit had been properly dismissed on that ground. BHAGWATI PRASAD GIR v. BINDESHRI GIR, 6 A. 106=3 A.W.N. (1883) 229 ... 505

(12) *Suit to enforce the right of pre-emption—Non-joinder of vendor—Mortgage—*Wajib-ul-arz—"*Bhai band.*"—In a suit for pre-emption it was objected by the vendee in second appeal that the vendor had not been made a party. *Held* that, whether the omission to make the vendor a party in a suit to enforce the right of pre-emption renders the suit unmaintainable or not, as the vendee had not been prejudiced by such omission in this case, the objection taken at such a late stage of the case could not be allowed.

Held, also, that the word "*bhai-band*" in the *wajib-ul-arz* in this case meant the brotherhood of the village, and not merely those persons who were related by blood. HIRA LAL v. RAMJAS, 6 A. 57=3 A.W.N. (1883) 206 ... 469

(13) *Wajib-ul-arz—Offer of property—Notification that property is for sale and offers will be received—Acquiescence.*—In order to entitle a co-sharer to assert a right of pre-emption based on the *wajib-ul-arz*, there must, as a condition precedent to such assertion, be a sale of a share already negotiated with a stranger, and a price fixed with the stranger by the co-sharer desiring to sell. The only mode in which a pre-emptive claim can then be defeated is by proof of a distinct intimation to the co-sharer seeking to maintain such claim, of the contemplated sale, and of the price agreed

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to be paid by the stranger, of an offer to him (the co-sharer) at such price, and of his refusal to purchase.

Where the sale in respect of which the pre-emptive claim was raised was one made by the Collector as Manager of the Court of Wards, and the Collector, before selling the property, issued a proclamation through the tahsildar, notifying to all the shareholders that the property was for sale, and that sharers intending to purchase should make offers—*held* that such a notification was not a sufficiently distinct and definite notice of a negotiated and intended sale to a stranger, so as to estop co-sharers failing to make an offer to purchase from subsequently asserting their pre-emptive rights. SUBHAGI v. MUHAMMAD ISHAK, 6 A. 463=4 A.W.N. (1884) 174 ... 754

(14) See MORTGAGE (BY CONDITIONAL SALE), 6 A. 344.

(15) See REVISION, 5 A. 42.

(16) See VENDOR AND PURCHASER, 5 A. 324 (F.B.).

Priority.

(1) *Registered and unregistered documents—Act* III *of* 1877 (*Registration Act*), s. 50.—*Held*, that a document which was registered under the Registration Act, 1877, took effect, as regards the property comprised therein, as against a document relating to the same property, the registration of which under the Registration Act, 1871, was optional and which was not registered thereunder. ABDUL RAHIM v. ZIBAN BIBI, 5 A. 593=3 A.W.N. (1883) 136 ... 409

(2) *Registered and unregistered documents—Priority of documents—Act* VIII *of* 1871 (*Registration Act*), s. 50—*Act* III *of* 1877 (*Registration Act*), s. 50.—*Held* by STUART, C.J., that under the *Explanation* to s. 50 of the Registration Act, 1877, a sale-deed, the registration of which under the Registration Act, 1871, was compulsory, and which was duly registered thereunder, took effect, as regards the property comprised therein, against a deed of simple mortgage of a prior date, relating to the same property, the registration of which under the Registration Act, 1871, was optional and which was not registered thereunder.

Held by STRAIGHT, J., that the former document had no preference over the latter under s. 50 of the Registration Act, 1877. DORI LAL v. UMED SINGH, 6 A. 164=4 A.W.N. (1884) 29 ... 545

Promissory Note.

Uncertain agreement.—*Held*, that the following instrument was so vague and indefinite in its terms that it could not be regarded as a promissory note :—"I, *J.M.C.*, do hereby promise to pay at Allahabad to the Manager of the Agra Savings Bank, Limited, the sum of Rs. 10 on or before the 15th day of October 1876, and a similar sum monthly every succeeding month, for full value and consideration received : dated the 9th September, 1876." CARTER v. THE AGRA SAVINGS BANK, LIMITED, 5 A. 562 =3 A.W.N. (1883) 148 ... 387

Public Servant.

Framing incorrect record—See PENAL CODE, 6 A. 42.

Registration.

Registered instrument—Oral agreement—Act XX *of* 1866 (*Registration Act*), s. 48 —*Act* VIII *of* 1871 (*Registration Act*), s. 48.—*Held* that an oral agreement of hypothecation of immoveable property, entered into in August, 1869, and which was not accompanied nor followed by possession of the property charged, could not avail against a registered sale-certificate obtained in respect of the same property and dated in August, 1876, whether s. 48 of Act XX of 1866 or s. 48 of Act VIII of 1871 were looked to. NATHU RAM v. PHULCHAND, 6 A. 581=4 A.W.N. (1884) 183 ... 836

Registration Act (XX of 1866).

S. 48—See REGISTRATION, 6 A. 581.

Registration Act (VIII of 1871).

(1) S. 17—See MORTGAGE (GENERAL), 5 A. 447.

(2) S. 48—See REGISTRATION, 6 A. 581.

(3) S. 50—See PRIORITY, 6 A. 164.

Registration Act (III of 1877). PAGE

(1) See PRIORITY, 6 A. 164.

(2) S. 3—See TREES, 5 A. 564.

(3) S. 17 (*b*)—See SALE CERTIFICATE, 5 A. 568.

(4) Ss. 17, 50—See MORTGAGE (GENERAL), 5 A. 447.

(5) Ss. 23, 60, 87, 89—See SALE CERTIFICATE, 5 A. 84.

(6) *Ss. 24, 73-77—Order for registration under s. 24 of Act* III *of* 1877 (*Registration Act*)—*Finality of order—Refusal to register—Application to establish righ to registration—Suit for registration.*—Where an application for registration of a sale-deed had been presented after the expiry of the period prescribed by law for registration, and had been dealt with under s. 24 of the Registration Act, and the Registrar had passed an order under that section directing that the document should be registered on payment of the prescribed fine, and such fine had been paid,—*held* that the requirements of the law had been complied with, and that it was not competent for the successor in office of the Registrar, dealing with the document under s. 74 of the Registration Act, to go behind the order of his predecessor, nor was it for the Court, in a suit instituted under s. 77, to question the propriety of that order, which was given in pursuance of a discretionary power allowed to a Registrar to accept documents for registration after the time prescribed. DURGA SINGH v. MATHURA DAS, 6 A. 460=4 A. W.N. (1884) 173 ... 752

(7) S. 35—See HINDU LAW (JOINT FAMILY), 5 A. 599.

(8) S. 50—See LIS PENDENS, 6 A. 444.

(9) S. 50—See PRIORITY, 5 A. 593.

Regulation XV of 1793.

Ss. 3, 4, 10, 11—See MORTGAGE (USUFRUCTUARY), 5 A. 419.

Regulation LII of 1803.

Court of Wards—Incompetency of disqualified proprietor to contract.—Under s. 7 of Regulation LII of 1803, *lakharaj* lands belonging to a disqualified proprietor may be committed by the Government (on its appearing that this will be for its interests and those of such proprietor), to the charge of the Court of Wards; and, thereupon, the whole estate and effects, real and personal, of such proprietor, become vested in that Court.

An estate consisting of *lakharaj* lands was duly placed under the management of the Court of Wards, the proprietess, a Muhammadan, being disqualified under the Regulation. This ward having then become a party to a mortgage of such lands to secure re-payment of money advanced to her, it was *held*, that she neither bound herself nor charged the estate.

This case distinguished from *Mohummud Zahoor Ali Khan* v. *Thakooranee Rutta Koer* (11 M.I.A. 468) where the proprietress, no intention to treat her as disqualified having been shown, was adjudged capable of contracting, though the Court of Wards was in possession of her estate.

On the facts of this case it was also *held*: that, although the Court had given to this ward an authority, under certain limitations of which the plaintiff had notice, to borrow money for a special purpose, there had not been such a holding out to the world of her competency as would have induced any reasonable person to suppose that she had power to make the contract on which this suit was brought. BALKRISHNA v. MASUMA BIBI, 5 A. 142 (P.C.)=9 I.A. 182=13 C.L.R. 232=4 Sar. P.C.J. 398 ... 97

Regulation XVII of 1806.

(1) Ss. 7, 8—See MORTGAGE (REDEMPTION), 6 A. 399.

(2) Ss. 7, 8—See MORTGAGE (FORECLOSURE), 6 A. 262.

(3) S. 8—Contemplating previous demand of payment of mortgage-money—See MORTGAGE (FORECLOSURE), 5 A. 9.

(4) S. 8—See MORTGAGE (BY CONDITIONAL SALE), 6 A. 344.

Regulation XI of 1825. PAGE

Ss. 2, 4 (ii)—*Dhardhura.*—The question whether the custom of *Dhardhura* applies to lands gained by gradual accretion only, or also to lands which have been separated from a mauza by a sudden change of stream, must be determined in each case on the evidence; for although the Court would be disposed to scrutinize with care evidence in regard to a custom which would have the effect of passing from one owner to another lands long held and enjoyed, and of which the character is in no way altered by river action, yet it cannot be said that such a custom can in no case be established and given effect to. SIBT ALI v. MUNIR-UD-DIN, 6 A. 479=4 A. W.N. (1884) 185 ... 766

Religious Offerings.

Right to sue for collecting—See GHAT, 6 A. 39.

Remand.

(1) *Finding not objected to—Practice—Duty of appellate Court—Civil Procedure Code,* ss. 567, 574.—Where a first appellate Court has remanded a case to the Court of first instance for the trial of issues, and where, on the return of the findings on these issues, no objections have been preferred under s. 567 of the Civil Procedure Code, the appellate Court, after the period fixed for presenting objections, may, at its discretion, receive or decline to receive any written objection, but is, in any case, bound to consider the findings of the lower Court on the merits, and is not precluded from hearing arguments for and against the findings at the hearing of the appeal.

The imperative provisions of s. 574 of the Civil Procedure Code apply alike to cases remanded by the first appellate Court for the trial of issues and to those in which no such remand has taken place. UMED ALI v. SALIMA BIBI, 6 A. 383=4 A.W.N. (1884) 127 ... 697

(2) *Finding not objected to—Practice—Duty of appellate Court—Civil Procedure Code, ss.* 567, 574.—Where a first appellate Court has remanded a case to the Court of first instance for the trial of issues, and where, on the return of findings on these issues, objections under s. 567 of the Civil Procedure Code have not been filed until after the expiration of the prescribed period, the appellate Court, though not bound to entertain the objection, should nevertheless, upon the hearing of the remand, allow the party filing them to be heard with regard to them.

An appellate Court, because it remands issues, does not therefore, in the absence of subsequent objection by either or both of the parties to the findings when returned, divest itself of its power to exercise its judicial mind as to the propriety of such findings; but, apart from any objection by the parties, it should examine and test them to see whether or not they ought to be accepted. MUMTAZ BEGAM v. FATEH HUSAIN, 6 A. 391=4 A.W.N. (1884) 129 ... 703

Rent.

See LANDLORD AND TENANT, 5 A. 25.

Rent-free Grant,

See JURISDICTION, 6 A. 403.

Res Judicata.

(1) *Civil Procedure Code, s.* 13.—Certain immoveable property was mortgaged to *R* and then sold to *N*. It was then brought to sale in execution of a decree against *N* and was purchased by *H*. The balance of the sale-proceeds after satisfaction of that decree was paid to *N*. Under the terms of the mortgage to *R* interest on the principal amount was payable annually, and its payment was charged on the property as well as the payment of the principal amount. The mortgagors having failed to pay the interest annually, *R* in 1875 sued them and *N* and *H* to recover the interest due. It was decided in that suit that *N* was primarily and personally liable for the interest then due on the mortgage, as he had received the sale-proceeds of the property, and that the property was only liable in case he failed to satisfy the claim. *N* subsequently paid into Court the sale-proceeds he had received and *R* was paid the same. In 1878 *R* again sued the same persons for interest and again *N* was declared

Res Judicata—(*Continued*). PAGE

primarily and personally liable, on the ground that he had not at once made over the sale-proceeds to *R*; in 1880 *R* sued the same persons to recover the principal amount and interest due on the mortgage, by the sale of the mortgaged property.

Held, that, whatever might have been the rights and relations of the parties so long as any portion of the sale-proceeds remained with *N*, their position towards him assumed an entirely different character when once he had discharged himself of those moneys, and with this change in the situation the "*ratio decidendi*" of the suits of 1875 and 1878 no longer existed and therefore the decisions in those suits did not preclude *R* from bringing a suit to recover the principal and interest due on his mortgage from the mortgaged property. RATAN RAI v. HANUMAN DAS, 5 A. 118=1 A.W.N. (1881) 139=7 Ind. Jur. 431 ... 81

(2) *Civil Procedure Code*, s. 13, *Explanations* I *and* II, *and* s. 44.—*L* was the owner of a four anna share in a village. On the 1st March, 1880, his childless widow *R* and his nephew *B*, who had separated from his two brothers and lived for some years with both *L* and *R*, sold to *S* one-third of the four-anna share. The brothers of *B* sued the vendors and the vendee to enforce a right of pre-emption, alleging that they, as well as *B*, had acquired and entered into exclusive possession of the estate of *L* as his heirs. In the second appeal in the suit the High Court held that, as it was proved that the four-anna share was *L*'s separate estate, and *R* had succeeded to it and was in possession of it, and thus the plaintiffs had not established a title to, or acquired possession of, any part of the share, the plaintiffs were not in a position to assert a preferential claim to purchase the property in dispute. The plaintiffs also pleaded that the question of the right and title asserted by them as the actual heirs of *L* should have been tried and determined in the suit; but the High Court rejected this plea on the ground that the suit had been based merely on the allegation of *de facto* possession, and that their claim was to obtain by purchase one-third share only, and not for any remedy in respect of their right to possession by inheritance of the entire four-anna estate. Subsequently to this decision, the same plaintiffs, alleging equal rights with *B* as reversionary heirs of *L*, sued the same defendants for a declaration of the incompetence of *R*, the widow, to alienate the property, and that the sale-deed might be declared, as against them, null and of no effect. The cause of action was stated to be the execution, on the 1st March, 1880, of the deed of sale.

Held that the plea of *res judicata* failed. The matter now substantially in issue between the parties, *viz.*, the presumptive title of the plaintiffs to possession of the property, had not been "heard and finally decided" in the sense of s. 13 of the Civil Procedure Code. Such title was not "alleged and denied" by the parties in that suit within *Explanation* I, s. 13. It was not matter which "might and ought" to have been made the ground of attack in the former suit, within *Explanation* II.

The law does not require a plaintiff at once to assert all his titles to property, or to be thereafter estopped from advancing them. A plaintiff may, with the leave of the Court (s. 44, Civil Procedure Code), join causes of action; but he is nowhere compelled to do so.

The cause of action in the second suit, although the date of its accrual was the same, was separate and distinct from the cause of action asserted in the previous suit. SHEO RATAN SINGH v. SHEO SAHAI MISR, 6 A. 358=4 A.W.N. (1884) 115 ... 679

(3) *Civil Procedure Code*, s. 13, *Expl.* III *and* s. 373—*Dismissal of suit "in present form."*—*K*, the purchaser of certain immoveable property in execution of a decree, sued for possession of the same. The suit was dismissed "in the form in which it was brought" because the plaintiff had not filed with the plaint the sale-certificate. *K* subsequently brought a fresh suit.

Held, that the dismissal of the former suit "in the form it was brought" did not amount to permission to sue again contemplated by s. 373 of the Civil Procedure Code, and such dismissal must be regarded as a "decision" thereof in the sense of s. 13, *Expl.* III, and therefore as a bar to the fresh suit. GANESH RAI v. KALKA PRASAD, 5 A. 595=3 A.W.N. (1883) 140 ... 410

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(4) See ACT XIX OF 1873 (N.-W.P. LAND REVENUE), 5 A. 280.

(5) See ACT XII OF 1881 (N.-W.P. RENT), 6 A. 295.

(6) See CONSTRUCTION, 6 A. 269.

(7) See CIVIL PROCEDURE CODE (1882), 6 A. 506.

(8) See CRIMINAL PROCEDURE CODE (1872), 5 A. 224.

(9) See LANDLORD AND TENANT, 5 A. 245 ; 6 A. 252.

Review.

(1) *Of judgment—Act* X *of* 1877 (*Civil Procedure Code*), *ss.* 565, 623—*Reasons for applying for review—Error in fact or law—Second Appeal—Applicability of* s. 565.—A Division Bench of the High Court, sitting as a Court of Second Appeal, being of opinion that the Court of First Appeal had omitted to determine a certain issue of fact, determined such issue itself and decided the appeal in accordance with its determination of such issue. An application for review of judgment was made on two grounds, *viz.*, (i) that the Bench was wrong in thinking that such issue had not been determined by the Court of First Appeal, and (ii) that the Bench, sitting as a Court of Second Appeal, was not empowered to determine an issue of fact which the Court of First Appeal had omitted to determine, but should have referred such issue to that Court for determination under s. 566 of the Civil Procedure Code. *Held* that, looking to the provisions of that Code relating to review of Judgment, such application ought not to be allowed on the grounds mentioned, which virtually disclosed reasons for appeal from the judgment.

Where a Court of First Appeal omits to determine a material issue of fact, the High Court, as a Court of Second Appeal, is not competent under s. 565 of the Civil Procedure Code to determine such issue itself, but should refer it for determination to the Court of First Appeal. SHEO RATAN v. LAPPU KUAR, 5 A. 14=2 A.W.N. (1882) 157=7 Ind. Jur. 319. 10

(2) See CIVIL PROCEDURE CODE (1882), 6 A. 292.

(3) See EX-PARTE DECREE, 6 A. 65.

Revision.

(1) *Decree, refusal to amend—High Court's powers of revision—Civil Procedure Code, ss.* 206, 622—*Laches.*—Where a Court improperly refused to amend a decree, which was at variance with the judgment, *held* that in so acting the Court had acted in the exercise of its jurisdiction illegally and with material irregularity, within the meaning of s. 622 of the Civil Procedure Code, and its order was consequently subject to revision under that section.

On the question whether the High Court should refrain from exercising its powers under s. 622 by reason of the long time which had elapsed from the date of the decree, *held* that the petitioner was not fairly chargeable with laches. BALMAKUND v. SHEO JATAN LAL, 6 A. 125=2 A.W.N. (1882) 60 ... 519

(2) *High Court's powers of—Sale in execution—Pre-emption—Civil Procedure Code, ss.* 310, 311, 622—Locus standi *of pre-emptor in execution proceedings.*—A person claiming to be a co-sharer in certain undivided immoveable property, a share of which had been sold in execution of a decree, objected to the confirmation of the sale in favour of the person recorded as the auction-purchaser, and prayed that it might be confirmed in his favour, with reference to the provisions of s. 310 of the Civil Procedure Code. The Court disallowed the objection and confirmed the sale in favour of the auction-purchaser. The objector thereupon applied to the High Court for revision of the order of the lower Court under s. 622 of the Civil Procedure Code. *Held* that, having been allowed to object to the confirmation of the sale, and treated as a party to the proceeding held therein, it was competent for him to make such application, notwithstanding that he was not one of the persons mentioned in s. 311 of the Code ; that there being no appeal in the case, so far as he was concerned, the High Court was competent to entertain the application under s. 622 of the Code,; but that, as he was not one of the persons who was competent to avail himself of the provisions of s. 311, he had no *locus standi* to

Revision—(*Concluded*). PAGE

justify his application to the lower Court, and the application for revision must therefore be dismissed. BISHESHAR KUAR v. HARI SINGH, 5 A. 42=2 A.W.N. (1882) 146 ... 29

(3) *High Court's powers of—Criminal Procedure Code, s. 439—Improper discharge of accused—Power to order commitment.*—The High Court has power, under s. 439 of the Criminal Procedure Code, 1882, if it considers that an accused person has been improperly discharged, to order him to be committed for trial. EMPRESS v. RAM LAL SINGH, 6 A. 40=3 A.W.N. (1883) 186 ... 457

(4) See ARREST, 5 A. 318.

(5) See CIVIL PROCEDURE CODE, (1877), 5 A. 293.

(6) See CIVIL PROCEDURE CODE, (1882), 6 A. 233.

(7) See CRIMINAL PROCEDURE CODE (1872), 5 A. 161.

Salary.

Power of Court to attach—See EXECUTION OF DECREE, 6 A. 243.

Sale Certificate.

(1) *Act* III *of* 1877 (*Registration Act*), *s.* 17 (*b*)*—Civil Procedure Code, s.* 316.—*Held* that a sale-certificate granted under s. 316 of the Civil Procedure Code is not a document the registration of which is compulsory under the Registration Act, 1877, s. 17 (*b*). MASARAT-UN-NISSA v. ADIT RAM, 5 A. 568=3 A.W.N. (1883) 159 ... 391

(2) *Registration—Effect of registration certificate—Civil Procedure Code, s.* 316 *—Act* III *of* 1877 (*Registration Act*), *ss.* 23, 60, 87, 89.—*Semble* that a certificate granted under s. 316 of the Civil Procedure Code is not an instrument the registration of which is compulsory.

Although that section says that a certificate granted thereunder shall bear "the date of the confirmation of the sale," that provision cannot alter the fact of execution or the time when execution does take place, which is the starting point from which the four months mentioned in s. 23 of the Registration Act begin to run.

Held, therefore, that a certificate granted under that section in respect of a sale which was confirmed on the 7th April 1880, which was registered within four months from the 10th May 1882, when it was executed, was registered within the time allowed by law.

The certificate showing that a document has been registered is conclusive proof that it has been registered according to law. HUSAINI BEGAM v. MULO, 5 A. 84=2 A.W.N. (1882) 183 ... 58

(3) See EXECUTION SALE, 5 A. 305 (F.B.).

Sanction to Prosecute.

(1) *Expiration of limitation — Fresh sanction—Criminal Procedure Code, s.* 195.—It is competent for a Court which has granted sanction to a prosecution under s. 195 of the Criminal Procedure Code to give a fresh sanction, if the one previously granted has expired by efflux of time.

The limitation of six months mentioned in s. 195 means that a Magistrate shall not take cognizance of a case under a sanction which is more than six months' old, not that the whole prosecution must be completed within that period.

Held, therefore, where sanction to a prosecution had been granted under s. 195 and the prosecution had been instituted, and the Magistrate, in consequence of the evidence of the complainant not being procurable, had ordered "the case to be shelved for the present," and the complainant, after the six months mentioned in s. 195 had expired, applied to the Magistrate to re-open the proceedings that it was competent for the Magistrate, having once taken cognizance of the case, and it still remaining on his file undetermined, to take it up again at any moment, and proceed with the prosecution, without fresh sanction. GULAB SINGH v. DEBI PRASAD, 6 A. 45=3 A.W.N. (1883) 196 ... 460

(2) *False charge—Criminal Procedure Code, s.* 195*—Act* XLV *of* 1860 (*Penal Code*), *s.* 211*—Preliminary inquiry.*—A prosecution of a charge under s. 211 of the Penal Code should not be granted under s. 195 of the Criminal

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Procedure Code as a matter of course, but only when the complainant can satisfy the Court that the interests of justice require a prosecution, and there is strong *prima facie* case against the accused. *Held*, therefore, where *S* who had been tried before the Court of Session for an offence, and acquitted, applied to the Court, in respect of the criminal proceedings which had been instituted against him, for sanction to prosecute *G* for abetment of an offence under s. 211 of the Penal Code, and the Sessions Judge granted the sanction, and there was nothing on the record of the criminal case or of the Judge's proceedings to show on what grounds *G* was accused of abetting a false charge, or on what grounds the Judge gave the sanction; that before the Judge gave the sanction, he should have satisfied himself by examination of *S*, or other inquiry, whether *S* had sufficient grounds, in fact, for accusing *G*, and whether there were *prima facie* grounds for suspecting *G* of abetting a false charge, and permitting a prosecution. *In the matter of the petition of* GAURI SAHAI, 6 A. 114 = 3 A.W.N. (1883) 240 ... 511

(3) *False evidence—Nature of sanction—Criminal Procedure Code*, s. 195.—A sanction to prosecution for giving false evidence, granted under s. 195 of the Criminal Procedure Code, should specify the place where, and the time when, the alleged false evidence was given, and in substance the assignments of perjury, as also the sections of the Penal Code under which proceedings are authorized. HAR DIAL v. DURGA PRASAD, 6 A. 105 = 3 A.W.N. (1883) 227 ... 504

(4) *Nature of sanction—False evidence—Criminal Procedure Code*, s. 195—*Preliminary inquiry.*—In a suit on a bond, instituted in the Court of a Munsif, the question whether the defendant had executed the bond or not was referred to arbitration. The arbitrator decided that the defendant had not executed the bond, and that it was a forgery. The Munsif dismissed the suit in accordance with the award. The defendant then applied to the Munsif for sanction to prosecute the plaintiff without specifying in his application the offences in respect of which he desired to prosecute. The Munsif granted sanction, merely observing that there were sufficient grounds for sanctioning the prosecution, without giving any reasons or specifying the offence or offences in respect of which sanction was granted. *Held* that the terms in which the Munsif had given his sanction to a prosecution were not sufficiently explicit, and that he should have mentioned the section or sections of the Penal Code, under which he authorized criminal proceedings to be taken, as also in a general way the offence or offences to be charged, the date of commission, and the place where committed. Further, that as the Munsif himself had not determined the question of forgery in the suit, he should have made some inquiry to satisfy himself that there were materials to justify a prosecution. PARSOTAM LAL v. BIJAI, 6 A. 101 = 3 A.W.N. (1883) 226 ... 501

(5) *Nature of sanction — Preliminary inquiry — Criminal Procedure Code*, ss. 195, 215, 476—*Illegal commitment—Want of evidence.*—The Court of an Assistant Collector is not subordinate to that of the Magistrate of the District, within the meaning of s. 195 of the Criminal Procedure Code.

Sanction to a prosecution granted under s. 195 should specify the Court or other place in which, and the occasion on which, the offence was committed, and such sanction should not be granted without a preliminary inquiry, where such inquiry is "necessary," within the meaning of s. 476 of the Code.

Where sanction to the prosecution of a person for the offence of using certain evidence known to be false was granted by a Court to which the Court in which such evidence was used was not subordinate, and such sanction did not specify the place in which, and the occasion on which, such offence was committed, and the Court granting the sanction did not make any preliminary inquiry, although such an inquiry was "necessary" in the sense of s. 476 of the Criminal Procedure Code; *held* that the indispensable preliminary conditions of s. 195 of the Code being wanting to the prosecution, the committing Magistrate was incompetent to entertain the case, and the commitment was illegal, and should be quashed. EMPRESS v. NAROTAM DAS, 6 A. 98 = 3 A.W.N. (1883) 225 ... 499

Security Bond.

See GUARDIAN AND MINOR, 5 A. 248.

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Information showing that a breach of the peace is imminent—Order to furnish security for good behaviour for three years—Arrest of accused—Inquiry as to truth of information—Proof of information—Statement of persons not called as witnesses—Criminal Procedure Code, ss. 112, 114, 117, 118.—Conversations out of Court with persons however respectable, are not legal or proper material upon which Magistrates should adopt proceedings under s. 107 or s. 110 of the Criminal Procedure Code.

The information to be required by a Magistrate, before issuing an order under s. 112, may to some extent be of a hearsay and general description; but when the party to whom the order is directed appears in Court in obedience thereto, the enquiry must be conducted on the lines laid down in s. 117. It is not because a man has a bad character, that he is therefore necessarily liable to be called upon for sureties of the peace or for good behaviour. There must be satisfactory evidence in the one case that he has done something, or taken some step that indicates an intention to break the peace or that is likely to occasion a breach of the peace; and, in the other, that he is within the category of persons mentioned in s. 110, the determination of which question must always be guided by the considerations pointed out in *Empress* v. *Nawab* (2 A. 835).

A Magistrate is not competent, upon information that suggests the likelihood of a breach of the peace, to resort to s. 110 of the Criminal Procedure Code, and it is altogether *ultra vires* for him to demand security for three years in such a case.

In ordering the arrest of a person under s. 114 of the Criminal Procedure Code, the Magistrate must act on recorded information; it is not enough for him to express a belief that such a course is necessary. Not only must he have "reason to fear the commission of a breach of the peace," but "that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person." EMPRESS v. BABUA, 6 A. 132=3 A.W.N. (1883) 260 ... 524

Security to keep the Peace.

(1) *Criminal Procedure Code, ss.* 107, 112, 115—*Substance of information—Joint inquiry.*—A Magistrate ordered sixty-nine persons to show cause why they should not give security to keep the peace, it having been reported to him by the police and the tahsildar of the pargaua in which such persons resided that they were likely to commit a breach of the peace at a religious procession which was about to take place, and the holding of which was opposed to their religious tenets. After an inquiry, as against all the accused jointly, the Magistrate, on the evidence of the tahsildar and the sub-inspector of police, ordered that ten of the accused, who were said to be the "ringleaders," should enter into bonds with sureties and the rest should enter into their own recognizances to keep the peace for one year.

Held that the Magistrate's order purporting to be prepared under s. 112 of the Criminal Procedure Code did not adequately or properly disclose the substance of the report or information upon which he issued his summons; the parties were entitled to something more than a mere assertion by the Magistrate that he had been informed that a breach of the peace was likely to occur, in order to enable them, if they were in a position to do so, to bring evidence to rebut the truth of such information—that the very loose statements of the tahsildar and the sub-inspector as to the large majority of the persons summoned were quite insufficient to justify the wholesale order for security passed by the Magistrate—that as the religious procession would have been over in a fortnight, it was a most excessive exercise of power to require all the parties to give security for one year—and that the Magistrate should have dealt with cases of the ten alleged "ringleaders" first, and should have required the tahsildar and sub-inspector to give much fuller statements *seriatim*, and particularly as to each individual man; and as to the remaining fifty-nine there should have been some clear and distinct proof, affecting each of them, and warranting the inference that suc | person was likely to commit a breach of the peace or to do a wrongful act likely to occasion a breach of the peace. QUEEN-EMPRESS v. NATHU, 6 A. 214=4 A.W.N. (1884) 51=8 Ind. Jur. 529 ... 580

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(2) *Power of the Magistrate of a District to call on a person residing in another District to furnish security—Criminal Procedure Code, s.* 107.—*Held*, by the Full Bench, that the terms of s. 107, Criminal Procedure Code, do not empower a Magistrate to issue process to a person not residing within the limits of his district.

Held, by the Divisional Bench, that "information" of the kind mentioned in that section, must be clear and definite, directly affecting the person against whom process is issued, and should disclose tangible facts and details so that it may afford notice to such person of what he is to come prepared to meet. *In re* JAI PRAKASH LAL, 6 A. 26 (F.B.)=3 A.W.N. (1883) 208 ... 447

Sentence.

See ENHANCEMENT OF, 6 A. 622.

Set-off.

(1) See CIVIL PROCEDURE CODE (1882), 5 A. 299.

(2) See PRE-EMPTION, 6 A. 351.

Small Cause Court Suit.

(1) *Attachment of moveable property—Suit to establish right—Civil Procedure Code, s.* 283.—A suit under s. 283 of the Civil Procedure Code by a party against whom an order under s. 281 has been passed to establish his right to moveable property attached in execution of a decree passed by a Civil Court and for such property, the same being less than Rs. 500 in value, is not a suit cognizable in a Court of Small Causes. ILAHI BAKHSH v. SITA, 5 A. 462=3 A.W.N. (1883) 115 ... 319

(2) *Institution in Court of Subordinate Judge invested with powers of a Court of Small Causes—Trial by Subordinate Judge not so invested—Transfer of suit—Appeal—Jurisdiction—Civil Procedure Code, s.* 25.—A suit of the nature cognizable in a Court of Small Causes was instituted in the Court of a Subordinate Judge, the Judge of which at the time of the institution of the suit was personally invested with Small Cause Court jurisdiction. That Judge retired from office without trying the suit, and the District Judge directed his successor, who was not invested with Small Cause Court jurisdiction, to try it, and he did so. *Held*, that it must be taken that the suit was transferred under s. 25 of the Civil Procedure Code to the Court of the Subordinate Judge; and that, therefore, regard being had to the provisions of that section, that the Court trying any suit withdrawn thereunder from a Court of Small Causes shall, for the purposes of such suit, be deemed a Court of Small Causes, no appeal would lie in the case to the District Judge. KAULESHAR RAI v. DOST MUHAMMAD KHAN, 5 A. 274=3 A.W.N. (1883) 49 ... 188

(3) *Suit by landholder against purchaser of produce of tenant's land for rent—Damages.*—*B*, who held a decree for money against *G*, a cultivator, brought to sale in execution of his decree the produce of certain land occupied by *G*, and such produce was purchased by *S*. The landholder, to whom *G* owed rent for land, sued *G* and *S* for the amount of the rent, on the ground that under s. 56 of the N.-W.P. Rent Act the produce of the land was hypothecated for the rent. *Held*, that the defendants could only be held responsible *ex delicto*, and the suit was therefore one for damages, and, the amount claimed being under Rs. 500, one cognizable in a Court of Small Causes. SHIBBA v. HULASI, 5 A. 518=3 A.W.N. (1883) 114 ... 358

(4) *Suit for damages—Objection to attachment of property.*—*C*, a decree-holder, alleging that *K*, a lambardar of a village, had objected to the attachment in his hands of money due as profits to the judgment-debtor, a co-sharer, on the ground that he had paid such money to the judgment-debtor, before the attachment, by reason whereof the attachment had been removed; and that such objection was dishonest and wrongful, inasmuch as such money was still in *K's* hands, sued *K* for the amount of such money and the costs of the attachment proceedings. *Held* that the suit was one for damages, and, the amount claimed not exceeding Rs. 500, one of the nature cognizable in a Court of Small Causes, and consequently a second appeal in the suit would not lie. KALIAN SINGH v. CHUNNI LAL, 6 A. 10=3 A.W.N. (1883) 172 ... 435

Small Cause Court Suit—(*Concluded*). PAGE

(5) *Suit for money had and received—Suit by assignee of profits against lambardar.*—The transferee of a mortgage of a share of an undivided estate sued the lambardar of the estate for the profits of such share for a certain year, the amount claimed being Rs. 500. *Held*, regarding such suit as one for money had and received to the plaintiff's use, that it was one of the nature cognizable in a Court of Small Causes. MUHAMDI BEGAM v. ABBAS ALI KHAN, 5 A. 531=3 A.W.N. (1883) 115 ... 366

(6) *Suit for money received for the plaintiff's use—Act* XI *of* 1865, *s.* 6—*Joint creditors—Payment of debt to one.*—When one of two or more joint creditors receives full payment of the debt, he does so under the implied contract that he will deliver their shares to the other joint creditors. Such implied contract falls under the purview of s. 6 of the Múfussal Small Cause Courts Act (XI of 1865). SOHAN v. MATHURA DAS, 6 A. 449=4 A.W.N. (1884) 179 ... 745

Specific Performance.

(1) *Of contract—Suit for execution of fresh instrument—Act* I *of* 1877 (*Specific Relief Act*), *ss.* 12, 21, 22—*Lost instrument, suit to restore terms of.*—The plaintiffs, alleging that the defendants, having executed in their favour and delivered to them a bond, the consideration for which was money due to them for rent of land and on a former bond, had received it back for registration, and, refusing to register it, had retained it, sued the defendants to have a similar bond executed and registered.

Per MAHMOOD, J.—That it was doubtful whether the suit could be regarded as a suit for specific performance of a contract, and whether the only remedy open to the plaintiffs was not a suit for the money. It was only on the hypothesis that the mere writing of the original bond, in the absence of registration and final delivery, did not amount to a performance of the contract, that the suit was entertainable at all.

That, assuming the suit to be one for specific performance of a contract, the plaintiffs were not entitled to the specific relief which they sought, since they could obtain their full remedy by suing for the money in respect of which the fresh bond was sought to be executed; and they had failed to prove the exact terms of the original bond.

Observations on the nature of the evidence required to prove a contract of which specific performance is sought.

Per STUART, C.J.—That the suit was bad in form and substance, and there was no ground for the remedy by specific performance of a contract. If the alleged bond were in existence, a suit simply and directly for the recovery of the money claimed by the plaintiffs would have sufficed, for in such a suit facts relating to the loss or concealment of the bond might have been proved, and under the circumstances secondary evidence at least of the terms of the bond might have been admissible, or the plaintiffs might have found themselves in a position to make out their claim by other evidence; but if the plaintiffs considered it material to their case to have their claim on the bond, the loss or destruction of which could not be doubted, their proper course of proceeding was by a suit to restore the terms of the lost bond, or as it was said in Courts of Equity in England, by a suit to obtain the benefit of the lost deed or instrument, and that, if the suit could be taken to be one affording such a remedy, it contained no sufficient materials to warrant it being held that the bond was of the tenor and in the terms alleged by the plaintiffs. MAYA RAM v. PRAG DAT, 5 A. 44=2 A.W.N. (1882) 154=7 Ind. Jur. 378 ... 31

(2) *Suit for contract—Suit on award—Act* XV *of* 1877 (*Limitation Act*), *sch. ii, No.* 113—*Act* I *of* 1877 (*Specific Relief Act*), *s.* 30.—A suit for money, based on an award, which directs its payment by the defendant to the plaintiff, is virtually a suit to have the award specifically enforced; and, as by s. 30 of the Specific Relief Act, 1877, awards are placed on the same footing as contracts, No. 113, sch. ii of the Limitation Act, 1877, is applicable to such a suit. SUKHO BIBI v. RAM SUKH DAS, 5 A. 263=3 A.W.N. (1883) 8 ... 180

(3) See LANDLORD AND TENANT, 5 A. 103.

(4) See VENDOR AND PURCHASER, 6 A. 231.

Specific Relief Act (I of 1877). PAGE

(1) Ss. 12, 21, 22—See SPECIFIC PERFORMANCE, 5 A. 44.

(2) S. 30—See SPECIFIC PERFORMANCE, 5 A. 263.

(3) S. 39—See DECLARATORY SUIT, 5 A. 331.

(4) S. 39—See LIMITATION ACT (XV OF 1877), 5 A. 322.

(5) S. 42—See HINDU LAW (PARTITION), 5 A. 532.

(6) S. 56 (*b*) and (*f*)—See LANDLORD AND TENANT, 5 A. 429.

Spoiled Stamps.

See STAMP ACT (I OF 1879), 5 A. 17.

Stamp Act (I of 1879).

(1) *S. 3 (17), sch. i, No. 52—"Sarkhat"—Receipt.*—The defendant in a suit on a bond set up as a defence that the bond had been paid in part in sugar-cane juice, and as evidence of this fact produced a document called a "*sarkhat*" alleged to be signed by the plaintiff, acknowledging the receipt of sugar-cane juice, the price of which exceeded Rs. 20. There was nothing in this document which showed that the sugar-cane juice had been received in part satisfaction of the bond.

Held that the document was not a "receipt" within the meaning of the Stamp Act, 1879, but a memorandum of sugar-cane juice supplied, and required no stamp. DEBI PRASAD *v.* RUPU, 6 A. 253=4 A.W.N. (1884) 72 ... 607

(2) *S. 51—Application for allowance for spoiled stamps—Inquiry to be made by Collector—False evidence—Contradictory statements—Joinder of charges—Alternative charge—Act* XLV *of* 1860 (*Penal Code*), *ss.* 181, 193—*Act* X *of* 1872 (*Criminal Procedure Code*), *s.* 455.—Section 51, Chap. VI of Act I of 1879, enacts that "subject to such rules as may be made by the Governor-General in Council as to the evidence which the Collector may require, allowance shall be made by the Collector for impressed stamps spoiled in the cases hereinafter mentioned, &c." According to a rule made with reference to that section, "the Collector may require every person claiming a refund under Chap. VI of the said Act, or his duly authorized agent, to make an oral deposition on oath, &c." *Held*, therefore, that the Collector himself is the officer, and no other, to whom power is given by law to make inquiries into applications for allowances for spoiled stamps, to take evidence on oath in reference thereto, and to grant or refuse such applications, and he cannot delegate his authority in the matter.

Held, therefore, where a person had applied for a refund under Chap. VI of Act I of 1879, and the Collector made over the application for inquiry to a Deputy Collector, that the Duputy Collector was not entitled to put the witnesses produced by the applicant on their oaths, and consequently, in reference to the statements of such witnesses, no charge under s. 181 or s. 193 of the Indian Penal Code was sustainable.

In prosecutions for giving false evidence under s. 193 of the Penal Code, the case of each person accused should be separately inquired into, and, if committed for trial, separately tried. It is wholly erroneous to include them in one joint charge.

It is not of itself sufficient to warrant a conviction for giving false evidence that an accused person has made one statement on oath at one time, and a directly contradictory one at another. The charge must not only allege which of such statements is false, but the prosecutor must be prepared with confirmatory evidence independent of the other contradictory statement to establish the falsity of that which is impeached as untrue. Section 455 of Act X of 1872 (Criminal Procedure Code) is no authority for framing against a person accused of giving false evidence, who has made one statement on oath on one occasion, and directly contradictory one on oath on another occasion, a charge in the "alternative," that word, as used in that section, meaning that where the facts which can be proved make it doubtful what particular description of offence an accused person has committed, the charges may be so varied or alternated as to guard against his escaping conviction through technical difficulties.

Held, therefore, where three persons were committed for trial jointly charged with "having on or about the 26th September 1881, or the 18th October

Stamp Act (I of 1879)—(*Concluded*). PAGE

1881, being legally bound upon oath to state the truth, knowingly on those days, regarding the same subject, made contradictory statements upon oath," and thereby committed an offence punishable under s. 193 of the Indian Penal Code, and such persons were jointly tried on such charge, that such charge was bad for being single and joint against the three accused persons, instead of several and specific in regard to each of them; that it was further bad because it did not distinctly and in terms allege which of the statements was false; that, assuming a committal upon so faulty a charge should be allowed to stand, the Court of Session should have prepared a fresh charge against each of the accused persons, specifically setting forth the statement alleged to be false, and should then have proceeded to try each of them separately; and that, there being no evidence that either of the statements made by two of such persons was false, except that it was contradicted by the other the charge against such persons was not sustainable, there being no sufficient evidence that either of the statement was false. EMPRESS OF INDIA v. NIAZ ALI, 5 A. 17=2 A.W.N. (1882) 161=7 Ind. Jur. 320 ... 12

(3) S. 41—*Fresh suit—Costs—Civil Procedure Code*, ss. 13, 43.—The plaintiff in a suit upon a certain instrument not duly stamped was compelled to pay the amount of duty and penalty. The defendant was the person bound to bear the expense of providing the proper stamp for such instrument. The plaintiff, with reference to s. 41 of the Stamp Act, 1879, sued the defendant to recover such amount.

Held, that such amount could not be regarded as part of the costs in the suit in which it was paid, and a separate suit to recover it was maintainable. ISHAR DAS v. MASUD KHAN, 6 A. 70=3 A.W N. (1883) 211... 480

(4) Sch. ii, No. 13 (*b*) and (*c*)—See LEASE, 5 A. 360.

Statute 13 Geo. III, C. 63.

S. 30—See MORTGAGE (USUFRUCTUARY), 5 A. 419.

Statute 11 and 12 Vic., Cap. 21.

S. 24—*Insolvency—Voluntary transfer by insolvent.*—A firm, trading in Calcutta having been there adjudicated insolvent, the transfer of a debt, transferred by one of its branches located in Lucknow, was held upon the evidence to have been a voluntary assignment, void under s. 24 of the Statute 11 and 12 Vic., Cap. 21, as against the Official Assignee.

A draft, dated of the day on which, at night, the insolvent firm stopped payment in Calcutta, adjudication having followed on the second day after, purported to have been drawn by a debtor owing money to the Lucknow branch under its assignment in favour of the defendant to the amount of such debt. The latter received the money. *Held*, that under all the circumstances it was not necessary to decide whether the transfer was made on the date which the draft purported to bear, the conclusion, upon all the facts being that the debt bad been transferred "voluntarily" within the meaning of s. 24. MILLER, OFFICIAL ASSIGNEE, HIGH COURT, CALCUTTA v. SHEO PRASAD, 6 A. 84 (P.C.)=10 I.A. 98=13 C.L.R. 305=4 Sar. P.C.J. 430=7 Ind. Jur. 439 ... 490

Step-in-aid of Execution.

(1) *Execution of decree—Act* XV *of* 1877 (*Limitation Act*), *sch. ii, No.* 179 (4).—An application by a decree-holder in the course of an investigation into an objection to the attachment of property to have his witnesses summoned is an application within the meaning of No. 179 (4), sch. ii of the Limitation Act, 1877. ALI MUHAMMAD KHAN v. GUR PRASAD, 5 A. 344=3 A.W.N. (1883) 57=8 Ind. Jur. 53 ... 238

(2) *Execution of decree—Act* XV *of* 1877 (*Limitation Act*), *sch. ii, No.* 179 (4).—An application by a decree-holder praying that the objections taken by the judgment-debtor to the sale of property belonging to him in execution of the decree should be disallowed, and the sale be confirmed, is an application from the date of which the period of limitation for a subsequent application for execution of the decree may be computed. KEWAL RAM v. KHADIM HUSAIN, 5 A. 576=3 A.W.N. (1883) 112 ... 397

(3) See LIMITATION ACT (XV OF 1877), 6 A. 366.

Stolen Property. PAGE

See PENAL CODE (ACT XLV OF 1860), 6 A. 224.

Summary Trial.

(1) *Fine—Imprisonment in default—Criminal Procedure Code, ss.* 32, 33, 262—*Act* XLV *of* 1860 (*Penal Code*), *s.* 67—*Act* VIII *of* 1882.—In cases of simple imprisonment ordered as a process for enforcement of payment of fine, the rule of s. 262 of the Criminal Procedure Code, limiting the period of imprisonment in summary trials, does not apply, as that section only refers to substantive sentences of imprisonment. EMPRESS v. ASGHAR ALI, 6 A. 61=3 A.W.N. (1883) 207 ... 472

(2) See CRIMINAL PROCEDURE CODE (1882), 6 A. 83.

Summons.

To attend, contents of—See PENAL CODE (ACT XLV OF 1860), 5 A. 7.

Transfer of Property Act (IV of 1882).

(1) Ss. 2, 67, 86—See MORTGAGE (FORECLOSURE), 6 A. 262.

(2) S. 3—See TREES, 5 A. 564.

(3) S. 52—See LIS PENDENS, 6 A. 444.

(4) S. 68 (*b*) and (*c*)—See MORTGAGE (USUFRUCTUARY), 6 A. 298.

(5) S. 76 (*c*) and (*h*)—See MORTGAGE (REDEMPTION), 6 A. 303.

(6) S. 123—See CIVIL PROCEDURE CODE (1882), 6 A. 634.

Trees.

(1) "*Immoveable*" *property*—"*Moveable*" *property—Act* XI *of* 1865, *s.* 19—*Act* III *of* 1877 (*Registration Act*), *s.* 3—*Act* IV *of* 1882 (*Transfer of Property Act*), *s.* 3—*Act* I *of* 1868 (*General Clauses Act*), *s.* 2 (5), (6).—*Held* that, for the purposes of the Mufassal Small Cause Court Act, standing timber is not "moveable" property. UMED RAM v. DAULAT RAM, 5 A. 564 (F.B.)=3 A.W.N. (1883) 157 ... 388

(2) See DAMAGE, 5 A. 369.

(3) See LANDLORD AND TENANT, 6 A. 19.

Trust.

Transfer of trust property—Purchaser without notice.—B having been sentenced to transportation for life, presented a petition in the Revenue Court in which, stating that he owned a certain zemindari estate, that he had been so sentenced, and that it was necessary to make arrangements for the payment of the Government revenue and the management of the estate, he prayed that his name might be removed from the revenue registers and that of *P* be recorded in its stead. *P* sold the property, for consideration, his vendee purchasing without notice of any trust, and it was subsequently put up for sale in execution of a decree against *P*'s vendee and was purchased without notice of any trust.

Held, that the transfer of the property by *B* to *P* was in the nature of a trust.

Held, also, that the property could not be followed into the hands of the purchaser at the execution-sale. HAIT RAM v. DURGA PRASAD, 5 A. 608=3 A.W.N. (1883) 161 ... 420

Trustee.

Transfer by trustee in breach of trust—Suit by trustee to recover possession—Bona fide transferee for value without notice—Estoppel.—A trustee, alleging that the trust property, consisting of land, was his own property, mortgaged it. The mortgagee took the mortgage in good faith, for valuable consideration, and without notice of the trust. The mortgagee obtained a decree against the trustee for the sale of the land, and the land was sold in execution of that decree. The trustee subsequently brought a suit to recover the land from the purchaser on the ground that it was trust property and that he had no power to transfer it. To this suit none of the beneficiaries under the trust were parties. *Held* that the plaintiff was estopped by his conduct from recovering possession of the land. GULZAR ALI v. FIDA ALI, 6 A. 24=3 A.W.N. (1883) 182 ... 445

Uncertified Adjustment. PAGE

Of decree—See CIVIL PROCEDURE CODE, 1877, 5 A. 269.

Valuation of Suit.

See MORTGAGE (REDEMPTION), 5 A. 332.

Vendor and Purchaser.

(1) *Arrears of Government revenue—Act* IX *of* 1872 (*Contract Act*), *ss.* 69, 70.—On the date of the purchase of a revenue paying estate there were arrears of revenue due. The instrument of sale was silent as to the party liable to pay such arrears. The purchaser was compelled to pay such arrears. *Held* that the purchaser could not recover the money so paid from the vendor. DOST MUHAMMAD v. SANJAD AHMAD, 6 A. 67=3 A.W.N. (1883) 210 ... 477

(2) *Contract of sale—Suit for specific performance of contract—Suit for possession of immoveable property—Act* XV *of* 1877 (*Limitation Act*), *sch. ii, Nos.* 113, 144.—A contract was made for the sale of certain immoveable property, in the event of the vendor obtaining a decree establishing his title to the property, in a suit which had been brought for that purpose. The vendor obtained such decree in that suit. The purchaser subsequently brought a suit "to have a sale-deed executed and completed," and for possession of the property. It was contended that the limitation applicable to the suit was that provided by art. 144 of the Limitation Act, 1877, and not art. 113. *Held*, that the suit was essentially one for specific performance of contract, and the limitation applicable was art. 113. The contention that, so far as the suit was for possession of immoveable property, it should be governed by art. 144 was invalid. The right to possession sprang out of the contract of sale, and the relief by giving possession was comprised in the relief by specific performance of the contract of sale, and could not be governed in this suit by any but art. 113. But assuming the suit might, so far as limitation was concerned, be entertained, still as the right to possession was dependent on the contract of sale, if the suit could not be maintained for specific performance of the contract, it could not be maintained for possession of the property sold under the contract. MUHI-UD-DIN AHMED KHAN v. MAJLIS RAI, 6 A. 231=4 A.W.N. (1884) 42=8 Ind. Jur. 524 ... 591

(3) *Sale—Mortgage.*—*Held* that an agreement by the purchaser of certain immoveable property that it should, on payment by the vendor of a certain sum within a specified time, be restored to the vendor, and that on failure of such payment it should become the absolute property of the purchaser, did not create the relation of mortgagor and mortgagee between the parties, and that upon the vendor's failure to comply with the terms of the agreement, the property vested in the purchaser. BHUP KUAR v. MUHAMMADI BEGAM, 6 A. 37=3 A.W.N. (1883) 211 ... 455

(4) *Sale—Mortgage—Pre-emption.*—In July 1870, *R*, the owner of a share of a village, executed in favour of *M* an instrument whereby he transferred by sale the share to *M* absolutely. In November, 1870, *M* agreed to re-transfer the share to *R*, if *R* desired, at any time within thirteen years to re-purchase it, on payment of the sum which *M* had paid for it. During the term mentioned in the agreement of November, 1870, *R* not having taken advantage of the agreement, *M* sued, as owner of the share, to enforce the right of pre-emption in respect of the sale of another share of the village.

Held, that, *M* having become under the transfer of July, 1870, the out-and-out proprietor of the share, until *R* availed himself of the option given him by the agreement of November, 1870, the full estate of an owner, carrying with it the right of pre-emption, vested in *M*, and it was competent for him to enforce such right by suit. BHAJAN v. MUSHTAK AHMAD, 5 A. 324 (F.B.)=3 A.W.N. (1883) 51=8 Ind. Jur. 50 ... 224

(5) See CIVIL PROCEDURE CODE, 1882, 6 A. 506.

Voluntary Payment.

See CONTRACT, 5 A. 400.

Wager. PAGE

Money paid—Betting on a horse-race—Entrance-money for horse-race—Agreement by way of wager—Act IX *of* 1872 (*Contract Act*), *ss.* 23, 30.—Where a person who had lost a bet on a horse-race requested another to pay the amount of such bet, agreeing to repay him, and the latter paid such amount. *Held*, that the money so paid was recoverable from the person for whom it was paid, the consideration for the agreement not being unlawful within the meaning of s. 23 of the Contract Act, 1872, and the agreement not being one by way of wager, within the meaning of s. 30 of the same Act. PRINGLE v. JAFAR KHAN, 5 A. 443=3 A.W.N. (1883) 68=8 Ind. Jur. 154 ... 306

Waiver.

See EXECUTION OF DECREE, 5 A. 289.

Will.

Construction — Legacy — Vesting — Directing clause — Gift over on legatee's death "prior to division" of the estate—Gift not void for uncertainty—Act X *of* 1865 (*Indian Succession Act*), *ss.* 76, 91, 106.—A testator directed his trustees and executors to hold his real and personal estate upon trust to sell the real estate either together or in parcels, and either by public auction or private contract, and to call in, sell, and convert into money such part of his personal estate as should not consist of money, and to divide the said moneys, and the ready money which might belong to such estate, amongst the several persons named in the schedule to the will, and to pay the same to them in the shares and proportions therein mentioned, as and when they should respectively attain the age of twenty-one years in the case of males, or, in the case of females, when they should respectively attain that age or marry. He directed that, in the event of any of such persons dying in his lifetime, or at any time thereafter "prior to the said division," leaving lawful issue, such issue should be entitled to the share which their deceased parent would have taken. One of the legatees who had attained the age of twenty-one years at the testator's death, died five months after him, before payment of the legacy, and left lawful issue.

Held that the legacy vested in interest in the legatee at the testator's death, but that the legatee having died prior to the division of the estate, it became divested; that the "division" of the testator's estate meant, in this will, the ascertainment of the amounts allottable to the share of each legatee, after the conversion of the estate into money; and that the gift over in favour of the legatee's issue was not void for uncertainty, but took effect. BACHMAN v. BACHMAN, 6 A. 583=4 A.W.N. (1884) 194 ... 837

Withdrawal of Suit.

(1) See ARBITRATION, 6 A. 211.

(2) See CIVIL PROCEDURE CODE, 1882, 5 A. 406.

Words and Phrases, Meaning of.

(1) "Bhai-band"—See PRE-EMPTION, 6 A. 57.

(2) "Cause of action"—See CIVIL PROCEDURE CODE, 1877, 5 A. 277.

(3) "Judgment"—See CIVIL PROCEDURE CODE, 6 A. 468.

(4) "Then"—See INSOLVENT, 5 A. 268.

(5) "Transfer"—See LANDLORD AND TENANT, 5 A. 121.

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